

A
DIGESTED INDEX.

TO THE

TERM REPORTS

ANALYTICALLY ARRANGED

CONTAINING ALL THE

POINTS OF LAW ARGUED AND DETERMINED

IN THE

Court of King's Bench.

FROM MICHAELMAS TERM, 1785, TO EASTER TERM, 1814.

AND IN THE

Court of Common Pleas,

FROM EASTER TERM, 1788, TO HILARY TERM, 1815;

WITH

NOTES, REFERENCES, TABLES OF TITLES AND STATUTES,
AND NAMES OF CASES.

IN TWO VOLUMES.

VOL. I.

CONTAINING THE DIGEST.

BY JOHN BAYLY MOORE,
OF THE INNER TEMPLE, SPECIAL PLEADER.

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AND

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1816.

TO
WILLIAM TIDD, ESQUIRE,
Barrister at Law,
THE
FOLLOWING PAGES
ARE,
BY HIS PERMISSION,
MOST RESPECTFULLY
DEDICATED;
AS A VERY HUMBLE TRIBUTE OF REGARD,
AND
WITH GRATEFUL REMEMBRANCE OF THE MANY OBLIGATIONS,
WHICH
HIS KINDNESS AND PROFESSIONAL INSTRUCTIONS
HAVE CONFERRED ON HIS LATE PUPIL,*

JOHN B. MOORE.

ADVERTISEMENT.

AS the very valuable and numerous decisions contained in the Term Reports, are, from the mode of their publication, necessarily unconnected and diffused through many volumes; the Compiler of the following sheets was induced to arrange and methodize them, not only as an Index to assist the student, but by carefully collecting together all the Cases upon every particular point, and placing them in a regular mode of succession under their respective heads, to furnish a ready means of reference to the Cases themselves.

The merit of a compilation of this nature, will depend not only on the fidelity with which the Cases or Authorities are collected and referred to, but on the order or mode of arrangement adopted in the disposal of them; and chiefly with the latter view, the present compilation has been edited.

Although the *placita* contained in the valuable and recent Reports of Mr. East would perhaps admit of some trifling reductions, it might be deemed imprudent to have abridged them in this Digest, and they are therefore, (except in a very few instances,) copied *verbatim* from those volumes.

It seems necessary to state distinctly the principles and the method upon which this Digest has been formed; as the several Titles as they respect each other, and also the Sub-divisions of those Titles, differ very materially from the Index published by

Mr. TOMLINS, to whose valuable labours the Profession is so much indebted; as the subject of a title may be referred to under a designation less technical, and more conformable to modern practice.

The general Heads or Titles follow each other in an exact and regular alphabetical succession. Their Divisions and Sub-divisions are denominated and described by figures and letters, thus:--The first division of a general head or title is marked with the figure I., the second division with the figure II., and so on without proceeding to letters, unless it is subdivided, in which case they are marked by Italic letters within brackets, as (*a*) (*b*) (*c*) according to the number of Sub-divisions.

Compression has been anxiously aimed at; double indexing has therefore been avoided; but when a Case might be looked for under several heads, a reference is made to the page where it is placed. Where a Case contains different points it is subdivided and arranged accordingly.

The Table of Titles at the beginning is intended to supply the place of an Index; as every subordinate title is there set down with reference to the general head in the Digest, under which it may be found.

With respect to many of the principal heads, it may be necessary to explain their arrangement and disposition. For instance, the pleadings and evidence in particular actions, are placed under the different titles to which they respectively belong.

Although Misnomer is a general title, yet, for the mode of pleading it in Abatement, a reference is made to the latter head.

Under the head Assumpsit the Cases for money paid, money had and received, &c. are collected.

The Cases relating to Agreements, Leases, and Wills, as governed by the Statute of Frauds, are collected under the latter.

For Proceedings by and against Bail, see also the titles of Error, Outlawry, and Scire Facias.

The laws relative to Courts Martial, Militia, Soldiers and Volunteers, will be found on referring to the head of Military Law.

The Duties and Liabilities of Sheriff are arranged as well under the head Sheriff, as also those of Bail, Escape, and Replevin.

For Contracts relative to the Sale of Land and of Goods, see the head of Vendor and Purchaser.

The Statutes are chronologically arranged in the Table at the commencement of the second volume, and the Cases are in general indexed under the names of the plaintiffs only; but in three instances they are also indexed under the names of the defendants, *viz.* 1st. such as have been decided in more Courts than one, in consequence of writs of error or appeal; 2dly, ejectment cases; 3dly, sessions and settlement cases, and in all others where the King is the nominal party.

The following Sheets are submitted to the Profession with great diffidence and anxiety. The Compiler feels that a number of imperfections will be observed, many of which experience might have enabled him to avoid. Should, however, a reference to the Cases in the Term Reports which form so large a body of law, be in the least facilitated, his labours will be more than compensated.

1, *Inner Temple Lane, Trinity Term, 1816.*

JUDGES, &c.

DURING THE PERIOD INCLUDED IN THIS DIGEST.

In the Court of King's Bench.

CHIEF JUSTICES.

THE RIGHT HON. WILLIAM EARL OF MANSFIELD:
His Lordship was not able to attend the Court after the first Day of *Michaelmas* Term, 1786, and resigned his Office on *June* 4, 1788, having held it nearly 32 Years.—He was succeeded by
THE RIGHT HON. LLOYD LORD KENYON,
Appointed *June* 9th, and took his Seat *June* 11th, 1788.
Died in *Hilary* Vacation 1802, and was succeeded by
THE RIGHT HON. EDWARD LORD ELLENBOROUGH,
Appointed *April* 12th, and took his Seat *May* 7th, 1802.

PUISNE JUDGES.

HON. EDWARD WILLES, ESQ.
Died *January* 14th, 1787.
HON. SIR WILLIAM HENRY ASHHURST, KNT.
Resigned in *Trinity* Term 1799.
HON. FRANCIS BULLER, ESQ. afterwards SIR FRANCIS BULLER;
Created a Baronet *Trinity* Vacation 1789; resigned in *June*, 1794, and went to the *Common Pleas*.
HON. SIR NASH GROSE, KNT.
Appointed *February*, 1787; resigned in *Easter* Vacation, 1813.
HON. SIR SOULDEN LAURENCE, KNT.
Appointed *June*, 1794, from the *Common Pleas*, where he had been appointed *Hilary* Vacation preceding; returned to the *Common Pleas* on the death of SIR GILES ROOK, *Easter* Term 1808.
HON. SIR SIMON LE BLANC, KNT.
Knighted, and took his Seat on the Resignation of SIR W. H. ASHHURST, 6th *June*, 1799.
HON. SIR JOHN BAYLEY, KNT.
Appointed *Hilary* Vacation 1808, on the Resignation of
SIR SOULDEN LAURENCE, who returned to the *Common Pleas*.
HON. SIR HENRY DAMPIER, KNT.
Knighted, and took his Seat on the Resignation of SIR NASH GROSE, KNT. 25th *June*, 1813.

In the Court of Common Pleas.

CHIEF JUSTICES.

THE RIGHT HON. ALEXANDER LORD LOUGHBOROUGH
 Jointed LORD CHANCELLOR *Hilary* Term 1793; and succeeded in the
 same Term, as Chief Justice, by

THE RIGHT HON. SIR JAMES EYRE, KNT.

Died in *Trinity* Vacation 1799.—Succeeded by

THE RIGHT HON. JOHN LORD ELDON, who was appointed in the
 same Vacation; under the Authority of 39 G. III. c. 113.

Appointed LORD CHANCELLOR, *Hilary* Vacation 1801, but presided as
 Chief Justice till *Easter* Vacation 1801, when he was succeeded by

THE RIGHT HON. RICHARD PEPPER LORD ALVANLEY;

Appointed *Easter* Vacation 1801; died *Hilary* Vacation, 1804;

Succeeded by

SIR JAMES MANSFIELD, KNT.

Appointed *Easter* Term 1804; resigned in *Hilary* Vacation 1814;

Succeeded by

THE RIGHT HON. SIR VICARY GIBBS, KNT. then Lord Chief Baron of
 his Majesty's Court of Exchequer; appointed *Hilary* Vacation, and
 took his Seat *April* 27th, 1814.

PUISNE JUDGES,

In the Court of Common Pleas.

HON. SIR HENRY GOULD, KNT. died *Hilary* Vacation 1794.

HON. JOHN HEATH, ESQ.

HON. SIR JOHN WILSON, KNT. died in *Trinity* Vacation 1793.

HON. SIR GILES ROOK, KNT. appointed *Michaelmas* Term 1793. Died
Hilary Vacation 1808.

HON. SIR SOULDEN LAURENCE, KNT. Appointed *Easter* Term 1794.

Removed to the Court of K. B. in *June*, 1794.

Returned to C. P., on the death of SIR G. ROOK, *Easter* Term 1808,
 and resigned in *Easter* Vacation 1812.

HON. SIR FRANCIS BULLER, BART. Came from the K. B. in *June*,
 1794. Died in *Easter* Vacation 1800.

HON. SIR ALAN. CHAMBRE, KNT. Appointed *Easter* Vacation 1800.

HON. SIR VICARY GIBBS, KNT. Appointed in the Room of SIR SOUL-
 DEN LAURENCE, *Trinity* Term 1812. Appointed Lord Chief
 Baron of the Exchequer, *Michaelmas* Term 1813.

HON. SIR ROBERT DALLAS, KNT. Appointed *Michaelmas* Term
 1813.

ATTORNIES-GENERAL.

RICHARD PEPPER ARDEN, Esq.

Promoted to be Master of the Rolls, and Knighted *Trinity* Vacation 1788.

SIR ARCHIBALD MACDONALD, KNT.

Appointed *Trinity* Vacation 1788; promoted to the Office of Chief Baron of the *Exchequer*, *Hilary* Term 1793.

SIR JOHN SCOTT, KNT.

Appointed *Hilary* Term 1793; promoted to the Chief Justiceship of C. P. *Trinity* Vacation 1799; and created Baron *Eldon*.

SIR JOHN MITFORD, KNT.

Appointed *Trinity* Vacation 1799.

Resigned *Hilary* Vacation 1801; and chosen Speaker of the House of Commons.

SIR EDWARD LAW, KNT.

Appointed *Hilary* Vacation 1801; promoted to the Chief Justiceship of K. B. *Hilary* Vacation 1802; and created Baron Ellenborough.

THE HON. SPENCER PERCEVAL, Appointed *Hilary* Vacation 1802.

SIR ARTHUR PIGGOTT, KNT. Appointed *Hilary* Term 1806.

SIR VICARY GIBBS, KNT. Appointed *Easter* Term 1807.

SIR THOMAS PLUMER, KNT. Promoted and appointed *Trinity* Vacation 1812—Promoted and appointed to the office of Vice-Chancellor of England, an office newly created by Stat. 53 G. III. c. 24.—*Hilary* Vacation 1813.

SIR WILLIAM GARROW, KNT. Appointed *Hilary* Vacation 1813.

SOLICITORS-GENERAL.

ARCHIBALD MACDONALD, Esq.

SIR JOHN SCOTT, KNT.

Appointed *Trinity* Vacation, 1788.

SIR JOHN MITFORD, KNT.

Appointed *Hilary* Term, 1793.

SIR WILLIAM GRANT, KNT. Appointed *Trinity* Vacation 1799.

Resigned *Hilary* Vacation 1801. Appointed Master of the Rolls, *Easter* Vacation 1801.

THE HON. SPENCER PERCEVAL.

Appointed *Hilary* Vacation 1801. Promoted to be Attorney-General.

THOMAS MANNERS SUTTON, Esq. Appointed *Hilary* Vacation 1802.

Promoted to the Office of a Baron of the *Exchequer* *Hilary* Term 1805.

SIR VICARY GIBBS, KNT. Appointed *Hilary* Term 1805.

Promoted to be Attorney-General.

SIR SAMUEL ROMILLY, KNT. Appointed *Hilary* Term 1806.

SIR THOMAS PLUMER, KNT. Appointed *Easter* Term 1807.

SIR WILLIAM GARROW, KNT. Appointed *Trinity* Vacation 1812.

SIR ROBERT DALLAS, KNT. Appointed *Hilary* Vacation 1813.

SIR SAMUEL SHEPHERD, KNT. Appointed *Michaelmas* Vacation 1813.

SE RJEANTS.

Easter Term 1786.

GEORGE BOND, Esq. Motto—*Hæreditas à Legibus.*

Michaelmas Term 1786.

JOHN WILSON, Esq. on his being made one of the Justices of C. P.
Secundis Laboribus.

Hilary Term 1787.

SIR ALEXANDER THOMPSON, Knt. on his being appointed one of the
Barons of the *Exchequer.*

SIMON LE BLANC, Esq.

SOULDEN LAURENCE, Esq.

Reverentia Legum.

Easter Term 1787.

WILLIAM COCKELL, Esq.—*Stat Lege Coronat.*

Michaelmas Term 1787.

C. RUNNINGTON, Esq.

S. MARSHALL, Esq.

J. WATSON, Esq.

} *Paribus se Legibus.*

Trinity Term 1788.

LLOYD LORD KENYON, on his being appointed Chief Justice of K. B.

RALPH CLAYTON, Esq.

Quid Leges sine Moribus?

Michaelmas Term 1789.

J. W. ROSE, Esq. chosen Recorder of London—*Vitium Lege Regi.*

Trinity Term 1794.

S. HEYWOOD, Esq.

J. WILLIAMS, Esq.

} *Legum Servi ut Liberi.*

Hilary Term 1796.

A. PALMER, Esq.—*Evaganti Fræna Licentia.*

Easter Term 1796.

S. SHEPHERD, Esq.—*Legibus emendes.*

Easter Term 1798

B. J. SELLON, Esq.—*Respice quid moneant Leges.*

Hilary Term 1799.

J. VAUGHAN, Esq.—*Paribus se Legibus ambæ.*

Trinity Term 1799.

J. LENS, Esq. }
J. BAYLEY, Esq. } *Libertas sub rege pio.*

Trinity Vacation 1799.

SIR J. SCOTT, created Baron *Eldon*, on his being appointed C. J. of C. P.
Rege incolumi mens omnibus una.

SIR ALAN CHAMBRE, on being appointed a Baron of the *Exchequer*.
Majorum instituta tueri.

Hilary Term 1800.

W. D. BEST, Esq.—*Libertas in legibus.*

Trinity Term 1800.

ROBERT GRAHAM, Esq. on being appointed a Baron of the *Exchequer*.
ARTHUR ONSLOW, Esq.
Et placitum læti componite fœdus.

Hilary Term 1801.

W. M. PRAED, Esq.—*Fœderis æquas dicamus leges.*

Hilary Vacation 1802.

SIR E. LAW, created Baron Ellenborough on being appointed C. J. of
K. B.
Positis mitescunt secula bellis.

Easter Term 1804.

SIR J. MANSFIELD, Knt. on being appointed C. J. of C. P.
Serus in Cælum redeas.

SIR T. M. SUTTON, Knt. on being appointed a Baron of the *Exchequer*:
Hic ames dici pater atque princeps.

Easter Term 1807.

SIR GEORGE WOOD, Knt. on being appointed a Baron of the *Exchequer*.
Moribus ornes, legibus emendæ.

Easter Term 1808.

WILLIAM MANLEY, Esq. }
ALBERT PELL, Esq. } *Pro Rege et Legē.*
WILLIAM ROUGH, Esq. }

SERJEANTS.

Easter Term 1809.

ROBERT HENRY PECKWELL, Esq. } *Traditum ab antiquis servare.*
 WILLIAM FRERE, Esq. }

Trinity Term 1812.

SIR VICARY GIBBS, Knt. on being appointed one of the Justices of C.P.
Leges Juraque.

Trinity Term 1813.

HENRY DAMPIER, Esq. on being appointed one of the Justices of K. B.
Consulta patrum.

JOHN GOPLEY, Esq. *Studiis vigilare severis.*

Michaelmas Term 1813.

SIR ROBERT DALLAS, Knt. on being appointed one of the Justices
 of C. P.
Mos et Lex.

Hilary Vacation 1814.

RICHARD RICHARDS, Esq. on being appointed one of the Barons of the
 Exchequer.
Lex est ratio summa.

Michaelmas Term 1814.

JOHN BERNARD BOSANQUET, Esq.
Antiquam exquirite matrem

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 5 E. R. — E. — M. 44 & 45 G. 3. 1804.
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 7 E. R. — M. 46 G. 3. 1805 to T. 46 G. 3. 1806.
 8 E. R. — M. 47 G. 3. 1806 — T. 47 G. 3. 1807.
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 14 E. R. — E. 51 G. 3. 1811 — M. 52 G. 3. 1811.
 15 E. R. — H. 52 G. 3. 1812 — E. 52 G. 3. 1812.
 16 E. R. — T. 52 G. 3. 1812 — M. 53 G. 3. 1812.
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In C. P.

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 ‡‡ 1 Marsh. — M. 54 G. 3. 1813 — T. 55 G. 3. 1815.

* Term Reports by Durnford and East. }

† East's Reports. }

‡ Maule and Selwyn's Reports. }

§ Henry Blackstone's Reports. }

§ Bosanquet and Puller's Reports. }

** New Reports. }

†† Taunton's Reports. }

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K. B.

C. P.

A

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OF ALL THE

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ANALYTICAL ·

DIGESTED INDEX

TO THE

TERM REPORTS.

[ABATEMENT. I.]

ABATEMENT.

Nonjoinder.

I. PLEAS TO THE PERSON.

- (a) *Coverture.*
- (b) *Nonjoinder.*

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- (a) *Variance.*
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III. TIME OF PLEADING.

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V. REPLICATIONS AND JUDGMENTS ON.

I. PLEAS TO THE PERSON.

(a) *Coverture.*

- 1 If the plaintiff take husband after suing out the writ, and before the declaration, the defendant cannot give the coverture in evidence under the general issue, but must plead it in abatement. *Morgan v. Painter.* 6 T. R. 265
- 2 An action of trespass for an injury done to the property of the wife *dum sola*, should be brought by the husband and wife: but if such action be brought by the wife alone, the defendant must plead the coverture in *abatement*, and not in *bar*. *Milner v. Milnes.* 3 T. R. 627

(b) *Nonjoinder.*

- 1 To an action on the case against several partners for negligence in their servant, whereby the plaintiff's goods were lost, it cannot be pleaded in abatement that there are other partners not named. *Mitchell v. Turbutt.* 5 T. R. 649
- 2 To an action against a carrier in case

on the custom of the realm, for not safely carrying goods; the defendant may plead in abatement that his partners ought also to have been sued. *Buddle v. Willson.* 6 T. R. 369

- 3 To an action on the case in the form of *tort* against one of several joint owners of a ship, for not safely conveying goods which had been delivered to him by the plaintiff for that purpose, the defendant may plead in abatement that the goods were delivered to him and his partners jointly, and that his partners are not sued. *Powell v. Layton.* 2 N. R. 365
- 4 If one of several part-owners of a chattel sue alone for a tort, the defendant can only take advantage of the objection by a plea in abatement, even though the defect appear in the declaration. *Addison v. Overend.* 6 T. R. 766
- 5 If one of two part-owners of a chattel sue alone for a tort, and the defendant do not plead in abatement, the other part-owner may afterwards sue alone, and the defendant cannot plead in abatement to such action. *Sedgworth v. Overend.* 7 T. R. 279
- 6 A defendant may plead a secret partnership in abatement, though the plaintiff had no means of knowing of the partnership, and could not have proved it, had he joined the secret partner in the action. *Dubois and others, assignees &c. v. Ludert.* 1 Marsh. 246
- 7 Joint contractors must be all sued, although one has become bankrupt and obtained his certificate; and if not

sued, the others may plead in abatement. *Bovill v. Wood*. 2 M. & S. 23

- 8 In *assumpsit*, a plea in abatement that the defendant made the promise jointly with another, is supported by evidence that the promise was made by the defendant jointly with an infant. For the plaintiff must plead and prove that the infant has avoided his promise, if he would reduce the joint contract to a sole contract. *Gibbs v. Merrill*.

3 Taunt. 307

- 9 If one of two partners is an infant, the holder of a bill accepted by both partners may declare on it as accepted by the adult only in the names of both, and if the defendant pleads in abatement that the other partner ought also to be sued, the plaintiff may reply his infancy, and it is no departure.

Burgess v. Merrill. 4 Taunt. 468

- 10 On a writ in debt for 1066*l.* plaintiff declared for 1000*l.* borrowed by defendant of the plaintiff; and, in a second count for 66*l.* for interest of a certain other sum of money lent by plaintiff to defendant, defendant pleaded in abatement of the writ, "*that the said sum of money in the said writ mentioned, and thereby supposed to be borrowed from the plaintiff,*" was borrowed by defendant and others, and not by defendant separately: on demurrer, because this plea only answered one of the causes of action (that mentioned in the first count), the Court held the plea bad.

Harries v. Jamieson. 5 T. R. 553

- 11 To an action of debt on the stat. 9 Ann. c. 14. to recover back money won at play, the defendant may plead in abatement, that the money was due from others not named as well as from himself.

Bristow v. James. 7 T. R. 257

- 12 Trespass against B., C. and D. for turning A. out of his house, and keeping the house and goods from him; plea, that A. had nothing in the said house and goods but "*jointly and undividedly with D.*" Judgment signed for want of a plea, and held right. *Hopgood v. Wright*. 2 N. R. 188

II. TO THE FORM OF THE WRIT.

(a) Variance.

- 1 Where defendant had been sued as the Right Honourable *Hamilton Fleming* Earl of *Wigtown*, having privi-

lege of peerage, and had judgment against him, and a debt on that judgment he was called *Hamilton Fleming*, Esq. commonly called Earl of *Wigtown*; on *null tiel* record pleaded, held to be a failure of record.

Blackmore v. Fleming. 7 T. R. 447, n.

(b) Misnomer.

- 1 A misnomer may be pleaded in abatement where the plaintiff misnames himself. *Stafford Corporation v. Bolton*.

1 B. & P. 44

- 2 Plaintiffs were incorporated by the name of "the Mayor and Burgesses of the borough of *Stafford* in the county of *Stafford*," and sued by the name of "the *Mayor and Burgesses* of the borough of *Stafford*," this is in abatement and not in bar. *id.* 40

- 3 A plea in abatement of misnomer of the defendant, beginning, "*and the said Richard* sued by the name of *Robert*," is bad. *Roberts v. Moon*.

5 T. R. 487

- 4 The defendant in a plea in abatement of misnomer must give his surname as well as his true christian name, although his true surname be used in the declaration. *Haworth v. Spraggs*.

8 T. R. 515

- 5 Defendant was baptized *Richard James*, and was called in the declaration *James Richard*; this is a misnomer, and may be pleaded in abatement. *Jones v. Macquillin*.

5 T. R. 195

- 6 Defendant being arrested by the name of *F. H.*, put in bail by the name of *S. H.*: plaintiff then declared thus: "*S. H.* arrested by the name of *F. H.*, was attached to answer," &c. defendant without craving oyer, pleaded in abatement of the writ that his name was *S. H.*; plaintiff having treated this plea as a nullity, and signed judgment accordingly, the Court refused to set it aside. *Murray v. Hubbart*.

1 B. & P. 645

- 7 One indicted for a misdemeanor, may plead in abatement a misnomer of his surname, *Shakepeare* for *Shakespeare*, which shall not be taken for *idem sonans*; and the plea concluding with praying judgment of the said indictment and that he may not be compelled to answer the same, is good.

Rex v. Shakespeare. 10 E. R. 83

- 8 A plea of misnomer in abatement must conclude with praying judgment

of the bill: praying that the same may be quashed was held ill on special demurrer. *Hixon v. Binns*. 3 T. R. 185

- 9 Defendant is estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, though he himself be no party to the recognizance. *Meredith v. Hodges*. 2 N. R. 453

(c) Addition, want of.

- 1 No addition having been given to the defendant, either in the recital of the writ, or in the subsequent part of the declaration, he pleaded the statute of additions, 1 H. 5. in abatement, and prayed judgment of the declaration. The Court held the plea a nullity, and allowed the plaintiff to sign judgment. *Gray v. Sidneff*. 3 R. & P. 395
- 2 As by the practice of the Court of K. B. they will not grantoyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad withoutoyer; the effect is to prevent such a plea from being pleaded, and therefore if pleaded the Court will quash it. *Deshous v. Head*. 7 E. R. 383

III. TIME OF PLEADING.

- 1 The four days allowed for pleading in abatement are both inclusive. *Jennings v. Webb*. 1 T. R. 277. *Harbord v. Perigal*. 5 T. R. 210
- 2 But if the last of the four days for pleading in abatement, happen on a Sunday, the defendant may file such a plea on the fifth day. *Lee v. Carlton*. 3 T. R. 642
- 3 Every plea in abatement must be pleaded before the rule for pleading is out, and cannot be pleaded after an imparlance, unless the declaration is delivered so late in term that the defendant is not bound to plead to it in that term, or is delivered after term; in both which cases the defendant may, within the four last days, inclusive, of the subsequent term, plead any plea in abatement as of the precedent term, whether a rule be given or not, and Sunday is one. *Jennings v. Webb*. 1 T. R. 278
- 4 When a declaration is delivered before the essoign day of a term, with a rule to plead in the first four days of that term, the defendant cannot plead within

that time in abatement, without a special imparlance. *Doughty v. Lascelles*. 4 T. R. 520

- 5 A plea in abatement is bad after a general imparlance. *Evans q. t. v. Stevens*. 4 T. R. 227
- 6 And may be taken advantage of on a general demurrer. *Buddle v. Wilson*. 6 T. R. 369
- 7 There cannot be a plea in abatement intitled as of the terms subsequent to that in which the declaration is delivered without a special imparlance. *Blackmore v. Flenyng*. 7 T. R. 447, n.
- 8 A plea of ancient demesne was permitted to be filed *de bene esse* within the first four days; pending a rule nisi for permission to allow the plea so filed. *Doc. d. Morton v. Roe*. 10 E. R. 523
- 9 Ancient demesne must be pleaded in ejectment within the first four days of the term. *Denn d. Wroot v. Fenn*. 8 T. R. 474
- 10 After declaration filed conditionally in a town-cause until special bail should be put in and perfected, and notice thereof served, defendant has only four days for pleading in abatement: and if he put in special bail on the fourth day, which are excepted to on the 5th, and not justified till the 9th, he is then too late to plead in abatement: and plaintiff having demanded a plea, and none other being pleaded, he is entitled to sign judgment as for want of a plea. *Binns v. Morgan*. 11 E. R. 411
- 11 A declaration is only well filed from the time of notice, whether it be a declaration in chief, or *de bene esse*; and therefore the defendant has four days after notice, in which to plead in abatement. *Hutchinson v. Brown*. 7 T. R. 298
- 12 In a country cause, if the defendant put in special bail in time, he may plead in abatement; though the bail be not perfected till after the four days, if they be ultimately perfected within the time allowed by the practice of the Court. *Dimsdale v. Nickson*. 2 E. R. 406
- 13 If defendant put in special bail within four days in a town cause, he is entitled to plead in abatement, provided such bail be afterwards perfected in time, though he had before put in other bail, and given notice of justifying, but had withdrawn them in time. *Hopkinson v. Henry*. 13 E. R. 170

- 14 The plaintiff may sign judgment if the defendant plead in abatement after the four days, though no rule to plead has been regularly served. *Brandon v. Payne.* 1 T. R. 689
- 15 If the tenant in a writ of right pray aid after a general imparlance, it is a good cause of demurrer, and the Court will give judgment thereupon, that the tenant answer alone. *Onslow v. Smith.* 2 B. & P. 384
- 6 Defendant having put in a plea in abatement in time, with an affidavit made before he could have seen the declaration, that *the promises contained in the declaration* were entered into if at all by others as well as himself, plaintiff signed judgment, treating the plea as a nullity: the Court on motion set aside the judgment. *Lang v. Comber.* 4 E. R. 348
- 7 Aid prayer is a dilatory plea, within 4 Ann. c. 16. and must therefore be verified by affidavit. *Onslow v. Smith.* 2 B. & P. 384

IV. FORM AND REQUISITES OF.

- 1 In a plea in abatement that another person ought to have been sued with the defendant, it is not necessary to lay a venue. And if it be pleaded that such other person is alive, to wit, *in Spain*, it will be considered as pleaded without any venue. *Neale v. De Garay.* 7 T. R. 243
- 2 A plea in abatement is bad if it do not give a better writ, but tend to shew that the plaintiff hath no action at all. *Trans q. t. v. Stevens.* 4 T. R. 227
- 3 A plea in abatement to the jurisdiction of the Court, beginning, "*defendit vim & injuriam quando*," was held good by the Court of K. B. *Wilkes v. Williams.* 8 T. R. 631
- 4 A writ in debt may be abated in part and stand good for the remainder. Therefore, if a plea in abatement contain matter which is in part abatement of the writ only, but concludes with a prayer that the whole writ may be abated, the Court may abate so much of the writ as the matter pleaded applies to. *Powell v. Fullerton.* 2 B. & P. 420
- 5 To a declaration against one upon joint promises by him and another, whom he avers to be outlawed, a plea of *nul tiel record* of outlawry is in effect a plea in abatement, for want of parties: and therefore, if it conclude in bar, it is bad on general demurrer, and the plaintiff is entitled to judgment *quod recuperet*, &c. *Noxlan v. Geddes.* 1 E. R. 634

V. REPLICATIONS AND JUDGMENTS ON.

- 1 If a replication to a plea in abatement of the writ begin, "that the said declaration ought not to be quashed," but conclude properly, it is well enough; for such words may be rejected as surplusage. *Sabine v. Johnstone.* 1 B. & P. 60
- 2 Replication to a plea in abatement, (that the promises were made by *A.* and *B.* jointly with the defendant,) that *A.* and *B.* were in *Scotland* at the commencement of the suit, &c. and had no property within the jurisdiction of the Court, by which they could be summoned, &c. is bad. *Shepherd v. Baillie.* 6 T. R. 327
- 3 To a plea in abatement of misnomer of plaintiff, replication that the plaintiff was known as well by the one name as the other: upon demurrer over-ruled, there must be judgment of *respondeas ouster*, and not *quod recuperet*. *Bowen v. Shapcot, in error.* 1 E. R. 542
- 4 In abatement the Court will give no other than the proper judgment prayed for by the party; but in the case of pleas in bar, the Court will give that which appears to them to be the proper judgment upon the whole record, whether regularly prayed for or not. *Rex v. Shakespeare.* 10 E. R. 87

ACCORD AND SATISFACTION.

- 1 Plea to *assumpsit*, that the defendant, (who was the payee of a promissory note,) indorsed it to the plaintiff "for and on account of" the said debt, is a good plea. *Kearlake v. Morgan.* 5 T. R. 513
- 2 ss cannot be a sa-
- 3 tisfaction in law of a greater sum then due: nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability. *Fitch v. Sutton.* 5 E. R. 230
- 4 Therefore where a debtor entered into an

agreement with his creditors, whereby they agreed to receive 20*l.* *per cent.* in satisfaction of their several debts, and released the remainder in consideration that half of the composition should be secured by the acceptance of one of the creditors, which accordingly was given, and paid when due: held that such agreement was binding on the plaintiff, one of the creditors, and that his suing the debtor after receiving the composition was a fraud upon the rest of the creditors. *Steinman v. Magnus.* 11 E. R. 390

- 4 A plea that the plaintiff and defendant agreed to settle all matters in dispute, and to bind themselves in a penalty not to sue each other, is a bad plea, as it does not amount to satisfaction. *James v. David.*

5 T. R. 141

- 5 One of three joint covenantors gives a bill of exchange for part of a debt secured by the covenant, on which bill judgment is recovered: held such judgment to be no bar to an action of covenant against the three; such bill, though stated to have been *given for the payment and in satisfaction* of the debt, not being averred to have been *accepted as satisfaction*, nor to have produced it in fact. *Drake v. Mitchell.* 3 E. R. 251

- 6 An agreement between a debtor and his creditors that they will accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors to recover his whole demand. *Heathcote v. Crookshanks.* 2 T. R. 24

- 7 But if the debt had been ascertained by the agreement, and a fund provided, and all the creditors bound to forbear, it seems that would have been a good plea. *id.* 27

- 8 So if the debtor had assigned over all his effects to a trustee in order to make an equal distribution among all his creditors, that would have been a good consideration in law for the promise. *id.* 28

- 9 A. declared that in consideration that he at the request of B. had *consented and agreed to accept and receive* from B. a composition of so much in the pound upon a sum of money owing from B. to A., in full *satisfaction and discharge* of the debt, B. promised to pay the composition: the Court of

C. P. on motion in arrest of judgment, held that this was not a good consideration to maintain an *assumpsit* against B., a mere *accord* not being a ground of action. *Lynn v. Bruce.* 2 H. B. 317

- 10 Accord and satisfaction made before breach of a covenant, cannot be pleaded in bar of an action on the covenant. *Kaye v. Waghorne.* 1 Taunt. 428

- 11 To debt on a bail-bond it is no good plea that the action was brought by the sheriff for the benefit of, and as trustee for the sheriff's officer who arrested the defendant, and to whom the defendant paid the debt and costs, and who accepted the money so paid by the defendant *in full satisfaction and discharge of the bond and fees*; and that if any damage afterwards accrued by default of defendant's appearance according to the condition of the bond, it was occasioned by the sheriff's officer not paying over the debt and costs to the plaintiff in the original action, *which would have been accepted by such plaintiff*: for the officer had no interest in the bond at the time of the supposed satisfaction received by him. *Scholey v. Mearns.*

7 E. R. 147

- 12 The Toleration Act, 1 W. & M. c. 18. provides (§ 18.) that any person maliciously disturbing any dissenting congregation under that Act, on proof before a justice of peace, shall find sureties in 50*l.*, or in default be committed to prison till the next sessions, and on conviction forfeit 20*l.* to the crown. To an action against magistrates for trespass and false imprisonment they pleaded a charge preferred before them for an offence against that clause, and a commitment for want of sureties under it to the next sessions: and that before the next sessions it was agreed between the prosecutor and the now plaintiff, *with the consent* of the committing magistrates (the now defendants,) that the prosecution should be dropped, and the plaintiff be discharged at the sessions for want of prosecution; that the plaintiff was accordingly then and there so discharged *in full satisfaction and discharge of the assault and imprisonment*: held this was no *legal satisfaction*; for either the agreement was illegal, as stifling a prosecution for a *public misdemeanor*, and thereby impeding the course of justice; or the satisfaction, if any, was

moving from the prosecutor only, and not from the justices; their authority over the prosecution being at an end after the commitment of the plaintiff, and *their consent* afterwards to the prosecutor dropping the prosecution being a mere nullity, and no satisfaction for a prior injury, if, any, received by

the plaintiff from their act. *Edgcombe v. Rodd.* 5 E. R. 294

13 If the plaintiff in an action commenced against several tort-feasors, accept of a sum of money from one of them, and drop that action, *scilicet* that he cannot sue the others. *Dufresne v. Hutchinson.* 3 Taunt. 117

ACTION.

I. JOINDER OF PARTIES.

II. FORM OF ACTION.

(a) *Debt or Case.*

(b) *Case or Trespass.*

III. JOINDER OF COUNTS.

IV. NOTICE OF ACTION.

(a) *To Magistrates.*

(b) — *Excise or other Officers.*

V. DEMAND OF PERUSAL AND COPY OF WARRANT.

VI. ABATEMENT OF.

(a) *By Death of Parties.*

(b) — *Bankruptcy.*

I. JOINDER OF PARTIES.

1 If the cause of action arise *ex contractu*, the plaintiff must sue all the contracting parties; if, *ex delicto*, he may sue all or any one. *Scott v. Godwin.* 1 B. & P. 73—75

2 It is no ground of nonsuit in an action on a contract, that a dormant partner, who is not privy to the contract, and is not party to the suit, partakes the benefit of the contract, and therefore ought to be joined as plaintiff: for such a dormant partner could not maintain the action. *Lloyd v. Archbold.* 2 Taunt. 324

And see *Bovill v. Wood.* 2 M. & S. 23

3 If the ostensible proprietor of materials enter into a contract for work to be done thereon, it is not necessary that in an action brought on the contract, another, who has secretly purchased a share of him, but is no party to the contract, should be joined as a co-plaintiff; nor could such dormant partner sustain an action. *Mawman v. Gillett.* 2 Taunt. 325, *noted*

4 The assignees of *A.* a bankrupt, and also of *B.* a bankrupt, under separate commissions, cannot recover in the same action a *joint* debt due from the

defendant to both the bankrupts, and also *separate debts due to each*; and if in such an action the Jury have assessed the damages severally on the separate counts, the Court will arrest the judgment on those counts, which demand the debts due to each bankrupt *separately.* *Hancock v. Haywood.*

3 T. R. 433

5 But where the plaintiffs sued as assignees of *A.* and *B.* and also as assignees of *C.*, for a joint demand as due to all the bankrupts, the declaration was held good on a motion in arrest of judgment. *Sreatfield v. Halliday.*

3 T. R. 779

6 *A. B.* and *C.* having been appointed assignees under a commission of bankrupt, and having acted as such, *A.* and *B.* pay each half of his bill to the solicitor; held, that *A.* and *B.* could not maintain a joint action against *C.* for his proportion of the money paid, but must each bring a separate action.

Brand v. Boulcott. 3 B. & P. 235

7 An order of the Lord Chancellor, made under the stat. 5 G. 2. c. 30., upon the petition of creditors, for removing one of several assignees of a bankrupt's estate, not followed up by any re-assignment or release of such assignee to the remaining assignees, nor by any new assignment of the commissioners under the Lord Chancellor's further order, does not operate to divest the legal estate out of such removed assignee: and consequently he ought to join in an action of trover brought by the assignees for a ship belonging to the bankrupt's estate.—*Bloxam v. Hubbard.* 5 E. R. 407

But if he be not joined, advantage can only be taken by plea in abatement to the whole action: though the other assignees who sue can only recover their proportional parts. *id. ibid.*

8 The plaintiffs, together with *A.* and *B.* being owners of one ship, and the

defendant of another, a prize was taken, condemned, and shared by agreement between them; afterwards the sentence of condemnation was reversed, and restitution awarded with costs, which was paid solely by the plaintiffs, *A.* and *B.* having in the mean time become bankrupts; an action for money paid to the use of the defendants cannot be brought by the plaintiffs alone, for a moiety of the restitution money and costs, because it was either a partnership transaction, when *A.* and *B.* ought to be joined, or not, when separate actions should be brought by each of the persons paying. *Graham v. Robertson.* 2 T. R. 282

- 9 In an action on the case upon a delivery of goods to several joint-owners of a ship, to be carried to *A.* for freight, alleging a deviation; if the plaintiff fail in proving all the defendants to be owners, he cannot recover even against those whom he proves to be owners. *Max v. Roberts.*

2 N. R. 454

- 10 A solvent partner may join with the assignees of his two bankrupt partners in maintaining an action for money had and received to recover back from a creditor the amount of a bill, the joint property of the firm received by him from the acceptor by the indorsement of the two other partners after acts of bankruptcy committed by them. *Thomason v. Frere.* 10 E. R. 418

- 11 *A.*, *B.*, and *C.*, having dissolved partnership, *C.* after such dissolution, drew bills in the partnership firm in favour of *D.*, he not knowing of such dissolution; upon which *D.* brought his action against all the former partners; and *C.* having pleaded his bankruptcy, *D.* entered a *noli prosequi* as to him, and recovered judgment against *A.* and *B.* which was afterwards satisfied by the attorney of *A.* and *B.*, who advanced part, and borrowed the rest of the money on their joint credit; held that the sum so paid in satisfaction of the judgment might be recovered in a joint action by *A.* and *B.* against *C.*—*Osborne v. Harper.* 5 E. R. 225

12. Where a banking trade was carried on in the name of father and son, in whose joint names the accounts with the customers were headed in the banking books, the father cannot sue alone for the balance of an account over-drawn by a customer, without

giving distinct proof, that the son though proved to be a minor, had no property in the banking fund, or share in the business as a partner. *Teed v. Elworthy.* 11 E. R. 210

- 13 In an action against three, wherein the plaintiff declared that *they* had the loading of a hogshead of the plaintiff's, for a certain reward to be paid to one of them, and a certain other reward to the other two, and that the defendants so negligently conducted themselves in the loading, &c. that the hogshead was damaged: held that the gist of the action was the *tort*, and not the *contract* out of which it arose; and therefore that on a plea of not guilty, the two being acquitted, judgment might be had against the third, who was found guilty. *Govett v. Radnidge and Others.*

3 E. R. 62

- 14 Upon a declaration in case, alleging a deceit to have been effected upon the plaintiff by means of a warranty made by two defendants, upon a joint sale to him by both, of sheep, their joint property, the plaintiff cannot recover upon proof of a contract of sale and warranty by one only, as of his separate property; the action, though laid in *tort*, being founded on the joint contract alleged. *Weat v. King.*

12 E. R. 452

- 15 Where bail call together upon an attorney and employ him to surrender their principal, one of them cannot afterwards maintain a separate action against such attorney for neglecting to effect the surrender pursuant to his undertaking. *Hill v. Tucker.*

1 Taunt. 7

- 16 The reversion of land, demised to the defendant for years, is conveyed to *A.* and *B.*, and the heirs of *B.* in trust for *A.* and his heirs: *A.* declares singly on a covenant contained in the lease, and after setting out the above title, without averring the death of *B.* states himself to be "thereby seised of the reversion in his demesne as of fee." Upon general demurrer, to the declaration, the Court of C. P. held this to be bad, and that the defendant need not plead it in abatement. *Scott v. Godwin.*

1 B. & P. 67

- 17 An action is well brought against one of several trustees, under a turnpike act. *Sutton v. Clarke.*

1 Marsh. 429

II. FORM OF ACTION.

(a) Debt or Case.

- 1 Where a navigation act empowered the company to sue for calls, &c. "By action of debt or on the case;" it was ruled that an action on the case in tort lay. *Huddersfield Canal Co. v. Buckley.* 7 T. R. 36

(b) Case or Trespass.

- 1 Where the injury is committed by the immediate act complained of, the action must be *trespass*; where the injury is consequential upon that act, *case* is the proper remedy. *Day v. Edwards.* 5 T. R. 648. *Savignac v. Roome.* 6 T. R. 125
- 2 The true criterion is, whether or not the injury were received by force: if it were, the action must be *trespass*. It is immaterial whether it were wilful or not. *Leame v. Bray.* 3 E. R. 599
- 3 If I put in motion a dangerous thing: as if I let loose a dangerous animal, and mischief ensue, I am answerable in *trespass*, though the case of *Scott v. Shepherd* (that of throwing the squib) goes to the limit of the law. *id.* 598
- 4 Where one accidentally drove his carriage against another's, the remedy is *trespass* and not *case*; the injury being immediate from the act done; though he were no otherwise blameable than by driving on the wrong side of the road in a dark night. *Leame v. Bray.* *id.* 593
- 5 Declaration against the defendant for driving his cart against the plaintiff's horse with force and violence, alleging it to have been done "by and through the mere negligence, inattention, and want of proper care," of the defendant. On demurrer to this declaration as not being in *trespass*, held that this declaration in *case* was good. *Rogers v. Imbleton.* 2 N. R. 117
- 6 A plaintiff cannot declare in an action on the case, that the defendant so furiously drove his cart, that by his improper conduct it was driven with great force against the plaintiff's carriage, *per quod*, the loss happened; his remedy is *trespass vi & armis*. *Day v. Edwards.* 5 T. R. 648
- 7 An action on the case stating that the

defendant's servant wilfully drove against the plaintiff's carriage whereby it was damaged, cannot be supported: it should have been *trespass*. *Savignac v. Roome.* 6 T. R. 125

- And *Tripe v. Potter.* 6 T. R. 128, n.
- 8 A. declared in *case* against B. for sinking his boat, and after averring a non-feasance in B. as the cause, stated him to have acted with great force and violence in accomplishing the injury; A. recovered; and on error brought because the action should have been *trespass*, not *case*, and because the two actions were mixed, the Court of Exchequer Chamber referred the two concluding expressions to the non-feasance first stated, and held the declaration sufficient to support the judgment. *Turner v. Hawkins, in Cam. Scac.* 1 B. & P. 472
- 9 An action of *trespass* cannot be maintained against the owner of one vessel for damage done to another by the negligence of the pilot while the owner is on board. The proper remedy is by an action on the case. *Hugget v. Montgomery.* 2 N. R. 446
- 10 If A. wilfully run his vessel against B.'s, and damage ensue, B. may bring *trespass*; but if A. so negligently steer his vessel that it runs foul of B.'s, then *case* is the proper action. *Ogle v. Barnes.* 8 T. R. 188
- 11 It is difficult to put a case where the master can be considered as a trespasser for an act of his servant, not done by his command. *Morley v. Gaisford.* 2 H. B. 443
- 12 Therefore *case* and not *trespass* is the proper remedy for an injury done to the plaintiff's carriage by the servant of the defendant negligently driving his carriage against it. *id.* 442
- 13 And if such act be done wilfully by the servant, without the assent of the master, neither *trespass*, nor, it should seem, any other action, will lie against the master. *McManus v. Crickett.* 1 E. R. 106
- 14 For false imprisonment, the distinction between *case* and *trespass* is this: where the immediate act of imprisonment proceeds from the defendant, the action can only be *trespass*; but where the act of imprisonment by one person is in consequence of information from another, there an action on the case is the proper remedy. *Morgan v. Hughes.* 2 T. R. 230

15. A father may maintain trespass for breaking, &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above 21 years of age, where acts of service are proved, though there be no contract for service. *Bennett v. Alcott.*

2 T. R. 166

16 But where this kind of offence is accompanied with an illegal entry of the father's house, he has his election either to bring trespass for the breaking, &c. and lay the debauching of the daughter and loss of her service as consequential; or he may bring the action on the case merely for debauching the daughter, *per quod servitium amisit.*

2 T. R. 167

And see the cases of *Woodward v. Walton.*

2 N. R. 476

And *Macfadyen v. Olivant.*

6 E. R. 387

III. JOINDER OF COUNTS.

1 Where the same plea may be pleaded, and the same judgment given on several counts, they may be joined in the same declaration. *Brown v. Dixon.*

1 T. R. 274

2 *Assumpsit* and *trover* cannot be joined.

id. 277

But to a declaration against a common carrier, upon the custom of the realm, a count in *trover* may be added.

id. ibid.

3 The first count of a declaration being in *trover* for bills of exchange, and the second and third counts stating the delivery of the bills to the defendant in order that he might get them discounted for a certain commission, and his having got them discounted, and converting the money to his own use; the defendant demurred generally on the ground of a misjoinder of tort and contract; but the Court held that on a general demurrer, as all the counts were in the form of tort, judgment must be for the plaintiff if any one count was good. *Judin v. Samuel.*

1 N. R. 43

Affirmed in K. B. *Samuel v. Judin.* (*in error.*)

6 E. R. 333

4 A count on a promise made by defendant as administrator to pay money received by him as such to the plaintiff's use cannot be joined with other counts on promises made by the intestate. *Jennings v. Newman.*

4 T. R. 347

5 A count upon a promise to the plaintiff

as administratrix for goods sold and delivered by her after the death of the intestate, may be joined with a count upon an account stated with her as *administratrix*; for the damages and costs, when recovered, would be assets. *Cowell, Administratrix, v. Watts.*

6 E. R. 405

6 A count in *assumpsit* to the plaintiff, *as executrix*, for money paid by her to the defendant's use, may be joined with another count on promises made to the testator: for, *non constat* but that she may have been compelled to pay the money upon an obligation by the testator as surety for the defendant to a creditor; in which case the law would raise an *assumpsit* in him to reimburse the testator's estate, and the money so recovered by the executrix would be assets. *Ord v. Fenwick, Executrix (in error.)*

3 E. R. 104

7 A count for money had and received by defendant to the use of the executor, *as such*, may be joined to an account for money had and received to the use of the testator. *Petrie v. Hamay.*

3 T. R. 659

8 But a plaintiff cannot join in the same declaration a cause of action as executor with another which accrued in his own right. 3 T. R. 659:—and

Cockerill & Ur, Executrix, &c. v. Kynaston.

4 T. R. 277

9 The three first counts of a declaration in *assumpsit* against executors stated promises made by the testator; the fourth was for money had and received by the defendants "*as such executors as aforesaid*," stating a promise to pay by them "*executors as aforesaid*," and the last was upon a count stated by the defendants "*executors as aforesaid*," and stating the promise to pay in the same manner: held bad upon general demurrer. *Brigdon v. Parkes, Exors.*

2 B. & P. 424

10 A count upon an account stated with the plaintiff, *executrix, &c.* (not saying *as executrix, &c.*) cannot be joined with counts on promises to the testator; for it is no allegation that the promises were made to the plaintiff in her representative capacity; and under such a count proof might be given of an account stated with her in her individual character. *Hershall v. Roberts in error.*

5 E. R. 150

2u. Whether, if it had been laid to be on an account stated with the plaintiff herself, though named as *executrix*, &c. it could be so joined, as the cause of action would still appear to have arisen in the time of the executrix, though the money, when recovered, would be assets. *Henshall v. Roberts (in error.)* 5 E. R. 150

11 A count on an *insimul computassent* with the plaintiff as executor, may be joined with a count for goods sold by the testator. *Thomson & Ur. Executrix v. Stent.* 1 Taunt. 322

12 The criterion whether the counts are misjoined, is, whether the money, if recovered, will be assets or not, in the hands of the executor. *id. ibid.*

13 A count in covenant, charging the defendants as executors for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors, and assigns; may be joined with another count, charging them that after the testator's death, and their proving the will, and during the term, the devised premises came by assignment to one D. A., against whom breaches were alleged; and concluding that so neither the testator, nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same. And *plene administraverunt* may be pleaded to both counts. *Wilson v. Wigg.*

10 E. R. 313

14 An executor cannot join a count upon a bond given to his testator, and a count upon a bond given to himself as executor, in the same action. *Hosier v. Lord Arundel.*

3 B. & P. 7

15 An action for debauching the plaintiff's daughter *per quod servitium amisit*, is an action of trespass, and a count thereon may be joined with a count for breaking and entering the house. *Woodward v. Walton.*

2 N. R. 476

kill game, by the stat. 24 G. 2. c. 44. for it will be presumed that he acted as a justice. *Biggs v. Evelyn, (Bt.)*

2 H. B. 114

2 One magistrate committing the mother of a bastard child to custody for not filiating the child, is yet entitled to the previous notice of action required by the above statute, though by the stat. 18 Eliz. c. 3. § 2. jurisdiction over the subject matter is given to two magistrates. *Weller v. Toke.* 9 E. R. 364

3 No action can be brought against a justice of the peace for any act done by him in that character without giving him a month's notice of the precise writ or process intended to be sued out as well as of the cause of action. *Lovelace v. Curry.* 7 T. R. 631

4 Notice of an action on the case for false imprisonment and assault was held not sufficient to support an action of trespass and false imprisonment. *Strickland v. Ward.* 7 T. R. 631, n.

5 Notice of action was subscribed given under my hand at *Durham* the 11th day of—&c. *Richard Ratcliffe*, attorney—for, &c. without adding any place of residence; held insufficient. *Taylor v. Fenwick.* 3 B. & P. 553, *notá*

6 A notice of action to a magistrate under 24 G. 2. c. 44. § 1. indorsed with the name of the plaintiff's attorney, and the words, "of Birmingham," as describing the place of his abode; held sufficient. *Osborn v. Gough.*

3 B. & P. 551

7 The action must be brought within six months of the notice. *Weston v. Fournier.* 14 E. R. 491

(b) *Excise and other Officers.*

1 An excise officer is entitled to notice under stat. 23 G. 3. c. 70. § 30. before an action is brought against him for an act not warranted by his official capacity, if done *bona fide* in the supposed execution of his duty; such as the assaulting of an innocent person whom he suspects to be a smuggler employed in running goods. *Daniel v. Wilson.* 5 T. R. 1

2 As to what is a sufficient notice under this statute, see the case of *Wood v. Folliott.* 3 B. & P. 551, *notá*

3 If a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action for money had

IV. NOTICE OF ACTION.

(a) *To Magistrates.*

1. The lord of a manor, who is also a justice of the peace, is entitled to a month's notice of an action brought against him for taking away a gun in the house of a person unqualified to

and received; in which action the month's notice under the above statute need not be given. *Irving v. Wilson.* 4 T. R. 485

4 *Assumpsit* for money had and received does not lie against an excise officer to recover duties received by him after the act imposing them is repealed, if he have paid them over to his superior; and in such case he is entitled to a month's notice before the action is brought by the above statute. *Greenaway v. Hurd.* 4 T. R. 553

5 The month begins with the day on which the notice is served. *Castle v. Burditt.* 3 T. R. 623

6 Notice of action against a custom-house officer for breaking the plaintiff's dwelling-house in *C. Street*, in the parish of *G.*, is not a sufficient notice of the plaintiff's place of abode, within the statutes 23 G. 3. c. 70. s. 30. and 24 G. 3. sess. 2. c. 47. s. 35. *Williams v. Burgess.* 3 Taunt. 127

7 The stat. 39, 40 G. 3. c. 69. s. 184. directs that the West India Dock Company shall sue in the name of their treasurer, in all actions by or on behalf of the Company, and that he shall be sued for the recovery of any claim or demand upon, or of any damages occasioned by the Company; and s. 185, after extending the protection of the stat. 24 G. 2. c. 44. for privileging Justices of the Peace in actions brought against them as such, to the Lord Mayor and Aldermen of London acting under this act, beyond the limits of the city; directs that "no action shall be commenced against any person or persons for any thing done in pursuance or under colour of this act, until after 14 days' notice in writing, or after tender of amends," &c. The Court of K. B. held that the treasurer is a person within the protection of the said clause; and being sued for an act done by the Company which induced an injury to the plaintiffs, was entitled to such notice before the action brought. The notice is necessary in actions for trespasses or torts, but *Qu.* whether in *assumpsit*. *Wallace v. Smith, Treas. of W. I. Dock Co.* 5 E. R. 115

8 One person acted as clerk to two bodies of public officers. A notice of action required by the statute was given him, addressed to him as clerk to the one body, the cause of action arising under the authority of the other

body: Held, that the notice was insufficient. *Hider v. Dorrell.*

1 Taunt. 383

V. DEMAND OF PERUSAL AND COPY OF WARRANT.

1 Where defendants, in order to levy a poor's rate under a warrant of distress granted by two magistrates, broke and entered the house and broke the windows, &c.: Held, that they might be sued in trespass without a previous demand of the perusal and copy of the warrant, according to 24 G. 2. c. 44. s. 6. *Bell v. Oakley.* 2 M. & S. 259

2 If an officer seize goods in obedience to the warrant of a magistrate, whether that warrant be legal or not, he cannot be sued without a previous demand of a copy and perusal of the warrant. *Price v. Messenger.* 2 B. & P. 158

3 If the warrant be to seize "*stolen goods*," and he seize goods which turn out not to have been stolen, he is still within the protection of the statute.

4 A constable executing the warrant of a justice of peace, and sued in trespass, without the magistrate, is within the protection of the statute, and entitled to a verdict on proof of such warrant; having first complied with the plaintiff's demand of a perusal and copy of the warrant before the action brought, though not within six days after such demand, as the act directs. *Jones v. Vaughan.* 5 E. R. 445

5 A constable cannot act as such out of his particular district; even though a warrant is directed to *A.*, constable of *B.*; to *C.* and to all other officers of the peace, in the county of *D.* *Blutcher v. Kemp*, cited. 1 H. B. 15, n.

6 Where goods were taken by constables, under a warrant of distress, granted by a justice of peace for the county of *Kent*, directed "*to the constables of the Lower Half Hundred of C. and G. in the county of Kent*;" which warrant recited that the plaintiff (whose goods were distrained) of the parish of *G.* in the said county, was ballotted for the militia of the said county, and having refused to serve, &c. was convicted in a certain penalty: for levying which the warrant was granted; if it turn out that the warrant was executed within a certain part of the parish of *G.*, within the

jurisdiction of the Cinque Ports, and not within the county of Kent, the constables are not within the protection of the statute, and may be sued in trespass without the magistrate's being made a defendant. *Milton v. Green*.

5 E. R. 233

- 7 A churchwarden taking a distress for a poor's rate under a warrant of magistrates, is entitled to the protection of the statute in having the magistrates joined with him as defendants in an action of trespass. *Harper v. Carr*.

7 T. R. 270

- 8 Replevin is not an action within the statute. *Fletcher v. Wilkins*.

6 E. R. 283

- 9 The statute not being a penal act, the Courts are not bound to construe it strictly; a demand of a copy of a warrant therefore under § 6. signed by the plaintiff's attorney for him, is, within the meaning of the statute, a demand signed by the plaintiff. *Per Buller J. Jory v. Orchard*. 2 B. & P. 42

VI. ABATEMENT OF ACTION.

(a) By Death of Parties.

- 1 The death of the defendant between the commission-day and day of trial is

not a ground for setting aside a verdict for the plaintiff. *Jacobs v. Minicomi*.

7 T. R. 31

- 2 If a defendant die on the night before the trial of a cause at the sittings in term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the Court. *Taylor v. Harris*.

3 B. & P. 549

- 3 The plaintiff, in an action for a libel, died after interlocutory judgment signed, a writ of inquiry executed, but before the next day in bank: Held, that final judgment could not be entered for the plaintiff, for the damages assessed, the suit having abated by his death. *Ireland, Clerk, v. Champneys*, 4 Taunt. 881

(b) By Bankruptcy.

- 1 An action does not abate by the plaintiff's becoming a bankrupt; and where he became such between interlocutory and final judgment, and sued out execution in his own name, the Court refused to set aside the proceedings. *Waugh v. Austen*. 3 T. R. 437

ACTION ON THE CASE.

I. TORTS TO PERSONS.

- (a) Against Surgeons.
- (b) For Consequences of public Nuisances.
- (c) Malicious Arrest.
- (d) Malicious Prosecution.
- (e) Debauching Daughters.
- (f) Enticing away, and harbouring Servants.

II. TORTS TO REAL PROPERTY CORPOREAL.

- (a) Not repairing Fences.
- (b) Obstruction of Lights.
- (c) Injuries to Lands in reversion.

III. TORTS TO REAL PROPERTY INCORPOREAL.

- (a) Disturbance of Franchises.

IV. TORTS TO PERSONAL PROPERTY.

- (a) On Bailments against Innkeepers.
- (b) Misfeasance in public Officers.

- (c) Misfeasance in performing Works.

- (d) Negligence in driving Carriages.

- (e) ——— navigating Ships.

- (f) False and deceitful Representations.

I. TORTS TO PERSONS.

(a) Against Surgeons.

- 1 An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the injury of a patient. *Searc v. Prentice*. 8 E. R. 348

- (b) Consequences of public Nuisances.

- 1 A person injured by an obstruction in a highway against which he violently rode, and was thereby thrown off his horse, cannot maintain an action, if it appear that he was riding with great violence and without ordinary care, and

that with due care he might have seen and avoided the obstruction. *Butterfield v. Forrester.* 11 E. R. 60

2 If the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, he cannot recover; at least, if the mischief be in part occasioned by the misfeasance of a third person not sued. Therefore, where *A.* placed lime-rubbish in a highway; the dust blown from it frightened the horse of *B.* and nearly carried him into contact with a passing waggon, in avoiding which, he unskilfully drove over other rubbish placed in the road by *C.* and was overthrown and hurt. Held; that upon a count stating these facts, *B.* could not recover against *A.* *Flower v. Adam.* 2 Taunt. 314

3 *A.* having a house by the road side contracted with *B.* to repair it for a stipulated sum; *B.* contracted with *C.* to do the work, and *C.* with *D.* to furnish the materials. The servant of *D.* brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned: Held, that *A.* was answerable for the damage sustained. *Bush & Ur. v. Steinman.* 1 B. & P. 404

4 If the owner of a house is bound to repair it, he and not the occupier is liable to an action on the case for an injury sustained by a stranger from the want of repair. *Payne v. Rogers.* 2 H. B. 349

5 Case lies against the landlord of a house demised by lease, who, under his contract with his tenant, employs workmen to repair the house, for a nuisance in the house occasioned by the negligence of his workmen. *Leslie v. Pounds.* 4 Taunt. 649

6 For the principal only is liable for damages done by the negligence of those whom he may employ. *Stone v. Cartwright.* 6 T. R. 411

7 If a person place dangerous traps baited with flesh in his own ground, so near to a highway or to the grounds of another, that dogs passing along the highway or kept in his neighbours' grounds must be attracted by their instinct into the traps, and in consequence thereof the dogs of another be so attracted and are injured, an action on the case lies.—*Townshend v. Wathen.* 9 E. R. 277

8 An action upon the case will not lie

by an individual against the inhabitants of a county, for an injury sustained in consequence of a county bridge being out of repair. *Russell v. The Men of Devon.* 2 T. R. 667

(c) *Malicious Arrest.*

1 An action on the case will not lie against a party suing out a writ, for neglecting to countermand it after payment of the debt, by means whereof plaintiff was arrested; at least unless malice be averred. *Scheibel v. Fairbain.* 1 B. & P. 388

2 Nor even though the costs were paid as well as the debt. *Page v. Wiple.* 3 E. R. 314

3 And if in such a case it were incumbent on the party suing out the writ to countermand the arrest, what is a reasonable time for doing so, is a question of law. 1 B. & P. 388

4 And even where the writ was sued out after payment of the debt, the facts of the case precluding any inference of malice, it was held, that an action for maliciously holding to bail would not lie without direct evidence of malice. *Gibson v. Chaters.* 2 B. & P. 129

5 In an action for maliciously arresting and imprisoning the plaintiff upon a plaint for debt in the sheriff's court in London, without reasonable or probable cause, it is sufficient to allege and prove that the plaint was made "at the sheriff's court in London, before J. A., one of the sheriffs, &c."

The usual course of that Court, upon the abandonment of a suit by the plaintiff, being to make an entry in the minute-book of "withdrawn" by the plaintiff's order, opposite to the entry of the plaint: Held, that proof of such entry in the minute-book was sufficient to prove an allegation that the former suit was "wholly ended and determined."

And a general allegation that the plaintiff was arrested "under and by virtue of the plaint," is proved by shewing the plaint entered and the subsequent arrest; though it also appeared that the officer making the arrest first received a paper in the nature of a warrant, (but which was no warrant, but only the parol direction of the sheriff, which is good by the custom, reduced into writing to avoid mistake,) directing him to make the arrest; and though the stat. 12

Geo. 1. c. 29. requires a previous affidavit of the debt, which had been made in this case. *Arundell v. White.*

14 E. R. 216

- 6 In an action for a malicious arrest the plaintiff can recover no damages for extra costs, nor any damages unless malice be proved, of which the first action being *non-prossed*, is not of itself evidence. *Sinclair v. Eldred.*

4 Taunt. 7

N. B. For variance between the declaration and record in this action, see *Judge v. Morgan.* 13 E. R. 547

(d) *Malicious Prosecution.*

- 1 An action lies for a malicious prosecution, though the plaintiff were acquitted on a defect in the indictment. *Wicks v. Fentham.* 4 T. R. 247
- 2 In an action for a malicious prosecution it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts was incorrect, or the opinion ill founded. *Hewlett v. Cruicheley.* 5 Taunt. 277
- 3 A declaration in an action for a malicious prosecution for felony, must state that the prosecution is at an end; alleging that the plaintiff was discharged not being equivalent to the word *acquitted* from his imprisonment is not sufficient. *Morgan v. Hughes.* 2 T. R. 225
- 4 The word *acquitted* must be taken in its legal sense, namely, by a jury. *id.* 231
- 5 So if it had been alleged that the plaintiff had been discharged by the Grand Jury's not finding the bill, that would have shewn a legal end to the prosecution. *id.* 232
- 6 It lies on the plaintiff in an action for a malicious prosecution to give evidence of malice in the defendant either express or to be collected from circumstances, shewing plainly the want of probable cause: and the malice is not to be implied from the mere proof of the plaintiff's acquittal for want of the prosecutor's appearing when called. *Purcell v. McNamara.* 9 E. R. 361
- 7 If the plaintiff, in an action for a malicious prosecution, offer to prove at the trial the original record of the indictment and acquittal, or a true copy thereof, such evidence must be received, though there were no order

of the Court, or *fiat* of the Attorney-General, allowing the plaintiff a copy of such record: but the officer, who without such authority, produces the record, or gives a copy of it to the party, is answerable for the contempt of Court in so doing; and the Judge at *nisi prius* would not compel him to produce the record in evidence, without such authority. *Legatt v. Tollervey.* 14 E. R. 302

And see *Jordan v. Lewis.* *id.* 305, *notd*

- 8 If a plaintiff declares that the defendant maliciously and without probable cause preferred an indictment, setting it forth, the averment is proved if some charges in the indictment, were maliciously and without probable cause preferred, although there was good ground for others of the charges preferred. *Reed v. Taylor.* 4 Taunt. 616

- 9 In an action for a malicious prosecution, the copy of the original roll or record of acquittal given in evidence, stated the finding of the bill of indictment against the now plaintiff *in K. B.*, the process to bring in the party, her appearance, and plea of not guilty in *Mich. Term*, and the joining of issue in the *same Court*: and then it stated the *venire facias juratores* returnable in *Hilary Term*, and the *distringas juratores*, by which the sheriff is commanded to have the Jury before our said lord the king at Westminster, on Wednesday next after 15 days from Easter, or before the Lord Chief Justice if he should come before that time, *i. e.* on Tuesday next after the end of the Term (Hilary), at Westminster, &c. in the great hall of pleas there; and then after giving a day in bank to the prosecutor and defendant, it proceeded, on which day, viz. on Wednesday next after 15 days, &c. before our said lord the king, at W., came the parties; and the Chief Justice before whom the said Jurors came to try, &c. sent here his record (which is the *nisi prius* record) in these words; (which are the words of the *postea* indorsed on the *nisi prius* record;) viz. "afterwards, on the day, and at the place last within mentioned, before the Chief Justice, &c." and so it proceeded to set out the trial, and the verdict of not guilty; (which is the conclusion of the *postea* on the *nisi prius* record sent into the

Court in bank by the Chief Justice:) and then the original roll proceeded—*Whereupon, all the premises being seen by the Court of our said lord the king now here, it is considered and adjudged by the said Court now here, that M. W. (the now plaintiff) do depart here without day, &c.*

The form and component parts of the original roll, or record of acquittal, being thus understood; it follows that the words of the postea, “afterwards, on the day and at the place last within mentioned,” stated in the indorsement on the *nisi prius* record, as sent by the Lord Chief Justice into the Court in bank, refer to *the day and place last mentioned in the distringas juratores* set forth in that record; namely, to “*Tuesday next after the end of the Term (Hilary), at Westminster, &c. in the great hall of pleas there;*” which was the day and place at *nisi prius* given; and not to the “*Wednesday next after 15 days, &c. before our said lord the king at W.*” which was the return day in bank in the subsequent term, and consequently after the trial was had; though the statement of this return day intervenes on the roll between the statement of the day and place given to the jury in the *distringas*, and the statement of the postea indorsed on the *nisi prius* record as sent in by the Lord Chief Justice.—

And as by the roll it appeared that the trial was at *nisi prius*, and the judgment of acquittal in bank; it was therefore held not to prove an allegation in the declaration, that “the defendant (the now plaintiff) on “Wednesday next after 15 days, &c. “in the Court of our said lord the king, before the king himself, at W. “before the Lord Chief Justice assigned to hold pleas before the king himself, &c. W. J. being associated with him, &c. was in due manner and according to the due course of law by a Jury of the said county of M. acquitted, &c.,” which allegation supposed the trial to have been in bank on the return day there given. *Woodford v. Ashley.*

11 E. R. 508

- 10 Where in an action for maliciously indicting for an assault the plaintiff gave no other evidence than “*the Bill returned not found,*” and was there-

upon non-suited: The Court refused to set aside the nonsuit. *Byne v. Moore,*

5 Taunt. 187

S. C. 1 Marsh. 12

- 11 An action upon the case will not lie for a malicious prosecution by a superior against an inferior officer, before a naval court-martial, for an offence cognizable by it. *Sutton v. Johnstone, Cam. Scac.* 1 T. R. 493; [affirmed in Dom. Proc. 1 T. R. 784]
- 12 An action for a malicious prosecution will not lie, if probable cause appear in the proceedings: for malice, and the want of probable cause, are both necessary to support this action.

id. 518

- 13 Whether certain facts proved, amount to a probable cause, or not, is a question of law. *Candell v. London.*

1 T. R. 520, n.

- 14 Action on the case lies for maliciously obtaining or executing a warrant to search a house for smuggled goods where none such are found. *Boot v. Cooper (in error.)* 1 T. R. 535, n.

- 15 An action on the case to recover damages against the lessor of the plaintiff in a vexatious ejectment is not maintainable. *Purton v. Honnor.*

1 B. & P. 205

(c) *Debauching Daughters.*

- 1 An action on the case for debauching and getting with child the plaintiff's daughter and servant, *per quod servitium amisit*, is not maintained by evidence that the daughter, though under age, was living in another person's family in the capacity of a housekeeper, and had no intention at the time of the seduction to return to her father's house, though she afterwards did return there while within age, in consequence of the seduction, and was maintained by her father. *Dean v. Peel.*

5 E. R. 45

- 2 No such action is maintainable unless laid with a *per quod servitium amisit*, where it does not appear that the daughter was under age. *Satterthwaite v. Duerst.*

id. 47, n.

- 3 But though the daughter be of age, yet the action is maintainable if she be living with her father. *Booth v. Charlton.*

id. 47, n.

- 4 Or absent on a visit with his consent, with the intention of returning. *Johnson v. M'Adam, id. ibid.,* and see *Bennett v. Allcott.*

2 T. R. 167

(f) *Enticing away, and harbouring Servants.*

- 1 An action will lie for continuing to employ the servant of another after notice, though the employer did not procure the servant to leave his master, or know when he employed him that he was the servant of another.

Blake v. Lanyon. 6 T. R. 921

- 2 In an action against *A.* for enticing the servant of *B.* from his service, it is sufficient evidence of the enticement, that *A.* asked the servant to enlist in the army, and afterwards gave him money.

Keane v. Boycott. 2 H. B. 511

II. TORTS TO REAL PROPERTY

CORPOREAL.

(a) *Not repairing Fences.*

- 1 An action on the case for not repairing fences, whereby another party is damaged, can only be maintained against the occupier, and not against the owner of the fee, who is not in possession.

Cheatham v. Hampson. 4 T. R. 318

- 2 If a person has a field fenced with a bank and ditch, it is not a necessary consequence that his ditch extends to the width of eight feet from the interior line of the foot of the bank, *i. e.* four for the base of the bank, and four feet for the ditch.

Fowles v. Miller. 3 Taunt. 137

- 3 Proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof.

id. ib.

- 4 And he has no right to cut away his neighbour's land for the purpose of widening the ditch.

id. ib.

(b) *Obstruction of Lights.*

- 1 A parol license to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling house through a window) cannot be recalled at pleasure after it has been executed at the defendant's expense; at least not without tendering the expenses he had been put to: and therefore no action lies for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light.

Winter v. Brockwell.

8 E. R. 308

- 2 Where lights had been put out and enjoyed without interruption for above 20 years, during the occupation of the opposite premises by a tenant; that will not conclude the landlord of such opposite premises without evidence of his knowledge of the fact: which is the foundation of presuming a grant against him, and consequently will not conclude a succeeding tenant, who was in possession under such landlord, from building up against such encroaching lights.

Daniel v. North. 11 E. R. 372

- 3 A window frame erected on a party wall, held not to be a common nuisance within the 14 Geo. III. c. 78. so as to deprive the owner of it of his right to the windows, which were proved to be ancient lights; and if it were, that it would not, without conviction, be an answer to an action for obstructing them.

Titterton v. Conyers. 1 Marsh. 140

(c) *Injury to Lands in reversion.*

- 1 An action on the case for an injury to the inheritance lies by the reversioner, pending the term against the tenant, for inclosing and cultivating waste included in the demise, and for continuing the grievance.

The Provost and Scholars of Queen's College, Oxford, v. Hallett. 14 E. R. 489

- 2 If the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion; otherwise the want of such allegation will be cause for arresting the judgment: therefore, where the plaintiff declared as reversioner of a yard and part of a wall, which *W. F.* occupied as tenant to him, and that the defendant on, &c. and on divers days, &c. wrongfully placed on the said part of the wall quantities of bricks and mortar, &c. and thereby raised it to a greater height than before, and placed pieces of timber, &c. on the said wall, overhanging the yard, *per quod*, the plaintiff during all the time lost the use of the said part of the wall, and also by means of the timber, &c. overhanging the wall, quantities of rain and moisture flowed from the wall upon the yard, and thereby the yard and said

part of the wall have been injured, to the damage of the plaintiff, &c.; without stating that his reversion was prejudiced: the Court arrested the judgment. *Jackson v. Pesked.*

1 M. & S. 234

III. TORTS TO REAL PROPERTY INCORPOREAL.

Disturbance of Franchises.

- 1 Firing at wild fowl to kill and make profit of them, by one who was at the time in a boat, on a public river or open creek, where the tide ebbs and flows, so near to an ancient decoy on shore as to make the birds there take flight, is evidence of a wilful disturbance of and damage to the decoy, for which an action in the case is maintainable by the owner. *Carrington v. Taylor.* 11 E. R. 571

- 2 An action on the case lies for discharging guns near the decoy pond of another with design to damnify the owner, by frightening away the wild fowl resorting thereto, by which the wild fowl were frightened away, and the owner damnified. *Keeble v. Hickeringill.* 11 E. R. 574, n.

- 3 An action on the case will not lie by the bailiff of a liberty, against a person for suing out a writ of *capias* with a *non omittas* clause: which writ was executed by the sheriff *within a particular liberty*, where such bailiff had the execution and return of writs (without a prior writ of *latitat* having first issued), upon an allegation that such writ of *capias* was *wrongfully, injuriously, and deceitfully* caused to be issued by the defendant, to the damage of the bailiff in his office. *Carrett v. Smallpage.* 9 E. R. 330

IV. TORTS TO PERSONAL PROPERTY.

(a) *On Bailments against Innkeepers.*

- 1 Though an innkeeper refuse to take charge of goods till a future day, because his house is full of parcels, still he is liable to make good the loss of them, if the owner stop *as a guest*, and the goods be stolen during his stay. *Bennet v. Mellor.* 5 T. R. 273

(b) *Misfeasance in Public Officers.*

- 1 An action on the case lies against the commissioners of the lottery for not adjudging a prize to the holder of a ticket entitled to receive it. *Schinotti v. Bumstead.* 6 T. R. 646

- 2 An action on the case lies against ministerial officers for a neglect of duty, 6 T. R. 649

- 3 An action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff; at least not without proof of malice. *Harman v. Tuppenden.* 1 E. R. 555

- 4 But in an action against a returning officer for refusing a vote at an election of members to serve in parliament, malice must be proved as well as laid. *Semble*, that charging that the defendant knowing, &c. and *wrongfully* intending to deprive plaintiff, &c. hindered him from giving his vote, &c. is a sufficient allegation of malice. *Drew v. Coulton.* 1 E. R. 563, n.

(c) *Misfeasance in performing Works.*

- 1 A count in a declaration, stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant, instead of using those, made use of new ones, thereby increasing the expense, may be supported. *Elsee v. Gatward.* 5 T. R. 143

(d) *Negligence in driving Carriages.*

- 1 In an action for negligently driving a cart against the plaintiff's carriage, it may be stated in the declaration as the act of the master, though in fact it be the act of the servant. *Brucker v. Frome.* 6 T. R. 659

N. B. This action is maintainable where the injury is only consequential to an act before done by the defendant. *Leame v. Bray.* 5 E. R. 593

(e) *Negligence in navigating Ships.*

- 1 The captain of a sloop of war is not answerable for damage done by her running down another vessel; the mischief appearing to have been done during the watch of the lieutenant, who was upon deck, and had the actual direction and management of the steering and navigating of the sloop at the time, and when the captain was not upon deck, nor was called by his duty to be there. *Nicholson v. Mounsey and Symes.* 15 E. R. 384

And see *Huggett v. Montgomery.* 2 N. R. 446

(f) *False and Deceitful Representations.*

1 A false affirmation made by the defendant with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit.

Pasley v. Freeman. 3 T. R. 51

N.B. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. *id. ibid.*

2 A. being desirous of disposing to B. of his buildings and stock in the trade in which he was engaged with B. pending a treaty between them, B. represented that he was about to enter into partnership with certain other persons, whom he did not name, but who, he said, would not consent to his giving more than a certain sum: although this representation was false, and though B. in fact charged his future partners with a larger price than he gave; yet the Court of K. B. held that an action on the case did not lie for this deceit, being a mere false representation of the intention of a third person, or at most a *gratis dictum* of the bidder, on which it was the folly of the seller to rely; and the declaration was also bad, in not shewing that A. was in fact damaged by such false representation. *Vernon v. Keys.*

12 E. R. 632

N. B. The judgment in this case was affirmed on writ of error, in Cam. Scac. See the report. 4 Taunt. 488

3 The defendant having had a credit lodged with him by a foreign house in favour of one W. T. to a certain amount, upon an express stipulation that W. T. should previously lodge in his hands goods to treble the amount; and being applied to by the plaintiffs for information respecting the responsibility of W. T. answered that he knew nothing of W. T. himself but what he had learned from his correspondent; but that he had a credit lodged with him for so much by a respectable house at H. which he held at W. T.'s disposal (omitting the condition), and that upon a view of all the circumstances which had come to his (the defendant's) knowledge, the plaintiffs might execute W. T.'s order with safety; viz. an order for the sale and delivery of goods on credit. In an action on the case to recover damages incurred by the plaintiffs in

consequence of having trusted W. T. on this representation; held, that there was a material suppression of the truth, and evidence sufficient for the jury to find fraud, which is the gist of the action; although the defendant had no immediate interest in making the false representation; and though at the time when it was made, he added, that he gave the advice without prejudice to himself. *Eyre v. Dunsford.* 1 E. R. 318

4 To an inquiry concerning the credit of another who was recommended to deal with the plaintiff, a representation by the defendant that the party might safely be credited, and that he spoke this from his own knowledge, and not from hearsay, will not sustain an action on the case for damages on account of a loss sustained by the default of the party, who turned out to be a person of no credit; if it appear that it was made by the defendant *bonâ fide*, and with a belief of the truth of it; for the foundation of the action is *fraud and deceit* in the defendant, and damage to the plaintiff by means thereof. And taking the assertion of *knowledge secundum subjectam materiam*, viz. the credit of another, it meant no other than a strong belief, founded on what appeared to the defendant to be reasonable and certain grounds. *Haycraft v. Creasy.* 2 E. R. 92

5 In an action on the case for giving a false character to a tradesman, whereby he was induced to trust an insolvent person, the Court held that fraud was necessary to support the action; but set aside a verdict for the plaintiff on payment of costs, though there were some circumstances in the case from which fraud might be inferred, on a suspicion that the inquiry was made of the defendant with a view to entrap him, and thereby obtain his guarantee for payment of the debt contracted by the insolvent. *Tapp v. Lee.*

3 B. & P. 367

6 If A. fraudulently represent the circumstances of B. to be good, in order to induce C. to give him credit, and add, "if he does not pay for the goods I will," an action may, notwithstanding the addition of the promise, be maintained against A. for the misrepresentation. *Hamar v. Alexander.*

2 N. R. 241

7 If A. make an inquiry of B. as to the circumstances of C., with respect to

opening an account with him as a general customer, and *B.* fraudulently misrepresents him, in consequence of which *A.* sells *C.* goods from time to time, and is afterwards a loser by him, an action lies for the deceit, although the buyer pays for the first parcels of goods, on the purchase of which the reference is made; but the defendant is liable only within a reasonable time, and to a reasonable amount. *Hutchinson v. Bell.* 1 Taunt. 556

8 If one who has sold goods on the representation of another concerning the buyer's circumstances, afterwards tells the buyer he will sell him no greater amount without further references, and after that entrusts him to a greater amount, the author of the misrepresentation is not liable beyond the sum due at the date of the plaintiff's declaration. *id. ibid.*

9 If a representation be made before a sale of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing, in which that representation is not embodied, no action for a deceit lies against the vendor on the

ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not. *Pickering v. Dowson.* 4 Taunt. 779

10 It being usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and drugs which are re-packed, or the packages of which are discoloured by sea-water, bearing an inferior price, although not damaged, the defendants who had purchased some sea-damaged pimento, re-packed it and advertised it in catalogues which did not notice that it was sea-damaged, or re-packed, but referred it to be viewed, with little facility however of viewing it, they exhibited impartial samples of the quality, and sold it by auction: Held, that this was equivalent to a sale of goods, as and for goods that were sea-damaged, and that an action lay for the fraud.

And though the declaration stated also that it was sold as and for pimento of good quality and condition, whereas the samples shewed that it was dusty and of inferior quality, yet the jury having found for the plaintiffs, the Court refused to set aside the verdict. *Jones v. Bowden.* 4 Taunt. 847

ADMIRALTY.

I. JURISDICTION OF.

II. ————— IN PRIZE CAUSES.

I. JURISDICTION OF.

1 Where the Court of Admiralty have given a sentence, it shall be taken that they had jurisdiction, unless the contrary appear on the face of it; therefore if the owner of a ship charge her for repairs done in *England*, by an instrument under seal, stated to be by way of bottomry, upon which she is afterwards seized by Admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but, between the seizure and decree, a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ; nor can he maintain trover against the officer in

possession by the warrant of the Court of Admiralty. *Ladbroke v. Crickett.* 2 T. R. 649

2 Whether the Admiralty have or have not jurisdiction depends upon the *subject-matter*. Therefore they may take cognizance of an hypothecation-bond given in the course of a voyage, though it be executed *on land* and *under seal*. *Meretone v. Gibbons.*

3 T. R. 267

3 The Admiralty have no jurisdiction in a case where a vessel is injured in the *Thames*, *within the body of a county*. *Velthusen v. Ormsley.* 3 T. R. 315

4 If it appear that the Court of Admiralty is proceeding in a question over which it has no jurisdiction, a court of common law will grant a prohibition, without imposing any terms on the party applying for it. 3 T. R. 315

5 The Admiralty Court has jurisdiction over the question of freight, claimed

by a neutral master against the captor, who has taken the goods as prize. *Smart v. Wolff.* 3 T. R. 323

- 6 And a monition having issued, after the goods were condemned and decreed to be delivered to the captors, at the suit of such master, against the plaintiffs, as owners or agents of the prize goods to bring into court the produce remaining in their hands to answer the freight, the Court of K. B. refused a prohibition; though no *fide-jussory* caution had been taken before the goods were delivered to the captor, but the question of freight had been reserved by the terms of the decree for future consideration. *id. ibid.*

- 7 2u. If the legal property in the goods had been altered by a sale in market overt, whether that would have varied the case? *id.* 342. 348

- 8 The *fide-jussory* caution is only an accumulative remedy; the better to enable that court to pursue the property; but it does not supersede the jurisdiction *in rem.* *id.* 342. 346.

- 9 An appointment by the Lords of the Admiralty of a captain in the navy to be second commander on board a king's ship is valid by their general authority to appoint what officers they think proper for the service, although another was appointed to the first command on board the same ship, and notice is only taken of one captain in the book of regulation for the navy. And such second captain is entitled to a captain's share of prize under the king's proclamation. *Waterhouse v. King.* 2 E. R. 507

- 10 The book of regulations for the navy, submitted by the Lords Commissioners of the Admiralty to the King in council in 1730, and approved by his Majesty by an Order of Council, is only directory to the Lords Commissioners. *id. ibid.*

- 11 The Vice-Admiralty Courts abroad have no authority, upon the mere petition of a captain, to decree the sale of a ship reported not to be sea-worthy, or repairable, so as to convey the cargo to its place of destination but at an expense exceeding the value of the ship when repaired. *Reid v. Darby.* 10 E. R. 143

- 12 It seems that the manslaughter of an English subject committed in China, by an alien enemy who had been a prisoner of war, but was then acting as a mariner on board an English

merchant ship, cannot be tried in England, under a commission issued in pursuance of statutes 33 H. 8. c. 23; & 43 G. 3. c. 113. s. 6. *Rex. v. Depardo.*

1 Taunt. 26

- [N. B. In this case no judgment was ever given, and the prisoner was ultimately discharged.]

II. IN PRIZE CAUSES.

- 1 During the late war with the States General, a squadron of the King's ships, having a detachment of the King's troops on board, was sent to attack a settlement belonging to the enemy; and secret instructions were given by his Majesty to the commanders in chief, that all the booty which should be gained by the joint operation of the army and navy, at the attack of that settlement, should be divided in two shares, between the land and sea forces. The attack was not made, but the squadron, while the troops were on board, took as prize a ship and cargo belonging to the enemy, in an open unfortified bay, at a distance from the destined object of attack. This ship and cargo being condemned as lawful prize, the produce of it was to be distributed according to the provisions of the Prize Act, 21 G. III. c. 15. and the subsequent proclamation: under that Act, a legal right was vested in the officers and crews of the squadron to their shares, on the condemnation as lawful prize; therefore, where the Court of Lords Commissioners of Appeals from the Admiralty had issued a monition to the prize agent, to bring in the proceeds which were in his hands, a prohibition was granted to that Court, because the monition was contrary to the legal vested right of the officers and crews of the squadron. *Home v. Earl Camden and others.*

1 H. B. 476

- 2 But this judgment was reversed on a writ of error to the Court of K. B. who refused to grant the prohibition, on the ground that the prize courts and courts of Lords Commissioners of appeals have the sole and exclusive jurisdiction over the question of prize or no prize, and who are the captors, notwithstanding any of the Prize Acts; and that if they pronounce a sentence of condemnation, adjudging also who are the captors, the courts of common law cannot examine the justice or pro-

priety of it; even though perhaps they would have put a different construction on the Prize Acts. And the same courts have power to enforce their decrees. *Camden v. Home, in error.*

4 T. R. 382

- 3 This judgment of the Court of K. B. was affirmed in *Dom. Proc.* 22 June. 1795, 2 H. B. 533; and see 6 *Parl. Cases*, 8vo. 203.

- 4 It is concluded therefore that no right is vested, by any of the *Prize Acts*, in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize. And that consequently, the issuing a monition to the prize agents by the court of Commissioners of Appeals in Prize Causes, to bring in the proceeds of a ship and cargo which have been sold after a sentence of condemnation as lawful prize, but from which sentence there is an appeal (on a subject distinct from the question, whether prize or not, which is not disputed), is not a ground for a prohibition to that Court; for the monition neither interferes with nor defeats any vested rights.

2 H. B. 533

- 5 A Prize Act directs, that where ships, &c. are taken from the enemy and condemned as lawful prize in a Court of Admiralty, and the sentence of condemnation appealed from, "execution of any sentence so appealed from as aforesaid, should not be suspended by reason of such appeal, in case the party or parties appellante should give sufficient security, to be approved of by the court in which such sentence should be given, to restore the ship, &c. concerning which such sentence should be pronounced, or the full value thereof, to the appellant or appellants, in case the sentence so appealed from should be reversed."—Though a security taken in a Court of Vice-Admiralty, by virtue of this section of the Act, is in the form of an acknowledgment of a debt to the king, yet not being in a court of record, it is not strictly a *recognizance*, but operates as a *stipulation* by the parties to abide the decision of the Court of Appeals. Neither is the Court of Appeals bound by this section to interpret the words "full value" by any definite measure, but they have a discretionary power of declaring what is the full value, and a

power to enforce payment, from the sureties, of what they declare to be the full value. *Brymer v. Atkins.*

1 H. B. 164

[The judgment in this case was affirmed by the Court of K. B. on a writ of error. M. 30 G. 3.]

- 6 The Prize Court of Appeals has jurisdiction to decree, that one who was co-agent of the captors, in whose hands the proceeds of the prize after condemnation and sale were placed, should, after a decree of restitution with interest pronounced against the captors, pay interest on such proceeds while in his hands to the claimant. And the Court of K. B. will not grant a prohibition to the Prize Court to restrain it from executing such decree, either on the ground that it did not appear on the proceeding below that the agent was a registered agent under the statute 33 G. III. c. 66; because that Court has original jurisdiction *in rem* and its incidents independent of the statute; nor on the ground that the Court below were restrained by the 32d clause of the Act from decreeing restitution of more than the net proceeds of the sale, awarded upon condemnation; because interest made of such net proceeds in the hands of the holder are to be deemed part of the proceeds; nor on the ground that it was not alleged that interest had in fact been made by such agent; because that was a fact for the Court below to decide upon, and they must be presumed to have decided on satisfactory evidence. *Willis v. The Commissioners of Appeals in Prize Causes,*

5 E. R. 22

- 7 If an ally actually co-operates in effecting a capture, he cannot recover any proportion of the prizes in the common law courts of this country, but must sue in the prize courts. *Duckworth, Bart. v. Tucker.* 2 Taunt. 7

- 8 If the Prize Court condemns captured vessels as prize to his Majesty, the sentence while unappealed from is conclusive on the common law courts and on all the world, that no ally or other person is entitled to a share in it.

id. ibid.

- 9 Common law courts cannot entertain jurisdiction of the question whether prize, or no prize, or by whom taken.

id. 34

10 If it can be discerned on the face of the sentence of a foreign court of prize, that the court condemned, on the ground that the property belonged

to enemies, the sentence is conclusive evidence in the courts here that the property was not neutral. *Bolton v. Gladstone.* 2 Taunt. 85

AFFIDAVIT.

I. TO HOLD TO BAIL.

Form and Requisites of.

II. ON MOTIONS AND RULES.

III. — JUDGMENTS IN CRIMINAL CASES.

I. TO HOLD TO BAIL.

Form and Requisites of.

- 1 An affidavit to hold to bail made by a third person, need not state a connection between the deponent and the plaintiff. *Peters v. Layties.* 1 B. & P. 1
 - 2 Therefore, it is no objection to an affidavit, which states that the defendant is indebted, and denies a tender in Bank-notes, that the plaintiff resides in a foreign country, and that it does not appear how the deponent could know these facts. *Andrioni v. Morgan.* 4 Taunt. 231
 - 3 It is an immaterial objection to an affidavit that the initials only of the defendant's christian names are inserted. *Howell v. Coleman.* 2 B. & P. 466
 - 4 The plaintiff, in an affidavit, must give himself an addition; otherwise the defendant will be discharged on common bail. *Jarret v. Dillon.* 1 E. R. 18
 - 5 An affidavit to hold to bail must shew on what account the debt became due, and the deponent's addition and place of abode. *Polleri v. De Souza.* 4 Taunt. 154
- And see *D'Argent v. Vivant.* 1 E. R. 330
- 6 The addition of "manufacturer" to the deponent's name is sufficient. *Smith v. Younger.* 3 B. & P. 550
 - 7 In an affidavit to hold to bail, the plaintiff's clerk may state his place of abode to be the office where he is employed the greater part of the day, though at night he sleeps at another place. *Maslope v. Thorne.* 1 M. & S. 103
 - 8 A foreigner whose general residence is abroad, and who only landed here for a temporary purpose, viz. to make an affidavit to hold to bail, may properly describe his place of abode to be in his own country, and not at the place

where the affidavit was sworn, within the meaning of the rule of court. *Mich. 15 Car. 2. Bouhet v. Kittoe.*

3 E. R. 154

- 9 Where a deponent had been a few days before discharged out of prison, but by permission had still continued to lodge there at night, having no other place of residence, his describing himself *bonâ fide* in an affidavit in court as *late* of such prison, is sufficient to satisfy the rule of Court of *Mich. 15 Car. 2.*, ordering the true place of abode of every person making affidavit in K. B. to be inserted. But a deponent who had left one place of residence, and resided in another, would not satisfy the rule, by describing himself as *late* of the former. *Sedley v. White.* 11 E. R. 528

10 Where several persons join in an affidavit, their names must be written in the *jurat*; and no affidavit can be read if there be any interlineation or erasure in the *jurat.* *Reg. Gen. M. 37 G. 3.* 7 T. R. 82

11 The defendant, who had been arrested in an action for penalties under the Lottery Act, was discharged on common bail, because the affidavit was entitled; there being no cause then in court. *King, qui tam, v. Cole.* 6 T. R. 640

12 But in a subsequent case the Court of K. B. refused to discharge a defendant out of custody on the ground that the affidavit on which he had been holden to bail was entitled in the cause. *Clarke v. Curwathorne.* 7 T. R. 321 (*S. P. Levi v. Ross, and Gaunt v. Marsh.* *id. ibid. in notis.*)

13 It is no objection to an affidavit that it is not intitled "in the King's Bench," or that it appears to have been taken before "A. B. a commissioner, &c." without adding "of the Court of K. B." if in fact he were a commissioner of that Court. *Kenney and Avon Canal Company v. Jones.* 7 T. R. 451

- 14 If an affidavit to hold to bail be entitled "*Plaintiff and Defendant*," it is bad. *Hollis v. Brandon*. 1 B. & P. 36
 - 15 It is now settled that affidavits of any cause of action, before process sued out to hold defendants to bail, are not to be entitled in any cause. *Reg. Gen. K. B. T. 37 G. 3.* 7 T. R. 454
 - 16 And this rule is recognised by the Court of C. P. *Green v. Redshaw*. 1 B. & P. 227
 - 17 But affidavits not entitled in the King's Bench and sworn before *A. B. a commissioner &c.* without stating him to be a commissioner of this Court cannot be read; but those sworn in Court or before a Judge of the Court, though not entitled in the King's Bench may be read. *Rex v. Hare*. 13 E. R. 189
 - 18 An affidavit of debt made by a plaintiff residing in a foreign country, before a foreign magistrate whose signature to the *jurat*, and authority to administer oaths and take affidavits there, was verified by a proper affidavit in this country, is a sufficient foundation for a judge's order to hold a defendant to special bail. *Omealy v. Newell*. 8 E. R. 364
 - 19 Where an affidavit of debt contained no place in the *jurat*, but purported to be sworn before the Chief Justice of the King's Bench of Ireland, and to be signed by him, and such signature was verified by affidavit here: Held, that it was sufficient foundation for arresting the defendant under a Judge's order on *mesne process*. *French v. Bellow*. 1 M. & S. 302
 - 20 The court will take cognizance of affidavits sworn before foreign magistrates, if properly authenticated to them. *Dalmer v. Barnard*. 7 T. R. 251
- Therefore an affidavit, purporting to have been taken before *J. C.* high bailiff and chief magistrate of the district of *Douglas* in the *Isle of Man*, is sufficiently authenticated by an affidavit taken in this Court, stating that the party making it knew the subscription "*J. C.*" &c. at the foot of the other affidavit, to be the hand-writing of *J. C.* *id. ibid.*
- 21 An affidavit sworn in Ireland, but made for the purpose of being used in England, ought to contain all the essential requisites of such an affidavit made in England; amongst others, according to the Acts, 37 G. 3. c. 45. s. 91: 38 G. 3. c. 1. that the defendant had not made a tender of the money in notes of the Bank of England. *Nesbitt v. Pym*. 7 T. R. 376, n.
 - 22 An affidavit to hold to bail, "*stating a promise made by the defendant, executor, &c. to pay a legacy of 100l. bequeathed by his testatrix, and confessing assets to the amount of 280l. but that the plaintiff, not receiving the said sum, caused several applications to be made to the defendant without effect, therefore that the defendant was indebted,*" &c., is not sufficiently positive. *Mackenzie v. Mackenzie*. 1 T. R. 716
 - 23 In one instance, the Court held an affidavit, "*that the defendant was indebted to the plaintiff in 5000l. for money had and received, and for which he had not accounted,*" to be insufficient. *Dict. per Buller J.* 1 T. R. 717
 - 24 An affidavit to hold to bail, stating that the defendant is indebted to the plaintiff in a certain sum, as appears by the Master's allocatur, is not sufficiently positive. *Powell v. Porthorch*. 2 T. R. 55
 - 25 An affidavit "*that the defendant is indebted to the plaintiff in 20l. according to the bill delivered by the plaintiff to the defendant,*" is insufficient; it must be positive. *Williams v. Jackson*. 3 T. R. 575
 - 26 And must state positively that the defendant is indebted to the plaintiff in so much, &c. 5 T. R. 364
 - 27 Stating that "*the plaintiff on, &c. gave the defendant notice to quit on, &c. and that the latter held over, &c. by reason of which, and by force of the statute, an action has accrued to the plaintiff to demand of the defendant, &c. (double rent), is not sufficient.*" *Wheeler v. Copeland*. 5 T. R. 364
 - 28 An executor or assignee must swear as to their belief of the debt. *Sheldon v. Baker*. 1 T. R. 83
 - 29 If an assignee of a bankrupt, and two others, sue jointly, the former may hold the defendant to bail, on an affidavit of the debt, "*as appears by the bankrupt's books, and as the deponent believes.*" *Swaine v. Crammond*. 4 T. R. 176
 - 30 A co-assignee of a debt arising out of bills of exchange in his own possession may sue in the name of the original creditor; and hold the defendant to bail on his own affidavit; swearing positively as to all the facts re-

quired which are within his own knowledge, and to the best of his knowledge and belief, as to such as are within the knowledge of his principal and co-assigneess. *Creswell v. Lovell.*

8 T. R. 418

31 If a plaintiff executor hold a defendant to bail upon an affidavit stating the debt to be due, "*as appears by the testator's books,*" but omitting to add, and which the deponent believes to be true; the Court of C. P. will allow the plaintiff to swear to his belief in a supplemental affidavit. *Garnham, Executor, v. Hammond.* 2 B. & P. 298

32 In an affidavit to hold to bail, the plaintiff deposed, that at the time of the assignment thereafter mentioned, the defendant was indebted to him on a bill of exchange, and that he afterwards assigned the debt by indenture to A. B. C. and D. in trust: A. then deposed, that, at the time of the affidavit being made, the defendant was indebted to them, A. B. C. and D. as such assignees and trustees as aforesaid: Held, that the affidavit was insufficient, because it did not deny that the debt had been satisfied to the plaintiff between the assignment and the time of the affidavit being made. *Mann v. Sheriff.* 2 B. & P. 355

N.B. In the above case a supplemental affidavit was allowed. *id.* 357

33 An affidavit to hold to bail must shew how the debt arose. *Cooke v. Dobree.*

1 H. B. 10

34 If a tenant bind himself in a penalty of 100*l.* for performance of repairs within a certain time, the Court will not permit him to be holden to bail for the 100*l.* upon an affidavit which does not shew in what respect and to what amount he has violated his contract. *Edwards v. Williams.*

5 Taunt. 247

35 An affidavit stating only that the defendant was indebted to the plaintiff in 5*l.* for goods sold and delivered, not stating by the plaintiff to the defendant, was held insufficient. *Perkes v. Severn.*

7 E. R. 194:

Taylor v. Forbes. 11 E. R. 315

36 An affidavit stating only that "the defendant was indebted to the plaintiff for goods sold and delivered to him the defendant," without saying by the plaintiff, is insufficient. *Cathrow v. Hagger.*

8 E. R. 106

37 A defendant cannot be held to bail

on an affidavit stating him to be indebted to the plaintiff in so much for goods bargained and sold, without alleging that they were delivered. *Hopkins v. Vaughan.* 12 E. R. 398

38 In an affidavit to hold to bail, for money paid to the use of the defendant, it is not necessary to state that it was at the request of the defendant. *Hultow v. Eyre.* 1 Marsh. 315

39 So where the affidavit is for work and labour, as the defendant's servant. *Bliss v. Atkins.* 1 Marsh. 317, *notá.*

40 An affidavit to hold to bail, stating "that the defendant is indebted to the plaintiff for money paid, laid out, and expended, and wages due to the plaintiff for his services on board the defendant's ship," is sufficient, without expressly stating that the debt is due from the defendant. *Symons v. Andrews.* 1 Marsh. 317

41 The Court of K. B. held it sufficient to state that the defendant was indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without adding, "received by the defendant." *Coppinger v. Beaton.* 8 T. R. 338

42 An affidavit "that defendant is indebted to plaintiff in 450*l.* as indorsee of a promissory note made by defendant "without stating the date of the note, or that it was payable on demand, or that it was due or payable at a day then past," is insufficient. *Jackson v. Yates.* 2 M. & S. 148

43 An affidavit of debt, stating that the defendant is indebted to the plaintiff on promissory notes of the defendant without stating how the plaintiff became entitled to recover upon them, is defective. *Bulbi v. Batley.*

1 Marsh. 424

44 An affidavit stating the defendant to be indebted to the plaintiff as indorsee of a bill of exchange, without alleging the bill to have become due, was held sufficient. *Davison v. March.*

1 N. R. 157

45 An affidavit stating that the defendant "was justly indebted to the plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw v. Saddington.*

7 E. R. 94

- 46 An affidavit stating that the defendant was indebted to the plaintiff so much for interest money, under and by virtue of an agreement, is insufficient. *Brook v. Trist*. 10 E. R. 358
- 47 An affidavit to hold to bail for stipulated damages for non-performance of an agreement must state a breach of the agreement. *Stinton v. Hughes*. 6 T. R. 13
- 48 So an affidavit for a sum certain for the breach of an agreement, must shew that the sum demanded is stipulated damages, and not merely a penalty. *Willey v. Thornton*. 2 E. R. 409
- 49 A party cannot be held to bail for a penalty, but only for the sum secured by the penalty. *Hatfield v. Linguard*. 6 T. R. 217
- 50 Therefore an affidavit "that the defendant was indebted to the plaintiff in 1000*l.* under an agreement in writing, whereby the defendant undertook to pay the plaintiff the balance of accounts, &c. which said balance is still due and unpaid," without stating that the balance was 1000*l.* was held to be defective. *id. ibid.*
- 51 An affidavit stating the defendant to be indebted "for damages awarded, and for costs and expenses taxed and allowed," is sufficiently certain; for it will be inferred that the award and taxation are such as will support the action. *Jenkins v. Law*. 1 B. & P. 365
- 52 Affidavit "that the defendant was indebted to the plaintiff in 245*l.* for money lent by plaintiff to defendant for the use of another, and for which defendant promised to be accountable and to repay or cause to be secured to the plaintiff," &c. is insufficient; it not appearing in the affidavit but that the money had been secured according to the agreement. *Jacks v. Pemberton*. 5 T. R. 552
- 53 So stating the circumstances under which the debt accrued, and concluding, "by reason whereof the defendant stands indebted," is insufficient. *Fowler v. Morton*. 2 B. & P. 48
- 54 The Court of C. P. held an affidavit that the defendant "was indebted to the plaintiff in trover" bad. *Hubbard v. Pacheco*. 1 H. B. 218
- 55 Affidavit to hold to bail in trover, stating, "that the plaintiff's cause of action against the defendant was for converting and disposing of divers goods of the plaintiff of the value of 250*l.* which he refused to deliver, though the plaintiff had demanded the same, and that neither the defendant nor any person on his behalf had offered to pay to the plaintiff the 250*l.* or the value of the goods," was holden to be insufficient. *Wooley v. Thomas*. 7 T. R. 550
- 56 In an affidavit in trover for a bill of exchange, it should be stated that the bill remains unpaid. *Clarke v. Cawthorne*. 7 T. R. 321
- 57 An affidavit to hold to bail on the *Lottery Act*, 27 G. 3. c. 1. should specify the nature of the offence, and aver that the defendant has incurred the forfeiture; but the offence need not be described circumstantially: nor is the plaintiff obliged to swear that the defendant is indebted to him to the amount of the penalty. *Davis v. Mazzinghi*. 1 T. R. 705
- 58 It is sufficient if the affidavit, on which the defendant is holden to bail for an offence against the said Act, shew the nature of the offence, without stating the particular circumstances of it. *Watson v. Shaw*. 2 T. R. 654
- 59 If an affidavit to hold the defendant to bail, state an Act to have passed in the 27 G. 3. which was passed in the 22 G. 3. under which a penalty was incurred, it is a fatal objection, even though the title of the Act be properly set forth. *id. ibid.*
- 60 An affidavit for penalties forfeited by unlawful insurances against the *Lottery Act*, 22 G. 3. c. 47. may include several offences, and need not state that the defendant received any consideration for making the insurances. *Holland q. t. v. Bothmar*. 4 T. R. 228
- 61 It is sufficient if it state that the defendant "insured or caused to be insured," &c. *Pritchett q. t. v. Cross*. 2 H. B. 17
- 62 It is sufficient if an affidavit to hold to bail state, that no tender was made by the defendant; without saying or by any other on his account. *Wyatt v. Smee*. 1 B. & P. 344
- 63 So, if it negative a tender in notes "payable on demand," though the words of the Act are "expressed to be payable on demand." *Fowler v. Morton*. 2 B. & P. 48
- 64 But in an affidavit to hold to bail for 20*l.* and upwards, it is sufficient to negative a tender of the said sum in bank-notes: that having reference to

the specific sum sworn to, which was such as might be so tendered. *Maylin v. Townshend*. 2 E. R. 1

- 65 But it is not sufficient to negative a tender of the said sum of 20*l.* and upwards: that having reference to a sum beyond the 20*l.* *Ford v. Lover*. 3 E. R. 110

- 66 In an affidavit for 1190*l.* 11*s.* 3*d.* it is not enough to negative a tender of the said debt in bank-notes; for *non constat* but a tender in bank-notes was made of all but the fractional sum, which would be sufficient within the statute. *Jennings v. Mitchell*. 1 E. R. 17

- 67 In an affidavit made by the plaintiff's agent (the plaintiff himself being abroad), it is sufficient to negative a tender, "as the agent believes." *Munro v. Spinks*. 8 T. R. 284

- 68 An affidavit however, sworn by a clerk in the chamberlain of London's office, as to the existence of the debt, and that no tender of it had been made in bank-notes to the best of his knowledge and belief, was held sufficient, in an action by the corporation. *Mayor, &c. of London v. Dias*. 1 E. R. 237

- 69 But where plaintiff resided in England, and the affidavit was made by his clerk, it was held not sufficient to negative a tender "to the knowledge and belief of the clerk." *Cass v. Levy*. 8 T. R. 520

- Elliott v. Duggan*. 2 E. R. 24

- 70 The Court of Common Pleas have held, that if an affidavit made by the plaintiff's clerk absolutely negative a tender in bank-notes, it is bad. *Smith v. Tyson*. 2 B. & P. 339

Hammersley v. Mitchell. 2 B. & P. 389

- 71 But the Court of King's Bench, on facts precisely similar, refused to discharge the defendant on a common appearance. *Madox v. Abercromby* (cited in *Hammersley v. Mitchell*. 2 B. & P. 389). And again in *Knight v. Keyte*. 1 E. R. 415

- 72 A person employed in London as agent to one residing at a distance in the country, with a power of attorney to collect his debts, may make an affidavit of debt, positively denying any tender in bank-notes. *Chatterley v. Finck*. 2 B. & P. 390

- 73 An affidavit in which a tender in bank-notes is negated by the plaintiff's clerk alone, then resident in London is insufficient, if the plaintiff be

also resident in London; though the debt arose upon a bill transaction of which the clerk had the sole management. *Bolt v. Miller*. 2 B. & P. 420

- 74 Affidavit made by A. in respect of a debt due to B. before his discharge under an Insolvent Act whereby B.'s estate became vested in the clerk of the peace, negating a tender in bank-notes to the knowledge or belief of A. held sufficient: the court allowing A. and B., by a subsequent affidavit, to shew that A. usually transacted B.'s business when out of town, and that at the time when the affidavit to hold to bail was made, B. was out of town, and that an immediate arrest was necessary, as the defendant was about to sail on a voyage. *Lawson v. McDonald*. 2 B. & P. 590

- 75 In an action by the assignees of a bankrupt, it is not sufficient for the bankrupt to negative the tender. *Smith v. Barclay*. 3 B. & P. 219

- 76 In an affidavit by an assignee of a bankrupt it is necessary to negative a tender to the bankrupt before his bankruptcy: negating a tender to the assignee is not sufficient. *Martin v. Ranoc*. 8 T. R. 455

- 77 An affidavit of debt made by one of three partners, denying any tender in bank-notes to himself or to either of his partners to the best of his knowledge and belief is sufficient. *Stacy v. Federici*. 2 B. & P. 390

- 78 A defendant having been held to bail on an affidavit of a debt due from three defendants as surviving partners of another deceased, was discharged on filing common bail; the declaration being for a debt due from the three defendants alone. *Spalding v. Mure and two others*. 6 T. R. 363

- 79 An affidavit to hold to bail made by the administrators of a person who died before the passing of the Bank Act, need not negative a tender in bank-notes to their intestate. *Percy v. Powell*. 3 B. & P. 6

- 80 *Semb.* That persons suing as administrators need not in any case negative such tender to their intestate.

id. ibid.

- 81 Where bailable process was sued out previous to passing the 37 G. 3. c. 45. and renewed four several times without any new affidavit, and the last renewal on which defendant was arrested, was subsequent to passing the Act, the

Court of C. P. held the affidavit sufficient, though not according to the Act. *Crooks v. Houlditch*.

1 B. & P. 76

82 If an affidavit to hold to bail state two sums of money to be due from the defendant to two separate plaintiffs, though only one writ be sued out on it, the Court will set aside the proceedings on that one writ. *The Dean and Chapter of Exeter v. Scagell*.

6 T. R. 688

83 Where several persons have separately incurred penalties for printing illegal schemes of the lottery, a separate affidavit must be filed against each of them; and if they be all joined in one affidavit, the irregularity is not waived by their putting in bail; but the court, on motion, will stay the proceedings against all of them. *Goodwin q. t. v. Parry*.

4 T. R. 577

84 On an affidavit that the maker and indorser of a promissory note are indebted to the holder, neither can be held to bail: it is also objectionable as being only on one stamp. And it is such an incurable defect, that if either be held to bail, he does not waive it by taking any step in the cause. *Hussey v. Wilson*.

5 T. R. 254

85 In both courts the affidavit to hold to bail is to be considered as part of the process to bring the defendant into court; an irregularity in it must be taken advantage of in the first instance; and may be taken advantage of before bail put in, or appearance entered; so such irregularity may be waived by a defendant, and is considered as waived, when he has voluntarily done an act, submitting to such process. *D'Argent v. Vivant*.

1 E. R. 334

86 A special *capias* issued upon an affidavit, sworn at the bill of *Middlesex* office, is irregular; but if the defendant be arrested under it, and put in special bail, he thereby waives the irregularity. *Dalton v. Barnes*.

1 M. & S. 230

87 If a defendant, on being informed that a bailable writ has been issued against him, voluntarily give a bail-bond, he cannot afterwards object to the insufficiency of the affidavit to hold to bail. *Norton v. Danvers*.

7 T. R. 375

88 Nor after merely putting in bail. *D'Argent v. Vivant*.

1 E. R. 330

89 Nor after perfecting bail above (in C. P.) *Chapman v. Snow*. 1 B. & P. 132
S. P. *Jones v. Price*. 1 E. R. 81

90 An objection cannot be taken advantage of after plea. *Levy v. Dupont*.

7 T. R. 376 n.

91 Nor after notice of executing a writ of inquiry on a judgment by default. *Desborough v. Coppinger*. 8 T. R. 77

S. C. 1 E. R. 19. n.

92 One who became surety for the defendant before his discharge under an Insolvent Debtor's Act, and was afterwards obliged to give a new security of a bond and warrant of attorney, &c. for the old debt, cannot thereupon hold the defendant to bail by an affidavit as for so much money paid to his use. *Taylor v. Higgins*. 3 E. R. 169

93 If the affidavit on which the defendant is held to bail be defective, the defect cannot in general be supplied by another affidavit. *Jacks v. Pemberton*.

5 T. R. 552

94 If a defendant be holden to bail under a judge's order, upon an affidavit disclosing circumstances which shew that the plaintiff has been *dannified* to such an amount, it is sufficient; though it improperly state that the defendant was *indebted* to that amount, and disclose the special circumstances. *Imlay v. Ellefsen*.

2 E. R. 453

95 A bond was given conditioned for the payment of bills of exchange drawn in *England*, on *A.* in the *East Indies*, in case such bills should be returned to *England* protested for non-payment. The affidavit to hold the obligor to bail, after stating "that he was indebted to the deponent the obligee in a certain sum," stated also the condition of the bond, and "that the said bills were not paid to his knowledge or belief in *India*, or elsewhere; but that they were protested for non-acceptance in *India*, and were still unpaid." It was no objection in this affidavit, that it was stated that the bills were unpaid to the knowledge and belief of the plaintiff; but it was *bad*, because it introduced a new term, not mentioned in the condition of the bond, viz. a protest for non-acceptance. But to remedy this, the plaintiff might have filed a supplemental affidavit. *Hobson v. Campbell*.

1 H. B. 245

96 The Court of C. P. will never receive a supplemental affidavit, unless to sup-

ply an ambiguity on the face of the original affidavit, and which the Court for its own satisfaction wishes to have explained. *Green v. Redshaw*.

1 B. & P. 227

- 97 No counter affidavit can be received in K. B. in order to contradict or do away the effect of an affidavit to hold to bail on the merits. And though such counter affidavit might be received to shew that the defendant had been before holden to bail for the same cause of action here, yet it will not avail to shew that he was before so holden to bail in a foreign country: at least, where it did not distinctly appear that the defendant could have the same redress and benefit by the proceedings abroad as here. *Imlay v. Ellefsen*.

2 E. R. 453

II. ON MOTIONS AND RULES

- 1 In the Court of C. P. a rule (to set aside execution) was discharged, because the affidavit on which the rule *nisi* was obtained was not entitled in any court: the words "*in the*" only being prefixed. *Osborn v. Tatum*.

1 B. & P. 271

- 2 If an affidavit be put into court without any title, the Court cannot take any notice of it, though the adverse party is willing to waive the objection. (Cited by Kenyon, C. J.) *Owen v. Hurd*.

2 T. R. 644

- 3 The christian names as well as the surnames of the parties must be inserted in the title of an affidavit produced to shew cause against any rule. *Fores v. Diemar*.

7 T. R. 661

- 4 Where common process is sued out against *A.* and several others; *A.* may move the Court if the others be not brought into Court, upon an affidavit, entitled of a cause between the plaintiff and *A.* only. *Dand v. Baines*.

1 Marsh. 403

- 5 If an affidavit on a motion for leave to file a criminal information be entitled, it cannot be read. *Rex v. Robinson*.

6 T. R. 642

- 6 An affidavit produced on shewing cause against such a rule may or may not be so entitled. *id. ibid.*

- 7 That it need not: see *Rex v. Harrison*.

6 T. R. 60

- 8 An affidavit made after such a rule is made absolute, must be entitled.

6 T. R. 642

- 9 Affidavits (and motions) for an at-

tachment in a civil suit are proceedings on the civil side of the Court until the attachment issues, and must be entitled with the names of the parties; but as soon as the attachment issues, the proceedings are on the crown side, and from that time the king is to be named as the prosecutor. *Wood v. Webb*.

3 T. R. 253

- 10 Affidavits to set aside an attachment that has been granted (though not issued) in the course of a civil suit must be entitled "*Rex v. the Party to be attached, &c.*"

Rex v. the Sheriff of Middlesex.

7 T. R. 439

The same v. The same. 7 T. R. 527

- 11 The affidavits made in answer to a rule *nisi* for an attachment, must be entitled on the *civil* side of the Court in the cause out of which the motion arises: but after the rule for the attachment is granted, the affidavits in any matter concerning such attachment are entitled on the *crown* side. *Whitehead v. Firth*.

12 E. R. 165

- 12 The Court will in no case issue an attachment against a party at the suit of another, where the affidavits on which the motion is founded are sworn before the agents of the prosecutor. *Rex v. Wallace*.

3 T. R. 403

- 13 An affidavit may be taken before the clerk of the attorney in the cause, if the clerk be empowered to take affidavits at all. *Goodtitle d. Pye v. Badtitle*.

8 T. R. 638

- 14 Any person other than the defendant making an affidavit of merits to set aside an interlocutory judgment, must either swear that he is the defendant's attorney's managing clerk, or the defendant's attorney. *Neeson v. Whytock*.

3 Taunt. 403

- 15 If the agent in town is the attorney on the record, it is no objection to an affidavit of the party, that it is sworn before his own attorney in the country. *Read v. Cooper*.

5 Taunt. 89

- 16 An affidavit to support a rule for an attachment for a contempt must state that the defendant was served personally with a copy of the rule, and that the original was shewn to him at the same time. *Rex v. Smithies*.

3 T. R. 351

- 17 An affidavit to hold to bail stated the debt to arise on a bill of exchange or order, drawn by *A.* and accepted by defendant.—On the face of the affidavit alone the Court refused to order

the bail bond to be delivered up.—But on a subsequent motion, on reading the affidavit *and the declaration*, by which latter it appeared that the instrument was not a bill of exchange, they ordered the bond to be delivered up on defendant's filing common bail.

Wilks v. Adcock. 8 T. R. 27

18 The Court of C. P. disallowed the objection on a rule that no place was mentioned in the *jurat* of the affidavit. *Symmers v. Wason.* 1 B. & P. 105

19 Where an affidavit is taken before a commissioner of K. B. by any person who from his signature appears to be illiterate, the commissioner shall certify in the *jurat* that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand the same; and also that the said party wrote his signature in the presence of the commissioner. *Reg. Gen. E.* 31 G. 3. 4 T. R. 284

20 If an affidavit to hold to bail be made by a person *prima facie* incompetent to make it: *2u.* Whether circumstances proving him to be competent can be shewn by affidavit, for cause against a rule for discharging the defendant on a common appearance. *Bolt v. Miller.* 2 B. & P. 420

21 The Court of C. P. held that the affidavit of the acknowledgment of a warrant of attorney to suffer a recovery, taken before an ordinary magistrate in a foreign country, must be attested by a notary public. *Ex-parte Worsley.* 2 H. B. 275

22 But the Court will, from courtesy, dispense with such attestation, in the case of an affidavit taken before a great judicial officer in *Ireland.* 2 H. B. 275

23 On a motion for an attachment for filing a bill in equity contrary to an order of reference, an affidavit that notice of the motion to make the order a rule of court had been served on the party's servant, &c. is not sufficient. *Hilton v. Hopwood.* 1 Marsh. 66

24 An affidavit, the title of which styles the plaintiff "Assignee," without further explanation, is bad. *Steyner v. Cottrell.* 3 Taunt. 377

25 An affidavit, having only one stamp, cannot be used in more than one cause. *Anonymous.* 3 Taunt. 469

judgment by default in a criminal prosecution is brought up for judgment, each party should come prepared with affidavits disclosing his own case (if he mean to produce any affidavit at all); but, if in the course of the inquiry the Court wish to have any point further explained, they will give the defendant an opportunity of answering it on a future day. *Rex. v. Wilson.*

4 T. R. 487

2 When a defendant who has been convicted on an indictment comes up to receive judgment, the prosecutor may read affidavits in aggravation, though made by witnesses who were examined at the trial, which affidavits the defendant is at liberty to answer. *Rex v. Sharpness.* 1 T. R. 228

3 Where a defendant in a prosecution had suffered judgment to go by default, and came up to receive judgment, the prosecutor was permitted to read affidavits in aggravation, containing expressions made use of by the defendant, confirming and aggravating his guilt, which had been uttered by him in the hearing of two persons, and by them afterwards related to the persons making the affidavits, the prosecutor having first entitled himself to this evidence, by swearing to an application to both those persons to come forward with their testimony, which they had refused, and it appearing to the Court that those witnesses were under the control of the defendant. *Rex v. Archer.* 2 T. R. 203, n.

4 Where a defendant is brought up to receive judgment after conviction, an affidavit by the prosecutor in aggravation, stating that a third person who refused to join in the affidavit, had informed him that the defendant, after the trial, had repeated in his hearing the libellous matter for which he was indicted, is not admissible; at least not without swearing that such third person was under the control or influence of the defendant. *Rex v. Pinkerton.* 2 E. R. 357

N. B. In this last case some doubt seems to be cast on the authority of the one preceding.

5 An affidavit taken before a judge at *nisi prius*, upon an information issuing out of the Court of K. B., which affidavit was returned there, is considered as taken under the authority of the Court, and they will take cognizance

III. ON JUDGMENTS IN CRIMINAL CASES.

1 When a defendant who has suffered

of the contents, and grant an information thereon. *Rex v. Jolliffe*.

4 T. R. 285

6 Affidavit entitled "In the King's Bench," upon which the Attorney-

General had filed an information *ex officio* against the defendant, was permitted to be read in aggravation after judgment by default. *Rex v. Morgan*.

11 E. R. 457

AGENT.

I. RIGHTS OF, WITH REFERENCE TO PRINCIPAL.

II. DUTIES AND RESPONSIBILITIES OF, TO PRINCIPAL.

III. OBLIGATION OF PRINCIPAL TO THIRD PERSONS, FROM ACTS OF.

IV. PERSONAL RIGHTS AND LIABILITIES OF AGENT TO THIRD PERSONS.

I. RIGHTS OF, WITH REFERENCE TO PRINCIPAL.

1 A broker purchases goods on commission at a month's credit, and pays duties on them, and sends them to the purchaser's place of abode, consigned to his own order: the seller being fearful of the purchaser's credit, procures the broker to delay the arrival of the goods till the month's credit is expired, and to tender them to the buyer on payment of the price, whereupon they are refused: Held, that the broker can neither recover the price, duties, or commission, in an action for money paid. *Hurst v. Holding*. 3 Taunt. 32

2 A broker who contracts with others for the sale of stock at a future day by the authority of his principal, who afterwards refuses to make good the bargain, cannot by paying the difference to such third persons, maintain an action on an implied *assumpsit* against his principal for the amount. If the principal were really possessed of the stock so bargained to be sold, such contract is not illegal, within the stat. 7 G. II. c. 8. against stock-jobbing, although the broker did not disclose the name of his principal at the time of the bargain made: and the purchaser may maintain an action for the difference against the principal. *Child v. Morley*. 8 T. R. 610

3 A factor gave his acceptance to his principal for the amount of goods sold on account, after a secret act of bankruptcy of the principal, but with-

out notice to the factor; and after notice of the bankruptcy the factor paid his acceptance to the holder of the bill; held that the payment was protected by stat. 1 Jac. I. c. 15. s. 14. *Wilkins v. Casey*. 7 T. R. 711

4 A trader, after a secret act of bankruptcy, consigned goods to a factor, who agreed to advance more money thereon, and accordingly accepted and paid bills drawn on him by the trader; a commission afterwards issued against the trader on such prior act of bankruptcy, after which the factor sold the goods and received the money: Held, that he was answerable to the assignees for the value of the goods. *Copland v. Stein*. 8 T. R. 199

5 *Quare*. Whether a broker, who sells goods and receives the money for them on account of his principal, can controvert his title to the goods in an action brought against him by the principal or his assignees for the money? *Jones v. Another, assignees, &c.* v. *Dwyer*. 15 E. R. 21

6 A. consigns goods to B., with directions to pay over the net proceeds to C.—B. employs D. to dispose of them. In an action by C. to recover the proceeds from D., D. is entitled to make the same deductions for freight, &c. as B., who was the owner of the ship in which the goods were brought, might have made. *Blackburn v. Kymer*. 1 Marsh. 223

7 A broker charters ships, at a commission of $2\frac{1}{2}$ per cent. on their outward freight, and the like on their homeward freight, if the charter-party makes it contingent what the amount of freight shall be, the broker cannot sue for any sum till the contingency is determined. *Winter v. Mair*.

3 Taunt. 531

8 A broker purchasing goods for his principals, without their knowledge, adds to the terms of purchase which the principals had agreed to, a guarantee by himself of their bills, the

goods were delivered to the broker; the principals became bankrupts; held, that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had any lien on them for the money he had paid on his guarantee. *Gurney and Others, Assignees, v. Sharp.* 4 Taunt. 242

II. DUTIES AND RESPONSIBILITIES OF, TO PRINCIPAL.

- 1 A broker when he bought goods for his principal agreed for $\frac{1}{2}$ per cent. to indemnify him from any loss on the re-sale; it was held that this undertaking was discharged when the principal had a fair opportunity of selling to advantage, but neglected it, though he was afterwards obliged to sell at a loss. *Curry v. Edensor.* 3 T. R. 524
- 2 A commission *del credere* is an absolute engagement to the principal from an insurance broker, and makes him liable in the first instance, and at all events; though the principal may resort to the underwriter as a collateral security. *Grove v. Dubois.* 1 T. R. 112
- 3 See further for the general nature of a commission *del credere.* *Bize v. Dickason.* 1 T. R. 285
- 4 And the case of *Mackenzie v. Scott* in *Dom. Proc.* 19th Dec. 1796.
- 5 A. and B., ship agents at different ports, enter into an agreement to share in certain proportions the profits of their respective commissions, and the discount on tradesmen's bills employed by them in repairing the ships consigned to them, &c. By this agreement they were held to become liable as partners to all persons with whom either contracted as such agent; though the agreement provided, that neither should be answerable for the acts or losses of the other, but each for his own. *Waugh v. Carver.* 2 H. B. 235
- 6 A., a general merchant, undertakes voluntarily, without any reward, to enter a parcel of goods belonging to B. together with a parcel of his own of the same sort, at the custom-house, for exportation; but makes the entry under a wrong denomination, by means of which both parties are seized. A. having taken the same care of the goods of B. as of his own, not having received any reward, and not being of

a profession or employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss sustained by B. *Shiells v. Blackburne.* 1 H. B. 158

- 7 A banker in London receiving bills from his correspondents in the country, to whom they had been indorsed to present for payment, is not guilty of negligence in giving up such bills to the acceptor upon receiving a check upon a banker for the amount, although it turn out that such check is dishonoured. *Russell v. Hankey.* 6 T. R. 12

- 8 A. entrusted B. with goods to sell in India, agreeing to take back from B. what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price. B. not being able to sell the goods in India himself, left them with an agent to be disposed of by him, directing the agent to remit the money to him (B.) in England: Held that A. could not maintain trover against B. for the goods. *Bromley v. Corwell* 2 B. & P. 438
- 9 And it seems that he could not maintain any action. *id. ibid.*
- 10 To make it a defence to an agent that he has paid over money, it is necessary that the money should have been paid to the agent expressly for the use of the person to whom he has so paid it over. *Snowdon v. Davis.* 1 Taunt. 359

- 11 If goods are consigned to a factor for sale on commission, the law will raise a contract to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold, *on demand.* An action does not lie against him for not accounting, till after a demand made of an account. *Topham v. Braddick.* 1 Taunt. 572

- 12 If a broker, being authorized to sell goods for a certain price, sells them at an inferior price, he is not liable in trover for amount of the goods, but the proper remedy is by an action on the case. *Dufresne v. Hutchinson.* 3 Taunt. 117

- 13 If a broker absconds with money entrusted to him by his principal for the purpose of exchequer bills, he is not thereby guilty of felony. *Rex v. Walsh, M. P.* 4 Taunt. 258

III. OBLIGATION OF PRINCIPAL TO THIRD

PERSONS, FROM ACTS OF.

- 1 Fraud will vitiate any transaction, though the principal person interested do not personally take any part in the fraud; for the principal is civilly responsible for the acts of his agent. *Doe d. Willis v. Martin.* 4 T. R. 39
- 2 A special agent under a limited authority cannot bind his principal by any act beyond the scope of such authority. *Fenn v. Harrison.* 3 T. R. 757
- 3 If an agent, employed by the indorsee of a bill to get it discounted, warrant it to be a good one, his employers are bound by his act, and are liable to refund if the bill be afterwards dishonoured by the acceptor. *Fenn v. Harrison.* 4 T. R. 177
- 4 *Secus*, if, at the time of employing the agent, the principals said they would not warrant or indorse the bill. *id. ibid.*
- 5 A power of attorney to receive all salary and money, with all the principal's authority to recover, compound and discharge, and to give releases, and appoint substitutes, does not authorize the person possessing the power of attorney to negotiate bills of exchange received by him; nor to indorse them in his own name: and therefore trover may be maintained against him for bills so negotiated. *Hogg v. Smith.* 1 Taunt. 347
- 6 Where sugars were shipped from abroad under a bill of lading, which expressed that they were on account of the plaintiffs, and were to be delivered to *W.* and their assigns, and *W.*, who were the agents of the plaintiffs for the management of their property consigned from abroad, indorsed the bill of lading, together with the other bills of lading comprising the rest of the cargo, to the defendants, and drew bills upon them for the amount of the whole cargo, which the defendants accepted and paid, and sold the sugars at two months' credit, at the expiration of which they carried the amount of the proceeds to the account of *W.*, who in the interval between the sale and the expiration of the credit had become bankrupts: Held, that the plaintiffs were entitled to recover the

proceeds of such sale from the defendants. *Shipley v. Kymer.*

1 M. & S. 484

- 7 Where a purchaser of hemp lying at wharfs in *London*, had, at the time of his purchase, the hemp transferred in the wharfinger's books into the name of the broker who effected the purchase for him, and whose ordinary business it was to buy and sell hemp; this was held to give the broker an implied authority to sell it, and that his sale and receipt of the money bound his unknown principal. So if it be transferred into the names of "*P. or S.*," that is, of the principal or broker. *Pickering v. Busk, Assignees &c.* 15 E. R. 38
- 8 Brokers in the usual habit of buying and paying for, and of selling and receiving the value for sugars on speculation, in their own names, and upon their own judgment, for their principals; sometimes, when the market was low, under an unlimited authority as to quantity and price; at other times under special instructions to buy; but guided from time to time by special instructions to sell, and limited in respect of price, and advised from time to time by their principal as to the probable rise or fall of the market; but keeping only a general account with their principal of the sums advanced to and received for him, without accounting separately for each particular lot purchased and re-sold; may bind him by a re-sale of a particular parcel of sugars before purchased and paid for in their own names, and lodged in their own warehouse; though sold under the price directed by their principal, for whom they received the money, but afterwards failed. The general authority of the brokers to sell, so as to bind their principal in respect of the purchaser, being to be collected from their general dealing, and not merely from their private instructions as to the particular parcel of goods. *Whitehead v. Tuckett.* 15 E. R. 400
- 9 Goods sold by a broker for a principal not named, upon the terms, as specified in the usual *bought and sold* notes (delivered over to the respective parties by the broker), of "*payment in one month, money,*" may be paid for by the buyer to the broker *within the*

month, and that by a bill of exchange accepted by the buyer, and discounted by him within the month, though having to run a longer time before it was due. But where the buyer was also indebted to the same broker for another parcel of goods, the property of a different person, and he made a payment to the broker, generally, which was larger than the amount of either demand, but less than the two together; and afterwards the broker stopped payment; such payment to the broker ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. *Favenc v. Bennett.* 11 E. R. 36

10 The property of goods bought by an agent for the vendee, delivered by him to the vendee's packer, in whose hands they are attached by the vendee's creditors; reverts in the vendor, so as to avoid the attachment, by the vendee's having countermanded the purchase by letter to his agent dated before such delivery, though not received till afterwards, the vendor assenting to take back the goods. *Salte v. Field.* 5 T. R. 211

11 A share in the London Institution, incorporated by charter for the advancement of literature, &c. cannot be transferred until the proprietor shall, by writing under his hand, signify his desire so to do to the committee of managers, and mention therein the name, &c. and other description of the person to whom he is desirous the same should be transferred; which person is to be approved by the committee: Held, that a note addressed to them in these words: "Having disposed of my share in the London Institution to [leaving a blank for the name], I beg leave to recommend him to be elected in my place, as a proprietor," &c. and signed by the proprietor, which note was left in the hands of an agent (the clerk of the society), for the purpose of selling the share, did not authorize such agent to fill up the blank himself with the name of the purchaser: with whom he contracted for the price; against the rules of the society, which require the recommendation of the candidate to be vouched by the proprietor himself, inserting his name, &c. in the paper, and consequently

the agent had no authority, before the transfer was so completed, to receive the money of the purchaser and to insert his name in the blank unknown to the proprietor. And such purchaser paying the money before the time of payment when the transfer from the proprietor was complete, pays it at his own risk to the agent, whom he thereby makes his own for that purpose. And such agent afterwards absconding with the money, and the society disallowing the transfer, upon the interference of the proprietor, the Court of K. B. held that the purchaser could not recover the amount from such proprietor in an action for money had and received. *Parnther v. Gaitshell.* 13 E. R. 432

12 Taking the property of another, by assignment from one who had no authority to dispose of it; as taking an assignment of tobacco in the king's warehouse, by way of pledge from a broker who had purchased it there, in his own name for his principal; and refusing to deliver it to the principal, after notice, and demand by him; none other than the person in whose name it is warehoused being able to take it out; is a conversion. *M'Combie v. Davis.* 6 E. R. 538

13 Where plaintiffs consigned goods to their factors, who, not having friends to pay the freight and duties, agreed with defendants, that they should take charge of the consignment, pay the freight and duties, and sell the goods, and have one half the usual commission on such sale; and defendants accordingly paid the freight and duties, and received the goods, after which the factors became bankrupt, having before informed defendants that the goods were the plaintiffs', but defendants notwithstanding sold the goods: held, that on trover by the plaintiffs, the defendants had not a right to retain for the freight and duties, after deducting the balance due from the factors to the plaintiffs, at the time of the bankruptcy. *Solly v. Rathbone.* 2 M. & S. 298

14 Where C. consigned goods to M. their broker, upon a *del credere* commission, for sale, and drew bills on him in advance, which M. accepted, but never paid, and afterwards, without the knowledge of C. placed the goods with H. and the broker, upon

a *del credere* commission, and upon an agreement to divide the commission with him, and obtained his acceptances for the amount, and *H.* sold the goods, and afterwards became bankrupt, and his assignees received the proceeds of those sales, and the acceptances of *H.* were proved under his commission, and a dividend received upon them: held, that the assignees of *H.* were liable to the assignee of *C.* who had also become bankrupt, for the amount of the proceeds, in an action for money had and received. *Cockran*, assignee, &c. v. *Irlam*. 2 M. & S. 301, in *notâ*

15 *A.*, a merchant, purchases goods of *B.*, for the use of *C.* who is present, and selects the goods, and stipulates with *B.* the price and other terms of the purchase. *A.* credits *B.* with the amount, and debits *C.* with the amount and a commission. *B.* credits *A.* in his books and invoices. *B.* cannot recover the price of the goods against *C.* *Addison v. Ganda-sequi*. 4 Taunt. 574

16 A factor cannot pledge the goods of his principal; therefore, where goods were consigned from abroad to a factor, to be sold on account of the consignor, and a bill of lading was sent to deliver the goods to the factor or his assigns, and the factor afterwards indorsed and delivered the bill of lading, together with the goods, to the defendants, as brokers, with instructions to do the needful, and the defendants made advances to him on the credit of those and other goods, without knowing that he was not the owner of them: Held, that the defendants could not retain the goods against the consignor, until payment of the debt due to them from the factor on account of these advances. *Martini v. Colcs*.

1 M. & S. 140
17 Neither can he pledge the goods of his principal by indorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the indorsee knew not that he was the factor. *Newsom v. Thornton*. 6 E. R. 17

18 If a factor pledge the goods of his principal, the latter may recover the value of them in trover against the pawnee, on tendering to the factor what is due to him, without any

tender to the pawnee. *Daubigny v. Duval*. 5 T. R. 604

19 But this rule does not apply to the case of a banker, (or it should seem any other person), pledging indorsed bills of exchange deposited in his hands by a customer. *Per Eyre, C. J.* — *Collins v. Martin*.

1 B. & P. 651
20 Where a broker pledges the goods of his principal as his own, the pawnee for a valuable consideration, who claims under such tortious act of the broker, cannot retain the goods against the principal in trover for the amount of the lien which the broker had on the goods for a balance due from the principal to him at the time of such pledge; the lien being personal and not transferable by such tortious act of the broker. *McCombie v. Davies*.

7 E. R. 5
21 The plaintiff and the defendant having each lodged their respective India Bonds with the same bankers, who afterwards privily and without the defendant's authority sold his bonds, and upon his demand of them delivered up to him the India bonds of the plaintiff to the same total amount, and payable to the same obligee, (being always the treasurer of the company, who indorses such bonds in blank before they are circulated), but having different numbers and for different separate sums, and therefore manifestly distinguishable from his own bonds; though the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for these: held, that the defendant, having sold the plaintiffs' bonds so received from his own agents, who had acted *malâ fide* in passing them to him, was liable to answer over to the plaintiffs, for the amount, in an action of *assumpsit* for money had and received to their use. *Glyn, Bart. v. Baker*.

13 E. R. 509
22 Where an agent is employed to buy goods, an acknowledgement under his hand-writing of his having received them is evidence of a delivery to the buyer. *Biggs v. Lawrence*.

3 T. R. 454
23 Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the

person contracting with him has a right to consider him to all intents and purposes as the principal: and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor in answer to the demand of the principal. *Rabone v. Williams*.

7 T. R. 360, *noted*

- 24 If one take the security of the agent unknown to the principal, and give the agent a receipt as for money due from the principal, on the faith of which the principal deals differently with his agent, the principal is discharged although the security fail. *Secus*, if the principal do not shew that he was injured by means of such false voucher, and the omission of the party to inform him of the truth in due time. *Wyatt v. The Marquis of Hertford*. 3 E. R. 147 (And see *Ward v. Felton*.

1 E. R. 507)

- 25 If the seller of goods knowing at the time that the buyer, though dealing with him in his own name, is in truth the agent of another, elect to give the credit to such agent, he cannot afterwards recover the value against the known principal; but if the principal be not known at the time of the purchase made by the agent, it seems that when discovered, the principal or the agent may be sued at the election of the seller; unless, where by the usage of trade, the credit is understood to be confined to the agent so dealing; as particularly in the case of principals residing abroad. *Paterson v. Gandasequi*. 15 E. R. 62
- 26 A factor made purchases for his principal, who made payments to him on account: afterwards the factor was pressed for payment by the sellers in a letter which came to the hands of the principal, who transmitted it to the factor; and with this knowledge of the fact paid him the residue: held, that the principal was liable over to the sellers for the residue so paid over to his factor after notice. *Powel v. Nelson*.

cited ib. 65

- 27 The defendant having contracted with a surveyor, who ordered goods from the plaintiff for the use of the

defendant's house: held, that the defendant was not liable for them. *Bramah v. Lord Abingdon*, *cited*.

15 E. R. 66

- 28 Where the defendant bought goods of the plaintiffs in the name and upon the credit of *Smith and Co.*, but in reality on his own account, he was held liable. *Railton v. Hodgson*, and *Peele v. Hodgson*, *cited ib.*

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IV. PERSONAL RIGHTS AND LIABILITIES OF, TO THIRD PERSONS.

- 1 If a person describing himself as agent for another residing abroad enter into a contract here, he is personally liable. *Per Eyre C. J. De Gaillon v. L'Aigle*. 1 B. & P. 368

- 2 An officer appointed by government treating as an agent for the public, is not liable to be sued upon contracts made by him in that capacity. *Mackheath v. Haldimand*.

1 T. R. 172

- 3 Not even though he contract by deed, if it be *on account of government*. *Unwin v. Wolseley*. 1 T. R. 674

- 4 No action lies against a steward, manager, or agent, for damage done by the negligence of those employed by him in the service of his principal, but the principal of those actually employed only are liable. *Stone v. Cartwright*. 6 T. R. 411

- 5 The mere indorsement of a bill of lading to an agent to enable him to receive the goods on account of the principal, without any consideration, will not enable such agent to maintain trover in his own name for the goods. *Coxe v. Harden*.

4 E. R. 211

- 6 *A.* having received money as agent for *B.* and others, in specific proportions for each, pays it over to *C.* as a banker in his own name, and having drawn out part of it, directs *C.* not to pay away the remainder, except by his order:—Held, that *C.* is bound to hold the money for *A.*, and that therefore *B.* cannot recover the remainder of his share from *C.*; though he had given *C.* notice that *A.*'s agency was at an end. *Pinto v. Santos*. 1 Marsh. 132

- 7 And see the case of *Ogle v. Atkinson*, where it was held that the absolute property in goods vested in the con-

- signee, though the bill of lading was indorsed to another. 1 Marsh. 323
- 8 *A.* employs *B.* to sell goods for him; *C.* as *B.*'s broker, procures a purchaser, and draws a bill for the amount, payable to *A.*, which is accepted by the purchaser, but dishonoured.—Held, that *C.* is answerable to *A.* as drawer of the bill. *Le Feuvre v. Lloyd.* 1 Marsh. 318

AGREEMENT.

- I. CONSTRUCTION AND OPERATION OF.
II. VALID OR ILLEGAL.

(a) *Contrary to Public Policy.*

I. CONSTRUCTION AND OPERATION OF.

- 1 Where two parties agreed to be bound by the opinion of a professional man upon the construction of an act of parliament, who gave his opinion in favour of one; such opinion was considered as final and conclusive, though it recommended the printed statute to be compared with the parliament roll before the matter was settled, under a doubt whether the statute was not misprinted. *Price v. Hollis.* 1 M. & S. 105
- 2 *A.* being tenant to *B.*, under a lease containing covenants, by which the former was bound to fetch 75 bushels of coals from *Pool* yearly, and deliver them at the mansion house of the latter, and also to supply him with as much good wheat as he should want in his family at 5s. *per* bushel, it was agreed between them that the lease should be surrendered up and a new one granted, omitting the above covenants. A new lease was accordingly executed, and at the same time an agreement was entered into, whereby *A.* agreed with *B.* that he would fetch and bring to the dwelling-house of *B.*, his heirs and assigns 75 bushels of coals yearly, for 12 years, (the term of the new lease), and yearly supply *B.*, his heirs and assigns, with as much good wheat as he should want in his family at 5s. *per* bushel. *B.* having parted with his reversion in the farm, and also quitted the mansion-house, in which he resided at the time when the agreement was made: held, that he was not entitled to maintain an action against *A.* for refusing to deliver the wheat at the stipulated price; that the agreement being entire, must receive one uniform construction; and as it was clearly local in respect of the delivery of coals, it could not be deemed personal with respect to the wheat: Also, that no parol evidence could be admitted to explain the agreement, there being no latent ambiguity. *Coker v. Guy.* 2 B. & P. 565
- 3 A person agreed to deliver 100 bags of hops at a certain price by a certain time, and having delivered part, commenced an action for the price before the expiration of the time fixed for the delivery of the remainder: held, that the contract being entire could not be split, and that such action could not be maintained. *Waddington v. Oliver.* 2 N. R. 61
- 4 If a party entitled under a contract to receive a profit from another by his own act, so confounds the measure of that which he was to receive, that it can be no longer ascertained, he vacates his whole claim. *Pringle v. Taylor.* 2 Taunt. 150
- 5 *A.* agreed to find sufficient coals for *B.*'s engine to draw water from *A.*'s mine, and *B.*'s little coal as *they then stood.* *B.* sunk to a lower seam, in draining which he drained the other two seams, but consumed for his engine more coal than before: Held, that *A.* was no longer bound to furnish any coal, because *B.* had destroyed the measure of sufficiency. *id. ibid.*
- 6 *A. B. C.* and *D.* agreed to purchase a cargo of coals in certain proportions, to be severally taken and received out of the ship by them respectively, at the rate of forty chaldrons *per* day, and to settle their turns among themselves. And further agreed, that in case of any loss or demurrage, by not fixing on their respective turns, or by subsequent detention in working out the cargo, to hold themselves severally and respectively liable for their several and respective defaults. At the rate of forty chaldrons *per* day, the whole cargo would have been cleared in nine days; but in consequence of one of the days being wet,

- only five chaldrons were taken out on that day; and on the 10th day, some of A.'s coals remained on board; held, that *working* days only were within the meaning of the contract, and that as one day was wet, A. was not bound to pay demurrage for the 10th day. *Harper v. McCarthy*. 2 N. R. 258
- 7 The defendants contracted to carry the plaintiff's goods from *Liverpool* to *Leghorn*; on the vessel's arriving at *Falmouth* in the course of her voyage, an embargo was laid on her "until the further order of council;" held that such embargo only suspended, but did not dissolve, the contract between the parties; and that even after two years, when the embargo was taken off, the defendants were answerable to the plaintiff in damages for the non-performance of their contract. *Hadley v. Clarke*. 8 T. R. 259
- N. B. For the non-performance of special agreements, see *tit. Assumpsit*.

II. VALID OR ILLEGAL.

- 1 There is no objection upon the stat. 6 Geo. 1. c. 18. s. 18, 19. as for a public nuisance and grievance, to articles of agreement, whereby 50 persons agreed to raise 200 shares at 210l. each, by small monthly subscriptions, for building houses for each other, every holder paying interest on his shares till paid up; with a stipulation for the members to employ certain tradesmen only in the building; with power to each member to sell his shares and transfer them in the books of the society; provided that the purchasers shall be approved at a meeting of the society, and should, on his admission, become a party to the original articles; for there is nothing illegal *per se* in the general object or in the mode of executing it; nor is such a limited power of transferring the shares a raising of transferable stock within the mischief of the act. *Pratt v. Hutchinson*. 15 E. R. 511
- 2 A contract entered into by a practising attorney to relinquish his business and recommend his clients to two other attorneys for a valuable consideration, and that he would not himself practise in such business within certain limits, and would permit them

to make use of his name in their firm for a certain time, but without his interference, &c. was holden to be valid in law. *Bunn, executor of Bunn, v. Guy*. 4 E. R. 190

- 3 An agreement, that in consideration that A. would take on board his ship B.'s goods for the purpose of conveyance, B. would pay a certain sum on A.'s delivering to him the bills of lading:—Held, that this is a valid contract, and that the price of the carriage of the goods is recoverable immediately on the loading them, whether the voyage be performed or not. *Andrew v. Moorehouse*. 1 Marsh. 122
- 4 An agreement in writing to put in good bail for a person arrested on mesne process, at the return of the writ, or surrender the body, or pay debt and costs, made by a third person with the bailiff of the sheriff, in consideration of his discharging the party arrested, is void by 23 H. 6. c. 10. *Rogers v. Reeves*. 1 T. R. 418
- 5 No action can be maintained for the breach of an agreement. "to dance at the King's Theatre in the *Haymarket*, or at such other place as the plaintiff should appoint;" if it appear that no licence for that theatre was granted by the Lord Chamberlain, as required by stat. 10 G. 2. c. 28, and that the plaintiff did not request the defendant to dance at any other place which was licensed. *Gwillim v. Laborie*. 5 T. R. 242
- 6 It being contrary to stat. 7 & 8 W. 3. c. 4. for a candidate to furnish provisions to any voters after the teste of the writ, an innkeeper cannot recover against a candidate, for provisions so furnished at his request. *Ribbans v. Crickett*. 1 B. & P. 264
- 7 Where goods are delivered under an agreement to take a specific parcel of copper money in payment, a delivery of such copper will be a good bar to an action for the value of the goods, though in fact it was counterfeit money. *Alexander v. Owen*. 1 T. R. 225
- 8 An illegal contract, if rescinded as to part, must be rescinded as to the whole. Therefore, if a plaintiff furnishes goods in consideration of counterfeit money to be paid him, and he afterwards refuses to take it, he cannot recover in an action the value of the goods delivered. 1 T. R. 226

- 9 If *A.* agree to give *B.* a certain sum for goods, in advancement of *C.*, any secret agreement between *B.* and *C.* that the latter shall pay a further sum, is void as a fraud on *A.* although the bill of sale is made to *A.*, and *B.* can not recover such further sum against *C.* *Jackson v. Duchaire.* 3 T. R. 551
- 10 The plaintiff cannot recover upon a written contract made in *Jamaica*, which by the laws of that island was void for want of a stamp. *Alves v. Hodgson.* 7 T. R. 241
- 11 An agreement for carrying into effect a former simoniacal agreement is not absolutely void. *Greenwood v. Bishop of London.* 1 Marsh. 292
- And see *Frauds, Statute of, & Insolvent Debtor.*

II. AGREEMENT.

Contrary to Public Policy.

1. An agreement entered into by a number of dyers, pressers, bleachers, &c. at a public meeting, that they would not receive any more goods to be dyed, &c. but on condition that they should respectively have a lien on those goods for their general balance, is good in law: and any one who after notice of it delivers goods to any of those persons must be taken to have assented to those terms: and consequently cannot demand goods so delivered to any such dyer, &c. without paying the balance of his general account. *Kirkman and another, assignees, &c. v. Shawcross.* 6 T. R. 14

2. *A.* being possessed of an office in a dock-yard, *B.*, in order to induce him to procure himself to be superannuated, and retire on the usual pension, agrees (without the knowledge of the navy board, to whom the appointment belongs) in case *B.* should succeed him in the office, to allow him a certain annual share of the profits; *A.* retires, *B.* is appointed to succeed him, but does not perform the agreement. *A.* can maintain no action against *B.* on the agreement. *Parsons v. Thompson.* 1 H. B. 322
- 3 *A.* by the interest and on the application of *B.* to the lords of the treasury, is appointed customer of a port, having previously entered into an agreement, declaring that his name was used in the application in trust for *B.* that he would appoint such deputies as *B.* should nominate, and would empower *B.* to receive the profits of his office to his own use. On the failure of *A.* to comply with the agreement, no action upon it will lie against him. *Garforth v. Fearon.* 1 H. B. 327
- 4 A sale (by the owner) of the command of a ship, employed in the East India Company's service, without the knowledge and against the bye-laws of the Company, is illegal; and the contract of sale cannot be the foundation of an action. *Blachford v. Preston.* 8 T. R. 89
- (And see stat. 39 G. 3. c. 89).
For stamps on agreements, see *tit. Stamps.*

ALIENS.

I. THEIR PRIVILEGES.

II. — INCAPACITIES.

I. THEIR PRIVILEGES.

- 1 A foreigner is entitled to equal justice, but not to greater indulgence, in our court, than a subject. *Duckworth, Bart. v. Taylor.* 2 Taunt. 7
- 2 If an alien enemy, a prisoner of war, makes a contract, it may be enforced by the king for the benefit of the crown; and if the crown does not enforce it, the prisoner may sue on it after the return of peace. *Maria v. Hall.* 1 Taunt. 33
- And see *Rex v. Depardo.* *id.* 26
- 3 A native of a foreign state in amity

- with this country, taken in an act of hostility on board an enemy's fleet, and brought to *England* as a prisoner at war, is not disabled from suing while in confinement, on a contract entered into as a prisoner at war. *Sparrburgh v. Barnatyne.* 1 B. & P. 163
- 4 Where the defendant had been held to bail on an instrument entered into in *France*, by which his property only and not his person, was according to the law of that country, made liable, the Court of C. P. (*dissent. Heath J.*) on motion, ordered the bail bond to be cancelled on defendant's entering a common appearance. *Melan v. Fitzjames (Duke).* 1 B. & P. 138
- N. B.* In the case of *Inlay v. Ellefsen*, 2

E. R. 455, Lord *Ellenborough* signified his dissent from this determination.

- 5 The defendant, an alien within the terms of the 38 G. 3. c. 50. § 9. (which exempts from arrest for debts contracted abroad, aliens residing in this country in consequence of a revolution in their own), having entered into an agreement with the plaintiff in a foreign country, the latter, in pursuance of the agreement, laid out money in *England*; after which the parties came to an adjustment in *England*, and the defendant acknowledged the debt. The defendant having been holden to bail for money laid out by the plaintiff in *England*, and on an account stated in *England*, disclosed the above circumstances by affidavit, whereupon the court discharged him on a common appearance. *Sinclair v. Charles Philippe, Monsieur de France.* 2 B. & P. 363

II. THEIR INCAPACITIES.

- 1 No action can be maintained either by or in favour of an alien enemy. *Brandon v. Nesbitt.* 6 T. R. 23
- 2 Nor of an Englishman living in, and carrying on trade under the protection, and for the benefit of an hostile state. *McConnell v. Hector.* 3 B. & P. 113
- 3 The son of an alien father and *English* mother, born out of the king's allegiance, cannot inherit to his mother in this country. *Doc d. Count Dauroue v. Jones.* 4 T. R. 300
- 4 In a plea of alienage the defendant must state that the plaintiff was born in a foreign country at enmity with our king, and that he came here without letters of safe-conduct from our king. *Casseres v. Bell.* 8 T. R. 166
- 5 Where one who was an alien *amoy* at the time of the action brought, became an *alien enemy* before plea pleaded, and the defendant pleaded that the plaintiff ought not to *have or maintain* his action, because he was before and at the time of exhibiting his bill, and that he now is an *alien enemy*, &c.; concluding that therefore the plaintiff ought to be barred from *having or maintaining his action*, &c.; to which the plaintiff replied, that at the time of exhibiting his bill he was an *alien amoy*; wherefore he prayed judgment and his damages: to which there was a demurrer: held, that the plea was ill pleaded. But yet, as the Court were *ex officio* bound to give such judgment as appeared upon the whole record to be proper, without regard to the issues found or confessed, or to any imperfection in the prayer of judgment on either side; and as it appeared upon the whole that the plaintiff was now an *alien enemy*, and therefore incapable of *maintaining further* his suit, judgment was given that he be barred from *further having or maintaining his action.* *Le Bret v. Papillon.* 4 E. R. 502
- 6 Under the stat. 34 G. 3. c. 9. s. 7. prohibiting his majesty's subjects from paying money to any persons residing under the government of *France*, the Court of C. P. refused to discharge a defendant on a common appearance, on the ground of the plaintiff's residence in *Holland*, which was suggested to be under the dominion of *France.* *Pieters v. Laytjes.* 1 B. & P. 1
- 7 The Court of K. B. refused to stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbrynen v. Wilson.* 9 E. R. 321
- 8 The defendant being in custody of a messenger under an order of the secretary of state, for the purpose of being sent out of the kingdom, by virtue of the alien act, 43 Geo. III. c. 155. the Court refused to issue a *habeas corpus* on the application of his bail to bring him up, that they might render him in their own discharge, on account of the public inconvenience, and of the probable risk of his passage, which had been taken in a ship immediately about to sail to his destined port. *Folkein v. Critico.* 13 E. R. 457

N. B. As to the incapacity of aliens to be parties to policies, see *Tit. Insurance.*

AMENDMENT.

I. IN WRITS.

II. — DECLARATIONS AND SUBSEQUENT PLEADINGS.

III. — RECORDS AND VERDICTS.

IV. — JUDGMENTS.

V. — PENAL ACTIONS.

VI. — CRIMINAL PROCEEDINGS.

I. IN WRITS.

- 1 Where a writ of *fi. facias* directed the money to be returned "before us" instead of "before the king's justices at Westminster," but was tested by the chief justice of C. P. the Court permitted the plaintiff to amend on payment of costs. *Simon v. Gurney*. 1 Marsh. 237
- 2 Where a *fi. fa.* was sued out into a different county from that in which the *venue* was laid, and the party suing it afterwards took out a *fi. fa.* into the proper county, and got a return of *nulla bona* to warrant the *fi. fa.* which first issued, the Court of C. P. permitted the first writ to be amended, by adding the return of the *nulla bona* and the *testatum* clause, though the second writ was returnable several days before judgment was signed. *Meyer v. Ring*. 1 H. B. 541
- 3 So where a *fi. fa.* was sued out into one county (when it should have been a *test. fi. fa.*) without any original *fi. fa.*, and the plaintiff afterwards sued out an original *fi. fa.*, the Court of K. B. permitted the party to amend the former on paying the costs. *Cowperthwaite v. Owen*. 3 T. R. 657
- 4 A *fi. fa.* made returnable on a King's Bench instead of Common Pleas return day, was amended by the award of execution on the roll. *Atkinson v. Newton*. 2 B. & P. 336
- 5 Leave granted to amend a special *capias*, in order that an application might be made to the Master of the Rolls to procure a new original. *Carr v. Shaw*. 7 T. R. 299
- 6 One obligee in a joint bond having sued out a *capias* against the obligor, and taken a recognizance of bail in his own name only, afterwards sued out an original in the name of both obligors, and then applied to the Court to amend both the *capias* and recognizance; the Court granted the former, but refused the latter. *Tabrum v. Tenant*. 1 B. & P. 481
- 7 A. B. having been arrested on a *capias* sued out against him by the name of C. B. a bail-bond was given, by which A. B. arrested by the name of C. B. became bound, conditioned for the appearance of A. B. arrested by the name of C. B. The affidavit to hold to bail named the defendant properly A. B. The Court amended the *capias* and return (but without prejudice to the sheriff), and rejected an application by the bail to cancel the bail-bond. *Stevenson v. Danvers*. 2 B. & P. 109
- 8 Where a *capias* is made returnable on a day certain, instead of a general return day, the Court will allow it to be amended on payment of costs. *Walker v. Hawkey*. 1 Marsh. 399
- N. B. For amendments in *fin. se. tit. Fine*; in *recoveries, tit. Recovery*.
- 9 One of two plaintiffs died before interlocutory judgment, but the suit went on to execution in the name of both; after this, and after a motion to set aside the proceedings for this irregularity, the Court permitted the surviving plaintiff to suggest on the roll the death of the other before interlocutory judgment, and to amend the *ca. sa.* without paying costs. *Newham v. Laro*. 5 T. R. 577
- 10 A plaintiff recovered judgments against two defendants in K. B. and one of them brought a writ of error in *Cam. Scac.* where the judgment was affirmed and costs given of the writ of error, and both the defendants were taken under a writ of execution on the whole sum including the costs of the writ of error as well as the original sum recovered; the Court permitted the plaintiff to amend his writ of execution as to the defendant who did not join in the writ of error, by altering it to the original sum recovered. *Laroche v. Washbrough*. 2 T. R. 737
- 11 A writ of execution to satisfy James the debt awarded to John, amended after execution executed, upon payment of costs. *Mackie v. Smith*. 4 Taunt. 322
- 12 A bill of *Middlesex*, filed of record as

of the 24 G. 3. when it ought to have been of the 25th, may be amended agreeable to the truth. *Green v. Rennet.* 1 T. R. 782

The principal circumstance the Court looks to in such cases is to see whether there is any document to amend by.

id. 783

13 After a rule obtained to shew cause why the *test. ca. sa.* should not be set aside because not warranted by the judgment, and because there was no original *ca. sa.*, the Court of K. B. permitted plaintiff to amend the *test. ca. sa.* agreeably to the judgment, and directed the sealer of the writs to seal an original *ca. sa.* to warrant it. *Shaw v. Maxwell.* 6 T. R. 450

14 If there be not fifteen days between the *teste* and the return of a *capias*, the Court of C. P. will allow the *teste* to be amended. *Bouchier v. Wittle.* 1 H. B. 291

Davis v. Owen. 1 B. & P. 342

15 If a *capias per continuance* be *tested* on the same day as the original *capias*, a new original *capias* may be sued out to warrant it; though such new original bear *teste* before the cause of action accrued. *Davis v. Owen.* 1 B. & P. 342

16 A *testatum capias*, having been made returnable on a day certain instead of a general return day, was held irregular. And the Court refused to amend it on account of the bail. *Inman v. Huish.* 2 N. R. 133

17 If the award of the writ of inquiry on the roll be right, the *teste* of the writ, if wrong, shall be amended by it. *Johnson v. Toulmin.* 4 E. R. 173

18 It is not of course to amend in a writ of right: the demandant ought to make out a case by affidavit. *Dumaday v. Hughes.* 3 B. & P. 453

19 But in this case the Court thought that writs of right ought not to be encouraged; that the least slip was fatal to the demandant; and that it was only possible a case might be brought before them which they should think a fit one for an amendment. *Charlwood v. Morgan.* 1 N. R. 66

20 Amendment of the disseisor's name refused in a writ of entry *sur disseisin en le post.* *Hull v. Blake.* 4 Taunt. 572

21 The Court will not amend a *mandamus* after a return has been made to it. *Rex v. The Mayor, &c. of Stafford.* 4 T. R. 689

22 After a verdict on a traverse to a return to a *mandamus* made by a corporation, the Court would not allow the defendants to amend the return by setting forth a different constitution. *Rex v. the Mayor and Burgesses of Grampound.* 1 T. R. 689

23 The Court of K. B. refused leave to amend a return to a *habeas corpus.* *Ex-parte Eden.* 2 M. & S. 230

24 The Court of K. B. will amend a writ of error from the Court of C. P. in case by converting it to a writ of error in covenant. *Sampayo v. De Payba.* 5 Taunt. 86

25 If, to a writ of *venditioni exponas* for goods already taken in execution with a clause of *feri facias* for the residue, the sheriff return that he has made of the said goods 20*l.* but omit by mistake to return *nulla bona* to the *feri facias*, the Court will allow the sheriff to amend the return, and will set aside an attachment issued against him for not making the return. *Rex v. The Sheriff of Monmouth.* 1 Marsh. 344

II. IN DECLARATIONS AND SUBSEQUENT PLEADINGS.

1 The Court will give the plaintiff leave to amend the declaration in a civil action after the second term even against a prisoner; but they will not permit him to add new counts to his declaration in such a case. *Owens v. Dubois.* 7 T. R. 698

2 The Court will grant leave to amend a declaration on a special agreement according to the bill filed, by increasing the damages, even after verdict; setting aside the verdict, and granting a new trial. *Tomlinson v. Blacksmith.* 7 T. R. 132

3 Leave given to amend the declaration by entitling it of the day on which it was actually delivered, instead of the term generally, in order to accord with an averment therein, that other defendants named in the writ were then outlawed. *Coutanche v. Le Ruez.* 1 E. R. 133

4 The Court of C. P. refused to permit a declaration in an action of covenant brought against executors in their own right, and who had merely acted in the disposition of the testator's effects, to be amended after demurrer. *Noble v. King.* 1 H. B. 37

5 The Court, will pending a writ of error, amend a clerical mistake in the decla-

- ration, upon which the defendant relied for his matter of error. *Moody v. Stracey*. 4 Taunt. 588
- 6 The defendant was allowed to amend his avowry in an action of replevin on payment of costs. *Brown v. Sayce*. 4 Taunt. 322
- 7 Where a *sham* plea was put in, to which plaintiff pleaded a bad replication, he had leave to amend without payment of costs, after demurrer argued, *Solomons v. Lyon*. 1 E. R. 369
- 8 After a party has once amended on a demurrer, the Court will not give him leave to amend again on a second demurrer. *Kinder v. Paris*. 2 H. B. 561
- 9 In certain cases the Court will permit an amendment to be made in a notice at the bottom of a declaration in ejectment. *Doe d. Bass v. Roe*. 7 T. R. 469
- N. B. For amendments relating to bail, see *tit. Bail*.
- 10 The Court refused to allow the demandant in a writ of right to amend the mistake of a christian name in the count, though an affidavit accounting for the mistake was produced: or to discontinue the suit. *Charlwood v. Morgan*. 1 N. R. 64
- 11 The Court refused to permit the demandant in a writ of right to amend his count, by introducing an additional step in the descent, though it was sworn that the mistake had arisen from the demandant having been misinformed in the country, and that the demandant would be barred, unless the amendment were allowed. *Baylis v. Manning*. 1 N. R. 233

III. IN RECORDS AND VERDICTS.

- 1 The Court will give leave to amend a record by inserting a special memorandum of the day when the plaintiff's bill was filed after a writ of error brought, but no such alteration can be made without leave of the Court, though by consent of the other party. *Dickinson v. Plaisted*. 7 T. R. 474
- 2 Where in a plea by an executor of a former judgment recovered, by mistake a less sum is stated than the judgment was really for, if it clearly appear that a greater sum was recovered, the Court will permit the defendant to amend the record by inserting the real sum in the plea, though the application be not made for the amendment till a considerable time (*ex gr.* near three years) after the record has

- been made up; but in such case they will allow the plaintiff to reply *per fraudem*. *Skutt v. Woodward (executrix)*. 1 H. B. 238
- 3 If to a rejoinder concluding with a verification, the plaintiff add the *similiter* and take the record down to trial, and the defendant obtain a verdict, the Court will not grant a new trial, but will amend the record. *Grundy v. Mell*. 1 N. R. 28
- 4 After nonsuit for a variance in an undefended action on a replevin bond, the Court permitted the record to be amended, and a new trial to be had. *Halhead v. Abrahams*. 3 Taunt. 81
- 5 The Court (of C. P.) said that they could not alter a verdict unless it appeared clearly on the face of it, that the alteration would be according to the intention of the jury. *Spencer v. Goter*. 1 H. B. 78
- 6 Defendant pleaded the general issue and the statute of limitations; a verdict was found for the plaintiff on the first issue, and no notice taken of the last; after error brought and joinder in error (which was assigned on this point), the Court allowed it to be amended by the judge's notes, on payment of costs. *Petrie v. Hannay*. 3 T. R. 659
- 7 Where a general verdict was given on two counts, one of which was bad, and it appeared by the judge's notes, that the jury calculated the damages, on evidence applicable to the good count only: the Court (of C. P.) amended the verdict, by entering it on that count, though evidence was given applicable to the bad count also. *Williams v. Breedon*. 1 B. & P. 329
- 8 The *postea* may be amended by the judge's notes at any time, even after final judgment and a writ of error brought. *Doe d. Church v. Perkins*. 3 T. R. 749
- 9 Where the parties had gone down to trial upon a plea which had not been traversed, after verdict for the plaintiff, the plaintiff was permitted to amend, by adding a traverse, and the defendant's motion in arrest of judgment was discharged, upon payment of costs by the plaintiff of both motions. *Cooke v. Burke*. 5 Taunt. 164

IV. IN JUDGMENTS.

- 1 Where a defendant is entitled to treble costs by a judge's certificate, under a

statute, and the judgment is entered up for treble costs generally, without stating on what ground the defendant is entitled to them; this is a substantial defect, and the Court will not amend the judgment by striking out the word "treble." *Dunbar v. Hitchcock.* 1 Marsh. 382

- 2 A judgment cannot be amended after the term in which it was delivered. *Prince v. Nicholson, Exor.*

1 Marsh. 401

- 3 In the case of executors, if the clerk enter judgment *de bonis propriis*, instead of *de bonis testatoris*, and error is brought, the Court of K. B. will order the entry to be amended, even if the record is sent back from the Exchequer Chamber. *Green v. Reunet.*

1 T. R. 783

- 4 Where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderunt*; if the executor receive assets between the time of the plaintiff's suing out the writ and the judgment, in a *scire facias* on such judgment, the Court will permit the plaintiff to amend his judgment as to the time, by making it a judgment as of that term when he could at the soonest have entered it up; unless the defendant can shew that in point of fact some injustice will be done by it in the particular case. *Mara v. Quin.* 6 T. R. 1

- 5 Where an executor pleads a false plea of judgment recovered against himself, on which judgment is entered up against him for the debt and damages *de bonis testatoris et si non de bonis propriis*, and words are afterwards interlined on the judgment roll, by which the judgment *de bonis propriis* is confined to the damages only: The Court of C. P. will not, on motion, strike out the words which had been interlined, it not appearing by whom the interlineation had been made, and the judgment being of six years standing. *Burroughs v. Stephens, Exors.*

1 Marsh. 211

- 6 Where the defendant in replevin made cognizance for rent in arrear, and the jury found a verdict for him, and damages to the amount of the rent claimed in his cognizance, *without finding either the amount of the rent in arrear, or the value of the cattle distrained*, and judgment was entered for the da-

mages assessed, the Court permitted the defendant to amend his judgment, and to enter a judgment *pro retorno habendo*, after a writ of error brought. *Rees v. Morgan.* 3 T. R. 349

V. IN PENAL ACTIONS.

- 1 The Court will not in a penal action, alter the term of which a declaration is entitled, to a previous term, in order to bring it within the time limited for the action. *Woodroffe v. Williams.*

1 Marsh. 419

- 2 Where a *qui tam* action for usury had been depending four years, the Court would not allow amendments to be made in the declaration, though the pleadings were still in paper. *Goff v. Popplewell.* 2 T. R. 707

- 3 In such an action the Court refused leave to amend the declaration after the time limited for bringing a new action, there appearing to have been unnecessary delay on the part of the plaintiff. *Steel q. t. v. Sowerby.*

6 T. R. 171

- 4 But the Court will permit an amendment to be made in a penal action after the time limited for bringing another action, provided there is no unnecessary delay on the part of the plaintiff. *Cross v. Kaye.* 6 T. R. 543

- 5 And where the amendment prayed for does not introduce any new substantive clause of action. *Maddock q. t. v. Hammett.* 7 T. R. 55

- 6 And wherever there is unnecessary delay in carrying on the suit by the plaintiff, the Court of K. B. will not in their discretion permit any amendments to be made in a penal action. *Ranking q. t. v. Marsh, Knt.*

8 T. R. 30

- 7 An amendment allowed in an action for a penalty under the bribery act, by altering the venue from the county at large to an interior jurisdiction, after the time limited for commencing a new action; the particularity of the declaration making it appear probable to the Court that the plaintiff was proceeding on the same fact for which the action was originally brought when laid by mistake in the wrong county, though there were no affidavit that it was the same. *Petre v. Craft.*

4 E. R. 433

- 8 Such an amendment allowed, though it appeared that there were distinct causes of action in the two different counties,

- upon an affidavit that the plaintiff proceeded on a mistake in supposing that both causes of action could be proved in the county where the election was holden. *Dorer v. Mestaer*. 4 E. R. 435
- 9 The Court will not give leave to amend, as to the parties to the suit, in a *qui tam* action after a demurrer. *Evans q. t. v. Stevens*. 4 T. R. 228
- 10 In an action on the statute of usury for taking more than legal interest on a loan of money "from the 15th of April to the 14th of July, 1802," the Court will amend the verdict by the judge's notes, if the jury by mistake the date of an instrument create a variance in their special finding, for which the evidence affords no foundation. *Manners q. t. v. Postan*. 3 B. & P. 343
- 11 The record in a penal action where the jury by mistake gave damages, being carried by writ of error to the King's Bench, the plaintiff may enter a *remittitur* of the damages on the record, and the transcript may be made conformable thereto. *Hardy q. t. v. Cathcart, Clerk*. 1 Marsh. 180
- VI. IN CRIMINAL PROCEEDINGS.
- 1 Amendments upon informations are now so much a matter of course, that they are made on an application to a judge at chambers. *Rex v. Holland*. 4 T. R. 458
- 2 An information filed by the Attorney General against an *East India* delinquent, under 24 G. 3. c. 25. and 26 G. 3. c. 57. to which the defendant demurs, may be amended in K. B. upon the motion of the Attorney General. *id.* 457
- 3 After verdict of guilty upon an indictment on the stat. 9 Ann. c. 14. for an assault on account of money won at gaming, the return to the writ of *certiorari* which had been issued at the instance of the defendant was amended by inserting in the return of the caption the true time when, and the names of the justices before whom, the quarter sessions at which the indictment was found was holden, and the names of the jurors by whom it was found. And the entry roll and record of *nisi prius* were also amended, as to the caption of the indictment (but not as to the names of the grand jurors), by making the same agree with the caption so amended. *Rex v. Hill Darley*. 4 E. R. 174
- 4 A return to a writ of *certiorari*, issued at the instance of the defendant, was amended by inserting therein the commission of *oyer* and *terminer*, by virtue of which, and also the names of the justices by whom, the Court before whom the indictment was found was holden, on production of the said commission and the minutes taken by the clerk in court. And also the caption of the indictment was amended by inserting the names of the grand jurors. *Rex v. Atkinson*. 4 E. R. 175. n.
- 5 Also the entry roll in the Treasury, and the record of *nisi prius*, in the same cause, were amended, as to the caption of the indictment, by making it agree with the amended caption. 4 E. R. 176. n.
- 6 But the amendment of the roll by inserting the names of the grand jurors is unnecessary, the practice of the Crown Office warranting the omission of their names. *Per Buller J. Rex v. Aylott*. 4 E. R. 176. n.

ANNUITY.

I. MEMORIAL.

- (a) *Inrolment of.*
- (b) *Parties and Securities, how stated.*
- (c) *Consideration, how described.*
- (d) *How pleaded.*

II. GRANT, REGISTRY OF.

III. ANNUITY, WHEN VACATED.

IV. DEEDS, WHEN SET ASIDE AND CANCELLED.

V. SECURITIES, VOID OR VOIDABLE.

VI. CONSIDERATION, WHEN RECOVERABLE.

VII. WHAT GRANTS ARE WITHIN THE ACT.

I. MEMORIAL.

- (a) *Inrolment of.*

- 1 The first section of the 17 Geo. 3. c. 26. requiring deeds to be inrolled

within 20 days of the execution, &c. means 20 days, exclusive of the day of execution. *Ex-parte Fallon*.

5 T. R. 283

2 *A.* grants an annuity to *B.*, the whole of which *B.* assigns to *C.* There being a memorial inrolled of all the original securities, it is not necessary that there should be also one of the assignment. *Dixon v. Birch*. 2 H. B. 307 & *Bromley v. Greathead*. *Id.* 307. n.

3 Where tenant for life conveyed estates to trustees, in trust to raise money by grant of annuities for his life, and such conveyance is recited in a deed for granting an annuity accordingly, it is not necessary to inroll a memorial of the first trust-deed. *O'Callaghan v. Ingilby*. 9 E. R. 135

4 No memorial is necessary to be inrolled of an annuity granted in consideration of the grantee resigning her trade and leasehold premises to the grantor; though part of the consideration was book-debts and stock in trade. *Doe d. Johnstone v. Phillips*. 1 Taunt. 356

5 An annuity-bond was assigned to secure another annuity of less amount: the Court held that the second annuitant was not bound to inroll a memorial of the first bond. *Henderson v. the Countess of Glencairn*. 2 Taunt. 235

6 If a correct memorial of an annuity-deed be incorrectly inrolled for a time, and after some years the officer of the inrolment-office discover and rectify the error before any proceedings had to vacate the annuity, the Court finding the inrolment right when they call for it, will not inquire when the entry was made. *Garrick v. Williams*. 3 Taunt. 540

7 But it is a high misprision in an officer to alter the inrolment without the sanction of the Court of Chancery. *Id.* 543

8 *Quære?* Whether it be sufficient for the grantee of an annuity to carry a memorial to the inrolment-office and pay for it, without insisting on himself seeing it inrolled, and comparing the inrolment with the original memorial. *Id. ibid.*

(b) *Parties and Securities, how stated.*

N. B. A new and concise tabular form for the memorials of life-annuities is now given by the stat. 53 G. 3. c. 141. s. 2.

1 *Semble*, that nothing more is necessary

to make good the memorial of an annuity, than a compliance with the requisites which are prescribed in terms by the stat. 17 Geo. 3. c. 26. s. 1.

Horwood v. Underhill. 4 Taunt. 346

2 It is not necessary that the memorial of an annuity should set forth all the trusts of the annuity deed: it is sufficient if it appears by the memorial for whom any of the parties is trustee. *Defaria v. Sturt*. 2 Taunt. 225

3 And the Court will not presume that a party is trustee for other persons than appears by the instruments laid before the Court. *Id. ibid.*

4 It is sufficient if a memorial sets out the trusts so that the Court may judge for whom the party is trustee, without expressly stating who is the *cestui que trust*. *Id. ibid.*

5 The memorial of an annuity recited a bond, warrant of attorney and indenture of grant of an annuity charged on land, and that the grantor demised the land to a trustee in trust for better securing the payment of the annuity with such powers and in such manner as were particularly expressed in the deed: the Court held that this was sufficient, for that it sufficiently expressed a trust for the grantee, and disaffirmed any trust for the grantor or other persons. *Defaria v. Sturt*. 2 Taunt. 225

6 Where the grantor of an annuity by deed conveyed to the grantees all his estate in the interest of 10,000*l.* in trust for himself until default in payment, and after default to retain thereout the arrears, &c., and after retaining the arrears, upon further trust for himself: held, that a memorial, which stated that the interest of the 10,000*l.* was by the deed conveyed to the grantees upon the trusts thereby declared, was defective; although the grantor had not the legal estate in the interest of the 10,000*l.* at the time of his conveyance of it to the grantees, but the same was vested in trustees in trust for him, after deducting certain annual payments, and the trustees did not join in conveying their interest to the grantees. *Leycester v. Lockwood*. 1 M. & S. 527

7 Where husband and wife, by deed granting an annuity charged on the estate of the wife, demised, for further security, such estate to *E. B.* a trustee, for the term of 99 years, if the wife

should so long live, *upon trust*, to permit the wife to receive and take the rents, &c. *until default made in payment of the annuity*; and in case of any such default *then in trust, in case the annuity should be in arrear for 20 days*, being lawfully demanded, that it should be lawful for the trustee, from time to time, out of the rents, &c., or by demise, mortgage or sale, &c. *to raise and pay the grantee the arrears and charges*, and to permit the wife to take the residue, &c. It seems that a memorial of such deed inrolled, stating at first that *E. B.* was a trustee nominated and appointed on behalf of the *grantee*; and after stating the grant of the annuity, "*with the usual powers of distress and entry*," (not stating particularly what those powers were, as applicable to the trusts of the term,) proceeding to state the demise of the term by the husband and wife to the trustee, *in trust* to permit the wife to receive and take the rents, &c., *until default made in payment of the annuity, &c., and in case of any such default, then in trust for securing the due payment of the annuity and costs, &c.* is not a valid memorial, inasmuch as it omits to state for whom *E. B.* was a trustee *during the 20 days after the annuity should be in arrear*, till the expiration of which time he was not a trustee for securing the due payment of it. *Bradford v. Burland.* 14 E. R. 415

8 The memorial stated the annuity deed to have been executed on the *trusts therein mentioned*, and on further trust, that if any of the payments should be in arrear 20 days after becoming due, the grantee might levy them out of the rents: the grantor moved to set aside the annuity, because the memorial did not disclose the trusts referred to; but it appearing by an affidavit of the grantee that he bought the annuity for himself, and that *there were no other trusts but that expressed*, the Court held the memorial to be sufficient. *Tolderry v. Allan.* 5 T. R. 480

9 The legislature only meant to require the parties to set forth the trusts created for or in consequence of the annuity, not those which are a lien on the estate independently of the annuity; as those to pay taxes, &c.

id. 481

10 But in a subsequent case, an annuity deed was set aside for two defects in the

memorial; 1st, because the memorial only stated that part of the consideration was paid by the grantee to the trustee "*in trust*, and for the purposes "*therein mentioned*," without disclosing those trusts; 2dly, because the memorial only set forth that the demise was made by the grantor to a trustee "*upon the trusts therein mentioned*," without saying what the trusts were. *Dann d. Dolman v. Dolman.* 5 T. R. 641

11 It is not necessary that the estates charged with an annuity should be specifically set forth in the memorial, where the annuity is charged on all the grantee's estate in a certain county, and so stated: nor is it necessary to state specifically the powers in a deed, except so far as they create a trustee; which brings them within the clauses of the statute relating to trustees. *O'Callaghan v. Ingilby.* 9 E. R. 135

12 In a conveyance of a life interest in an estate, to a trustee in trust for securing an annuity, it was first stipulated that the trustee should permit the grantor to receive the rents and profits until default made in the payment of the annuity, and then in trust for the grantee; the memorial of the annuity stated the trust to be for the grantee generally, which was holden ill. *Taylor v. Johnson.* 8 T. R. 184

13 Certain premises were conveyed by deed to a trustee to secure an annuity, in trust if the annuity should be in arrear 60 days, by lease, sale or mortgage, to raise the arrears, and permit the person entitled to the freehold to receive the rents and profits of the residue; and he was created a trustee for the grantee till default of payment. The memorial described him to be "*a trustee nominated on the part of the grantee*," without stating any of the trusts: held, to be an insufficient description. *Askew v. Mackreth.* K. B. [affirmed in *Dom. Proc.* 1 N. R. 214]

14 A memorial, stating that *A.* and *B.* severally became bound, is not sufficient if the bond be *joint*, as well as *several*. *Willey v. Cawthorne.*

1 E. R. 398

15 Where an annuity was granted by *three*, one of whom was known to be only a surety for the other two, to whose use the consideration-money was in fact applied; yet all three being present when the money was paid down upon the table, and counted over

by them all, and the receipt of it signed by all, it was properly stated in the memorial as a payment made to the three.

- 16 And though the deed and memorial stated the consideration-money to have been paid by the grantee by the hands of *W.* his agent, yet as it also appeared by the same instruments that a part of it was the money of a third person; that was held to be no objection: for either *W.* was the agent in fact of the sole grantee, or impliedly the agent, through the medium of the grantee, for such third person also, whose interest was stated in the deed and memorial according to the truth. *Cook v. Jones, Reeve, and Benwell.*

15 E. R. 237

- 17 The memorial ought to state the names of the witnesses to the respective instruments by which the annuity is secured; stating that *all* the instruments were attested by *A., B., and C., or one of them*, is not sufficient. *Hart v. Lovelace.*

6 T. R. 471

- 18 And if it state that they were attested by *A., B., C., and D.*, that must be taken to mean that each of them was so attested. *Ex-parte Mackreth.*

2 E. R. 563

- 19 At the time of executing an annuity deed, one *R. W.* the agent of *I. C.*, the grantee, entered into an agreement for redemption, beginning thus: "Memo-
"randum, I undertake and agree," &c. and concluding, "Witness my hand, *R. W.* agent for *I. C.*;" the memorial stated that *I. C.* entered into the agreement by *R. W.* his agent, and that it was witnessed by *R. W.*; held, that the memorial was sufficient. *Cator v. Hoste.*

2 B & P. 557

- 20 It is sufficient in the memorial of an annuity to state that the securities were executed "in the presence of *T. C.* of, &c." without expressing that he subscribed his name as an attesting witness. *Wallis v. Lade.*

4 Taunt. 761

- 21 But if the memorial of an annuity deed between *A., B., and C.*, after describing the parties to the deed and the contents, state that it was executed by *A. and C.*, in the presence of *E. and F.*, it will be no objection that *B.* also executed it in the presence of the same parties. For it is sufficient if the memorial state all the subscribing witnesses, without specifying what signa-

tures they respectively attested. *Orton v. Knight.*

3 B. & P. 153

- 22 A memorial of an annuity bond is bad for want of stating that the obligor became bound "*himself, his heirs, executors, and administrators,*" which words were in the body of the bond: for such a memorial does not truly describe the *extent* of the security. *Horwood v. Underhill.*

10 E. R. 123

- 23 The first part of a memorial stating a bond, by which certain persons became bound to the grantee, may be explained by a subsequent part setting forth another bond, in which the first is recited as a *joint and several* bond; such recital not being inconsistent with the preceding allegation, but only explaining what was before left short in the description of the first bond. *Coare v. Giblett.*

3 E. R. 461

- 24 But where a bond and warrant of attorney given to secure an annuity were no otherwise noticed in the memorial than by way of recital in the annuity deed, which was set out; the Court of C. P. held this insufficient. *Van Braam v. Isaacs.*

1 B. & P. 451

- 25 Where a warrant of attorney has been given to confess a judgment, to secure an annuity, together with other securities the memorial must state the warrant of attorney, as well as the other securities. *Davidson v. Lord Foley.*

2 H. B. 12

Hopkins v. Waller.

4 T. R. 463

- 26 In this respect there is no difference, whether the annuity were granted before or after the passing of the Annuity Act. 4 T. R. 463.

2 H. B. 12

- 27 If a bond and warrant of attorney to confess a judgment, be given to secure an annuity, the judgment need not be inserted in the memorial, though it be entered up before the memorial is registered.

For the bond and warrant of attorney are the securities on which the grantee relies. *Sherston v. Orlade.*

4 T. R. 824

- 28 But if the only security be a judgment actually entered up, that must be registered. *id.*

825

- 29 A memorandum indorsed on an annuity deed, importing that the grantor for whose life it is granted may redeem it on certain terms, must be inserted in the memorial. *Steadman v. Purchase.*

6 T. R. 737

- 30 So a clause of redemption in the deed. *Harris v. Stapleton*. 7 T. R. 205
- 31 If an annuity deed contain a proviso that the grantor shall repurchase, the memorial of such deed must state the proviso, and the terms and conditions of redemption; if it only refer to the deed, and state the annuity to be redeemable, "on such notice, terms, and conditions as therein expressed," it is insufficient. *Ex-parte Ansell*. 1 B. & P. 62
- 32 So if it only state the time at which execution may be sued out by words of reference to the deed. *Orton v. Knight*. 3 B. & P. 153
- 33 In the memorial of a grant of an annuity by a rector out of his benefice, and which grant, though voidable, is not set aside by the Court on the ground of a covenant by the grantor to pay the annuity; it is not necessary to set out this covenant. 8 T. R. 411
- 34 A deed for securing an annuity containing a stipulation that the trustee should permit the grantor to take the rents and profits until default in the payment of the annuity, and that in case the annuity should be in arrear for sixty days, the trustees might enter and raise sufficient to satisfy it, and suffer the grantor to take the overplus from time to time, is not satisfied by a memorial only describing such deed as containing the usual powers of entry and distress, and perception of the rents and profits of the premises, for better securing and enforcing the payment of the annuity. *Des Enfants v. O'Bryen*. 3 E. R. 559
- 35 The grantor of an annuity was required, for further security, to make her will and deposit it with the grantee, and to make an affidavit that she would not revoke it: a magistrate refused to let her swear the affidavit, but the grantee retained the will. 10l. which had been retained till the grantee should make the affidavit, were then paid to the grantee. The memorial did not notice the will. Held, that the memorial was therefore bad, but that the 10l. was not money retained within § 4. of the stat. 17 G. 3. c. 26. *Ex-parte Mackenzie*. 4 Taunt. 323
- 36 If the grantor of an annuity secures it by a bond, whereby he binds himself, his heirs, &c. it is not necessary that the memorial of the bond should describe it as binding his heirs. *Horwood v. Underhill*. 4 Taunt. 346
- 37 If a memorial of an annuity recites a bond binding the obligor and his heirs, as a bond merely binding himself: it is not cured by reciting the condition to be for payment, by the heirs of the obligor. *Parling v. Parkhurst*. 2 Taunt. 237
- 38 A concession to the grantor of an annuity of a greater facility of redemption, made at a time subsequent to the original grant of the annuity and inrolment of memorial, needs not to be memorialized. *Booth v. Druce*. 4 Taunt. 252
- 39 *Quare*, whether a fine, if levied before the memorial inrolled, is an *assurance*, within the meaning of the annuity act, 17 G. 3. c. 26., required to be memorialized. 14 E. R. 453
- (c) *Consideration, how described.*
- 1 Bank-notes are money within the annuity act, 17 G. 3. c. 26. and may be described as such in the memorial. *Wright v. Reed*. 3 T. R. 554
Cousins v. Thompson. 6 T. R. 335
- 2 The memorial must set forth precisely the manner in which the consideration money was paid. *Kirkman v. Price*. 1 H. B. 309
- 3 If the consideration of an annuity be paid in promissory notes, they must be specifically set forth in the memorial. *Rumball v. Murray*. 3 T. R. 298
- 4 So if paid in country bank-notes. *Morris v. Wall*. 1 B. & P. 208
(But see the opinion of Eyre, C. J. id. 209)
- 5 If the consideration of an annuity be paid by a note or a banker's check, the time when it becomes payable must be set forth in the memorial. *Berry v. Bentley*. 6 T. R. 690
Pool v. Cubanes. 8 T. R. 328
- 6 But it may be stated as money, if the value has been received by the grantor of the annuity before the execution of the deeds. *Ex-parte Michell Ck.* 2 E. R. 137
- 7 If the consideration money of an annuity be paid by an agent on behalf of the principal, it must be so stated in the deed; it is not sufficient to state that it was paid by the principal. *Dalner v. Barnard*. 7 T. R. 248
- 8 But if the consideration be paid to the agent of the grantor, the name of the

- agent need not be inserted. *Crawford v. Phillips*. 2 N. R. 141
- 9 So, if it be paid by the clerk of the bankers of the grantee, the name of such clerk ought to be stated in the deed. *Askew v. Muckreth*. K. B. affirmed in *Dom. Proc.* 1 N. R. 214
- 10 Nor is it sufficient if the mode of payment be truly stated. *Glasse v. Mount*. 7 T. R. 390
- And see 1 B. & P. 63 n.
- 11 A memorial, stating that the consideration money was paid to A. B., and C., "some or one of them," is bad; though it appear that the money was paid on the day on which the deed was executed by them all. *Vaux v. Ansell*. 1 B. & P. 224
- 12 A bond, to secure an annuity set forth in the memorial, recited, that the consideration money, 1400*l.*, was paid on the 24th of *December*, when all the deeds except one were executed and bore date; and the memorial also contained a specific allegation that the consideration-money was paid, but without stating any particular time; but, in fact, that one deed not having been executed by one of the grantors, the grantee delivered over the consideration-money on that day to another of the grantors, to be by him lodged in a banker's hands, in the names of himself and the grantee's attorney till that deed was executed; and such deed was not in fact executed, nor the money actually available to the grantors till the 26th of the same month: Held, that this was a substantial compliance with the Annuity Act, the time of payment of the consideration-money not being specifically required to be stated by that Act, nor being any otherwise material than as entering into the question of the value of the consideration. And held, that upon an issue taken (in an action of debt on bond) in general terms, without reference to the Annuity Act, upon a traverse that the consideration-money was not paid by the grantee to the use of the grantors; evidence that it was so paid on the 26th by the grantee's agent will sustain the affirmative of the issue so generally framed. *Coare v. Giblett*. 4 E. R. 85
- 13 So, where the consideration for an annuity was alleged in the deed to have been paid by the grantee on a particular day, on which day it was

- paid to the common agent of both parties who were at a distance from each other, and by him paid over in a few days afterwards to the grantor on his executing the deed; this was held a sufficient allegation of payment within the statute; for a payment to the agent of the principal, is a payment in law to such principal. *Crawford v. Phillips*. 2 N. R. 141
- 14 It is sufficient to state the true consideration for the purchase of the annuity in the memorial by way of recital. *Sowerby v. Harris*. 4 T. R. 494
- Cousins v. Thompson*. 6 T. R. 335
- 15 If a bond and warrant of attorney to confess a judgment be given to secure an annuity, the warrant of attorney need not express the consideration, if the bond do. *Hodges v. Money*. 4 T. R. 500
- 16 Where 1200*l.* had been paid for the grant of an annuity, and the securities, to prevent their being registered, had been renewed from 20 days to 20 days, and then 600*l.* had been paid for the grant of a further annuity, and the securities renewed in like manner, and sometime after a longer period than 20 days, and afterwards had been registered; a memorial of the annuity, stating the consideration to be 1800*l.* was deemed valid. *Symons v. Mortimer*. 5 T. R. 139
- 17 So, where the consideration of an annuity was stated in the memorial to be 640*l.* 105*l.* of which, was paid in money by the grantee to the grantors at the time, and the remaining 535*l.* was paid by the grantee at the desire of the grantors to another person, to redeem a former annuity granted by them, for which only 480*l.* was paid; this was held a sufficient consideration within the act. *Ex-parte Fallon & Wesc.* 5 T. R. 283
- 18 Money lent and paid at different times for the education and advancement of the defendant, is a good consideration under s. 3. of the Act, and is sufficiently expressed, in the deeds for securing the annuity, under the description of money lent and advanced, and also paid, laid out, and expended, to and for the maintenance, education, and advancement in the world, of the defendant. *Kelfe v. Ambrose*. 7 T. R. 551
- 19 If several deeds be given to secure an annuity, and the consideration be expressed in all, the memorial need

only state the consideration once.
Hodges v. Money. 4 T. R. 500

- 20 A consideration of 10s. paid to a trustee, need not be set forth in the memorial as part of the consideration. *Ince v. Everard.* 6 T. R. 545
- 21 Nor that an annuity was payable for the portion of time from the last quarter-day to the death of the annuitant.

id. ibid.

- 22 If it be agreed by the grantor and grantee of an annuity that the former shall pay the expenses of the writings, and he, immediately after receiving the consideration-money, pay the fair charges of the writings out of that money; no notice need be taken of it in the memorial, but it may be there stated, that the whole consideration-money was paid to the grantor.
Mouys v. Leake 8 T. R. 411

(d) *Memorial, how pleaded.*

- 1 The Annuity Act, 17 Geo. 3. c. 26. as appears from the whole purview of it, is confined throughout to annuities granted upon *pecuniary* consideration, though the first clause, in the terms of it, requires a *memorial of every annuity bond, &c. to be inrolled*: it is not enough, therefore, for the defendant to plead generally to an action on a bond conditioned for the payment of an annuity, the consideration whereof does not appear upon the face of the bond, or condition set forth upon *oyer*, that it was sealed and delivered *after* the passing of the Act, and that *no memorial* of it was inrolled: without shewing that the consideration was *pecuniary*, but such general plea is bad on demurrer. *Horn v. Horn.* 7 E. R. 529
- 2 To debt on an annuity-bond, the defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted; the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for that one of them did not receive any part of it; the rejoinder was held bad: first, because it was a departure from the plea: secondly, because the fact alleged respecting the memorial did not contradict the replication, for the consideration might have been paid to the other obligor

on account of himself and the co-obligor, or to a stranger for them both. *Prace v. The Duchess of Cumberland.* 4 T. R. 585

- Affirmed in *Cam. Scac.* 2 H. B. 280
- 3 In an action on a bond, conditioned for the payment of an annuity, a plea stating that a memorial of the bond had been inrolled, and, after reciting the memorial, that it was not a good and sufficient memorial according to the form of the statute: without stating in what particulars it was defective, or alleging that no other memorial had been inrolled, is bad on special demurrer. *Simmons v. Hunt.* 1 Marsh. 155

For the requisites of a replication, and mode of concluding the same, see De la Rue v. Stewart. 2 N. R. 362

II. GRANT, REGISTRY OF.

- 1 Those annuities only, which are granted in consideration of *something paid*, need be registered. 4 T. R. 792
- 2 If an annuity be granted in consideration of the grantee's giving up his business to the grantor, it need not be registered under the 17 Geo. 3. c. 26. *Crespigny v. Wittenoom.* 4 T. R. 790
- Horn v. Horn.* 7 E. R. 529
- 3 An annuity, granted in consideration of the grantee resigning his situation as master of an academy, in favour of the grantor, need not be registered; even though at the time of the grant the grantee agreed to assign over to the grantor his household furniture, &c. at an appraised value, and to lend a sum of money to the grantor to be repaid with interest. *Hutton v. Lewis.* 5 T. R. 639
- 4 An annuity, secured on lands in fee of equal annual value need not be registered, though it were also secured upon leasehold property. *Ex-parte Michell.* 2 E. R. 137
- 5 The 8th sect. of the Act, which excepts annuities secured by the transfer of stock, only extends to those cases where an actual transfer of the stock is made for the purpose of securing the annuity: Therefore, if *A.*, who is entitled for life to the dividends in certain stock standing in the names of trustees, grant an annuity to *B.* payable out of the dividends, and empower those trustees to pay *B.*, the annuity must be registered. *Hudson v. Skinner.* 6 T. R. 596

- 6 A bond given by a third person, to secure the payment of an annuity, must be registered, as well as the deeds made by the grantor himself. *Rosher v. Hurdiss*. 5 T. R. 678
- 7 A memorial of a warrant of attorney given to confess a judgment, in order to secure an annuity, must be registered. *Hopkins v. Waller*. 4 T. R. 463

III. ANNUITY, WHEN VACATED.

- 1 A, by will gave an annuity to B., directing that B.'s receipt only should be a discharge for it, that B. should not alienate, and that if he did, it should cease and determine: B. became a bankrupt, and his commissioners assigned the annuity with his other effects to the assignees; it was held that the annuity ceased. *Dommett v. Bedford*. 6 T. R. 684
- 2 An annuity being granted in consideration of a debt before secured by bond, the grantee's refusing to deliver up the bond, neither makes the consideration to be falsely described, nor is such a keeping back of part of the consideration as to vacate the annuity. *Cook & Check v. Tower*. 1 Taunt. 372
- 3 And where an annuity was granted in consideration of a bill accepted, which was dishonoured by the acceptor, but paid by the drawer on notice; this was not such a non-payment of the bill as to vacate the annuity, though it was accepted for the accommodation of the drawer, who undertook to provide for the payment of it, but neglected so to do. *id. ibid.*
- 4 An annuity was held void, because one of the trusts (*viz.* that in case the grantor should leave the kingdom, he should pay any extra expense of the grantee in insuring his life), was not stated in the memorial. *Cummins v. Isaac*. 8 T. R. 183
- 5 The several covenant of one grantor of an annuity is not avoided by the infancy of another grantor in the same deed. *Haw v. Ogilvie*. 4 Taunt. 10
- 6 A covenant in an annuity deed, made prior to the stat. 46 Geo. 3. c. 65. s. 115., which statute has a retrospective operation, whereby the grantor of the annuity covenanted to pay the same on the days and times, &c. without any deduction whatever out of the same, or any part thereof, for or in respect of the then present or any then future property tax, is void in respect of its obligation on the grantor

not to deduct the property tax, but not in respect of the payment of the annuity, subject to such deduction. *Readshard v. Balders*. 4 Taunt. 57

- 7 The bankruptcy and certificate of one of several joint grantors of an annuity and covenantors for payment, discharges the bankrupt, but not his co-defendants. *Baxter v. Nicholls*.

4 Taunt. 90

N. B. When an annuity is vacated by the Insolvent Act.—See *tit. Insolvent*.

IV. DEEDS, WHEN SET ASIDE AND CANCELLED.

- 1 Where a rule *nisi* is obtained for setting aside an annuity, the several objections thereto, intended to be insisted on by counsel at the time of making the rule absolute, must be stated in the rule *nisi*. *Reg. Gen. T.* 42 G. 3. 2 L. R. 569
- 2 It is discretionary with the Court of C. P. whether they will give relief under the 4th section of 17 Geo. 3. c. 26. *Cook v. Tower*. 1 Taunt. 372
- 3 A solicitor, who advances his own money on the purchase of an annuity, is not intitled to any commission fee: and if any part of the consideration money be returned to him by the grantor, as a charge for such commission, the Court will set aside the annuity deeds. *Broomhead v. Eyre*. 5 T. R. 597
- 4 A., an attorney, purchases an annuity of B., and having paid the consideration money, receives from B. the amount of a bill for business done, including, by mistake, a charge for searches for incumbrances, which searches had never been made:—Held, that the payment of this charge, so inadvertently made, was not a return of the consideration money within the meaning 17 G. 3. c. 26. s. 4. *Hurd v. Girdlestone*. 1 Marsh. 407
- 5 *Quere*. Whether the Court have a summary jurisdiction under the Act to set aside annuity deeds, &c. for objections arising on the first section of the Act. *Steadman v. Purchase*? 6 T. R. 738, 9
- 6 The grantor of an annuity, having assigned a lease for securing the payment of it, and afterwards sold his interest in the lease to a fair purchaser; it was held by the Court that the latter was not entitled to apply to the Court under the Annuity Act, to have the security delivered up to be cancelled, on the ground of the

- memorial required by the Act not having been duly registered. *Garrod v. Sanders*. 6 T. R. 403
- 7 The Court of C. P. refused to order an annuity bond to be delivered up to be cancelled, though it was void under 17 Geo. 3. c. 26. s. 1.—The motion should have been to stay proceedings. *Symonds & Ur. v. Cobourne*. 1 B. & P. 482
(See also 7 T. R. 253 : 1 B. & P. 66, n.)
- 8 Where an action was brought by executors, on a bond given by the defendant to their testator for securing an annuity, and upon a plea of *non est factum*, they obtained a verdict and judgment, and levied execution thereon, the Court held that this was not a case where they could give relief upon a summary application for a defect in the memorial. *Buck & others, Executors of Buck v. Tyle*. 7 T. R. 495
- 9 Where an ejectment was brought to recover possession of lands extended under an *elegit* upon a judgment confessed, which had been entered up upon a warrant of attorney given for securing an annuity, it is too late for the grantor to object to the consideration of such annuity, upon a summary application for staying the proceedings after verdict in such ejectment, because he had an opportunity of making his defence to the action. *Withy v. Woolley*. 7 T. R. 540
- 10 Where several persons who had purchased annuities of A. agreed to give up these annuities on receiving a certain sum and a bond to A. payable at a future day, retaining their annuity securities till the bond became payable; the Court of C. P. refused to order any of such securities to be delivered up on a summary application, although they might be void or useless. *Goring, Bart. v. Welles*. 1 B. & P. 395
- 11 If a bond and warrant of attorney to confess a judgment, be given to secure an annuity, and the date of the latter be not set forth in the memorial, the Court will only set aside the latter. *Ex-parte Chester*. 4 T. R. 694
- 12 But this the Court of K. B. will do on motion, though no action be brought, or judgment entered up, under the warrant of attorney. *id. ibid.* See *Thurkill v. Wallace*. 4 T. R. 695, n.
& 1 B. & P. 66, n.
- 13 A fine levied of a rent charge, assigned by way of annuity, will not give the Court of C. P. jurisdiction to set aside the annuity on account of a defective memorial, there being neither a warrant of attorney to enter, nor judgment actually entered in that Court. *Craufurd v. Caines*. 2 H. B. 438
- 14 Where, upon a summary application to set aside an annuity for non-compliance with the requisites of the act, the rule was discharged upon discussion of the merits, the Court will not entertain a similar application between the same parties on the same state of facts, though grounded upon a new objection to the annuity, which was not before urged or considered. *Great-head v. Bromley*. 7 T. R. 455
- 15 Where a memorial of an annuity omitted to register certain bonds, whereby the grantor, for whose life the annuity was granted, bound himself to pay the grantee a certain sum if he went abroad in a military capacity during three several years following the grant of the annuity : Held, that the annuity was thereby vacated; and the Court thereupon set aside the warrant of attorney and judgment given for securing the annuity; but said it belonged to another Court to set aside the other instruments executed for the same purpose. *Chawner v. Whaley*. 3 E. R. 500
- 16 Where a former rule for setting aside an annuity was discharged, because it did not appear that an indorsement (not memorialized), containing a clause of redemption (bearing date after the deed), had been made prior to the execution of it; in which case it could not be received in evidence for want of being stamped; the Court will not enter into the question on a subsequent rule; although it appear clearly that the indorsement was made before the deed was executed: and that such clause of redemption was not inserted in the memorial. *Schumann v. Weatherhead*. 1 E. R. 537
- 17 The Court of C. P. set aside a judgment and warrant of attorney given to secure an annuity for a defect in the memorial, without costs, because it was the case of an executor. *Dickenson, Executor, &c. v. Boyne*. 1 B. & P. 335
- 18 If the validity of an annuity has come in judgment before a Court of competent jurisdiction, no other Court will suffer the same objection to be stirred again. *Hart v. Lovelace*. 6 T. R. 471
(But see 2 E. R. 566.)

- 19 *A.* grants an annuity for his own life to *B.*, to secure which a bond and warrant are given, and judgment entered; *B.* dies; after his death the Court of C. P. will not admit evidence of a parol agreement between the parties, that *A.* should be at liberty to redeem the annuity on certain terms, (especially if it be the evidence of the attorney concerned for *B.*), as a ground to order the securities to be given up, and satisfaction entered on the judgment. *Haynes v. Hare.* 1 H. B. 659
- 20 If the grantor of an annuity pay it without objection, during the life-time of the person who negotiated the business for the grantee, the Court will not set aside the annuity deeds, on a representation of facts that could only have been answered by such agent for the grantee. *Poole v. Cabanes.* 8 T. R. 328
- 21 An annuity granted in 1790, the grantee of which died in 1794, and the interest of which was regularly paid till 1800 without objection, shall not be impeached for a supposed defect of consideration, which might have been explained by the grantee, if living. And *semble*, that an annuity paid without objection for more than six years, shall be protected by analogy to the statute of limitations against any such objection *dehors* the memorial, without strong reasons to the contrary. *Ex-parte Maxwell.* 2 E. R. 85
- 22 Though, perhaps the grant of a rent, charged by a rector or vicar out of his benefice is void by stat. 13 Eliz. c. 20; yet, if in such a deed of grant, he also covenant personally to pay the said rent charge, or annuity, and give a warrant of attorney to confess judgment as a collateral security for payment of the annuity, the Court will not order the deeds to be delivered up to be cancelled. *Mouns v. Leake, Ck.* 8 T. R. 411
- 23 The Court will not set aside annuity deeds for a mere clerical mistake in the memorial; as if, in stating the assignment of a term for 61 years, it set forth a term for 62 years. *Ince v. Everard.* 6 T. R. 545
- 24 Or if, after reciting the true consideration, *e. g.* 280*l.* it state afterwards "*which said sum of 250*l.* was paid,*" &c. *id. ibid.*
- 25 If it be set forth in the memorial, that the consideration was so much in money paid, when the real consideration was part in money and the giving up of a former annuity, the Court will set aside the securities. *Washburn v. Birch.* 5 T. R. 472
- 26 So, if part of the consideration be paid over by the grantee to a third person, with the consent of the grantor, or is accounted for to the grantor by a note from a third person, and it is stated in the memorial that the whole consideration was paid in money, the Court will set aside the annuity deeds. *Watts v. Millard.* 5 T. R. 593
- 27 It is no objection to a deed securing an annuity, that it assigns "the salary of the grantor of so much *per annum*," without saying what salary it is. *id. ibid.*
- 28 An annuity granted by *A.* to *B.*, and which was regularly registered, was redeemed by virtue of a clause of redemption in the deed, when the deeds were delivered up to the grantor uncanceled; and he and the attorney for the grantee agreed, that if at any future time, the former should wish to borrow money on the same terms, those deeds should be given as a security: on a subsequent application by the grantor, the attorney advanced the same money on having the same deeds delivered to him; but because this grant of the annuity was not registered, the Court set aside the annuity, and ordered the deeds to be cancelled. *Hammond v. Foster.* 5 T. R. 635
- 29 Where a security was improperly described, the Court refused to direct the warrant of attorney to be delivered up to be cancelled, but ordered it to be delivered into the custody of the proper officer of the Court. *Denne v. Dupuis.* 11 E. R. 134
- 30 If, in the deed securing an annuity, it be declared that the judgment, to be obtained under a warrant of attorney given at the same time, shall be only a collateral security for the regular payment of the annuity, and that no execution shall issue thereon till default made in the payment for 14 days; and the memorial, in setting forth the warrant of attorney, only states generally, that "it was executed for the better securing the payment of the annuity, as in the above stated deed is particularly mentioned," the Court will set aside the annuity. *Cunningham v. Mackenzie.* 2 B. & P. 598
- 31 An annuity being secured upon land,

expressed to be of equal or greater annual value; the Court of C. P. before they will set aside, upon the inferiority of the value of the land, a warrant of attorney given as a collateral security for the want of a memorial, will direct an issue to try the value of the land, and will not try that matter upon affidavits, especially, if there be conflicting evidence of the value of the land. *Saunders v. Wright*. 1 Taunt. 369

32 Where the memorial of an annuity stated that "the instruments given to secure the annuity, were witnessed by four persons," and it appeared by the answer on oath of the assignee of the grantee that three of the instruments were attested by two persons only, the Court, on application, though at the distance of near twenty years, and after the principal parties and witnesses to the transaction were dead, set aside the warrant of attorney; the merits of such objection not depending on testimony lost by the delay. *Ex-parte Mackreth, Kut.*

2 E. R. 563

33 So the Court of C. P. did not hold themselves precluded from interfering to give relief, though 18 years had elapsed since the grant of the annuity, and the grantee was dead. *Van Braam v. Isaacs*. 1 B. & P. 454

34 Where several deeds were executed to secure one annuity, and the christian name of the witness to one of the deeds was omitted in the memorial, the Court refused to set aside the deeds. *Watts v. Millard*. 5 T. R. 598

V. SECURITIES, VOID OR VOIDABLE.

1 An annuity deed, and every deed, &c. by which an annuity is secured, is *absolutely void*, and not merely voidable, if the memorial be not registered according to the directions of the act. *Crossley v. Arkwright*. 2 T. R. 603

2 Therefore, where a person, against whom a writ of *fi. fa.* is taken out, is in possession of goods under a deed which was given in consideration of an antecedent debt, and a small annuity payable therefrom, the sheriff is warranted in returning *nulla bona* if the memorial of the annuity be not registered.

id. ibid.

3 And a creditor of the grantor may take advantage of it. *Saunders v. Hardinge*. 5 T. R. 9

4 Therefore, where a memorial stated a

deed-poll, by which, (after reciting that *A.* had formerly granted an annuity of 24*l.* to *B.*, who had assigned to *C.*, and that *A.* had agreed to grant a further annuity of 7*l.* to *C.* for 42*l.*) certain tithes, &c. were assigned by *A.* to *C.*; and also a bond by *A.* to *C.* in 409*l.*; for securing "one annuity of 31*l.*" without reference to the deed poll: Held, that the consideration for the annuity secured by the bond should have been stated, and that for want of it the bond was void; the annuity mentioned in it, not appearing to be the same annuity as that secured by the deed-poll. *Saunders v. Hardinge*. 5 T. R. 9

5 If the memorial of a deed to secure an annuity be defective, the whole deed is void to all intents, even though there are other parts of it not connected with the annuity. *Danu d. Dolman v. Dolman*. 5 T. R. 641

6 Therefore, where *A.* being entitled to a life estate, subject to a condition not to charge or encumber it, granted an annuity, and demised the land as a security: but there being a defect in the memorial of the annuity, it was held that the deed was wholly void, and did not work a forfeiture of the estate. 5 T. R. 641

7 A grant of a rent charge by a rector or vicar out of his benefice is void by stat. 13 Eliz. c. 20. *Mouys v. Leake*. 8 T. R. 411

8 The full pay of a military officer cannot be assigned by way of annuity. *Barwick v. Reade*. 1 H. B. 627

9 If an instalment of an annuity secured by bond be not paid on the day, the bond is forfeited, and the penalty is the debt in law. *Judd v. Evans*. 6 T. R. 399

10 A deed, granting an annuity within the time included by relation back in the property tax act 46 G. 3. c. 65., reciting the agreement for the purchase at a certain price of certain annuity, *free from the property or income tax*, and covenanting for the payment of it *without any deduction in respect of the property or income tax*, or other parliamentary taxes, &c. is not void *in toto*, but only to the extent of such disallowance. *Howe v. Syngé*. 15 E. R. 440

11 If several deeds be given to secure an annuity, and one of them be not properly inrolled, *quare* if all of them be

not void by the Annuity Act? *Hart v. Lovelace.* 6 T. R. 471
But see 11 E. R. 134.

VI. CONSIDERATION, WHEN RECOVERABLE.

- 1 To entitle the grantee of an annuity to recover back the price, as money had and received, it is sufficient if the grantor has communicated to the grantee that there are defects in the memorial, and has treated for a compromise on the ground of the annuity being void, although the grantee neither demands payment of the arrears, nor tenders new securities, nor delivers up the old ones, before he sues. *Waters v. Sir William Mansell, Bart.* 3 Taunt. 56
- 2 And although the grantor has taken no active measures to set aside the securities. *id. ibid.*
- 3 The consideration of an annuity, being partly a debt antecedently due for goods sold, and the residue thereof money paid at the time of granting it, the grantee may recover back in an action for money had and received the whole consideration, if the annuity be set aside for informality in registering the memorial. *Shove v. Webb.* 1 T. R. 732
- 4 *Quære*, If part of the consideration be for goods sold at the time of granting the annuity, whether that can be recovered? *id. ibid.*
- 5 Where the grantor of an annuity, secured by a deed, bond, and warrant of attorney, applied by motion to set aside the annuity, and have the securities cancelled, on account of an error in the memorial as to the description of the warrant of attorney; and the Court did accordingly direct the warrant of attorney to be cancelled, and set aside a judgment entered up upon it: Held, that the grantee might recover back the consideration-money in *assumpsit*, and was not put to his action on the deed or bond; because part of the securities being taken away, the consideration for the money, *viz.* one entire assurance, consisting of several securities, has failed. *Scurfield v. Gowlard.* 6 E. R. 241
- 6 Where an annuity bond, granted by two, becomes void by the neglect of the grantee in not registering the memorial, he cannot recover back any part of the consideration money from

the one, who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. *Straton v. Rastall.*

2 T. R. 366

- 7 Where the grantee of an annuity, set aside for a defective registry, brings an action for money had and received, to recover back the consideration money paid for it, the grantor may, under a plea of set-off, set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks.* 3 E. R. 16
- 8 Premiums of life insurance cannot be charged on the vendor of a rescinded annuity. *Burdon v. Browning.*

1 Taunt. 522

- 9 *Quære*. Where a contract of life annuity is avoided, and the grantee is to receive back his principal and legal interest, if annuity instalments to a greater amount than the principal and interest have been paid: Whether it is reasonable that the grantee shall refund? *Burdon v. Browning.*

1 Taunt. 520

VII. WHAT GRANTS ARE WITHIN THE ACT.

- 1 *A.* who was tenant for life, with remainder to trustees, &c. remainder to his first and other sons in tail, remainder to himself in fee, suffered a recovery with *B.* his only son, and declared the uses to such person, and for such estates, &c. as they should jointly appoint; they jointly granted an annuity, and appointed and granted the lands to *C.* for a term of years in trust for the grantee: Held, that this case came within the exception of the act. *Holsey v. Hales, Bart.* 7 T. R. 194
- 2 An annuity, granted by one who was mortgagor in fee in possession of lands on which it was secured, of greater annual value than the interest of the mortgage, and the annuity is within the exception of s. 8. of the Annuity Act, as a grant of an annuity by one who was *seised in fee simple*; and therefore no memorial of it need be enrolled: the *seisin in fee* then excepted, extending by parity of reasoning, to *equitable* as well as *legal* estates. *Amhurst v. Skynner.*

12 E. R. 263

APPRENTICE.

- 1 The statute 20 G. 2. c. 19. s. 4. enabling two magistrates, upon application or complaint made upon oath by any master against such apprentice as is described in the act, touching any misdemeanour in such service, to hear and determine the same, and to commit or discharge the apprentice, extends to a complaint in writing preferred by the master, and verified by the oath of another person. *Finley v. Jowle*. 12 E. R. 248
- 2 And this statute is not repealed by stat. 6 G. 3. c. 25. s. 1., empowering the justice to oblige an apprentice absenting himself from his master's service, to serve out, after the expiration of the apprenticeship, such time of absence, or to make satisfaction for it; and in default of such satisfaction, to commit the apprentice: for the remedy given to the master by the latter statute, is cumulative to the punishment inflicted on the apprentice by the former for his offence. *Gray v. Cookson and Clayton*. 16 E. R. 13 N. B. *The stat. 5 Eliz. as to apprentices setting up trades, is repealed by 54 G. 3. c. 96.*
- 3 The stat. 5 Eliz. c. 4., avoiding all indentures of apprenticeship other than for 7 years, is to be construed as rendering indentures made for a less time voidable only, and not void. 16 E. R. 13
- 4 But such indenture cannot be avoided by the mere act of an apprentice absenting himself from his master's service, which is an offence under the statute 20 G. 2. c. 19. *id. ibid.*
- 5 And generally, it seems that no act can be relied on as such avoidance, in an action of trespass against the convicting magistrates, except it appears on the face of the conviction. *id. ib.*
- 6 So, a refusal of the apprentice to return into the service of his master, when urged to it by the magistrates themselves in the course of the inquiry, upon the complaint of the master, or a prior absenting himself by the apprentice from the service; is not available in support of such action against the conviction. *ib.*
- 7 But where the master had agreed by indorsement (unstamped), on the indenture to cancel it, "provided the apprentice made no engagement or entered into any person's service in the town of N.;" it was held that the apprentice setting up a trade for himself in N. was a breach of the condition, which entitled the master to recall him back into his service. *Gray v. Cookson*. 16 E. R. 13
- 8 *Quære*. Whether a person, not having served as apprentice to the trade of a miller, who embarked his capital in a mill, which he superintends, and derives the profits of it, through the agency of a foreman statutorily qualified, to whom he gave directions as to the order in which the corn of the several customers should be ground, but no otherwise interfered in the management, and never engaged in the manual exercise of the trade; be liable to the penalty given by the stat. 5 Eliz. c. 4. s. 31? *Keen v. Dormay*. 15 E. R. 161
- 9 Exercising a trade for seven years without molestation, exempts from the penalty of the Act. *Wallen v. Houlton*, in 1759, before all the judges. *ibid.* 165 in notd.
- 10 *Quære*. Whether a master who exercises a trade not within the statute 5 Eliz. c. 4. can legally take an apprentice? *Guy v. Felton*. 4 Taunt. 876
- 11 A contract under seal, and stamped, to serve another for three years, at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship. *Rex v. Rainham (Inhab.)* 1 E. R. 531
And see tit. Stamps.
- 12 *Quære*. whether an apprentice by the custom of London is compellable to serve after twenty-one? *Ex-parte Eden*. 2 M. & S. 226
- 13 No action can be maintained for harbouring an apprentice as such, if the master to whom he was bound was then not an housekeeper, and of the age of twenty-four years. *Guy v. Felton*. 4 Taunt. 876
- 14 *Quære*. Whether in an action by a master for harbouring his apprentice, it is necessary for him to prove that he has made oath that the premium

- mentioned in the indentures is the whole premium he has received? *Guy v. Felton.* 4 Taunt. 876
- 15 The master of an apprentice who has been seduced from his service to work for another, may waive the tort, and bring *indebitatus assumpsit* for work and labour done by his apprentice, against the person who employed him. *Lightly v. Clouston.* 1 Taunt. 112
- 16 The captain of a ship of war, detaining an apprentice who had been impressed, after notice by such apprentice, is liable in an action by the master for wages for the service of the apprentice. *Eades v. Vandeput.* 5 E. R. 39. n.
- 17 An apprentice, who at the age of 17, was bound by indenture (which stated her to be 14) for seven years, is entitled to be discharged at 21, being brought up by *habeas corpus.* *Ex-parte M. A. Davis.* 5 T. R. 715
- 18 The Court refused to discharge an apprentice who had bound himself at 18 to serve till 25, and who after attaining 21 had been committed to the house of correction for a mis-

- demeanor against his master; it appearing by the return that he was committed in execution upon a regular conviction; upon which conviction nothing appeared of the objection arising from the age of the apprentice. *Ex-parte Gill.* 7 E. R. 376
- 19 But the Court said, that such apprentice, having made such objection to the validity of the indentures before the convicting magistrates who disregarded it, has a remedy against them. *id. ibid.*
- 20 If an apprentice be impressed into the sea service, the master cannot sue out a *habeas corpus* to bring him up to be discharged, though the apprentice may: But the Lord Chief Justice may issue a warrant to bring him up, on the application either of the master or of the apprentice. *Rex v. Edwards.* 7 T. R. 745
- 21 And the master has also his remedy by action if his apprentice be improperly taken from him. 7 T. R. 745. 5 E. R. 39
- And see *Habeas Corpus, Impressment.*

ARREST.

- I. FOR WHAT CAUSE OF ACTION ALLOWED.
- II. WHO ARE PRIVILEGED FROM.
- III. ILLEGAL ON SUNDAY.
- IV. RE-ARREST, WHEN ALLOWED.
- V. OFFICERS, FEES ON WARRANT.
- VI. ——— FEES OF.

- I. FOR WHAT CAUSE OF ACTION ALLOWED.
- 1 None shall be held to special bail in action of trover or detinue, without a judge's order. *Reg. Gen. K. B. & C. P. Hil. 48 G. 3. 9 E. R. 325. 1 Taunt. 203*
- 2 A defendant may be held to special bail in an action on a judgment for 10l. for damages and costs; though the original debt alone were under 10l. *Lewis v. Pottle.* 4 T. R. 570
- 3 The Court of C. P. will not permit a defendant to be holden to bail in an action founded on the prothonotary's *allocatur* for costs. *Fry v. Malcolm.* 4 Taunt. 705
- 4 Two tradesmen agree to deal with each other by way of barter; if the one refuses to state the account, the

other may arrest him for the whole value of the goods which he has furnished to the party refusing. *Germain v. Burrows.* 5 Taunt. 259

II. WHO ARE PRIVILEGED FROM.

- 1 The king's servants are privileged from arrest; and if taken in execution, the Court will discharge them on motion. *Bartlett v. Hebbes.* 5 T. R. 686
- 2 A menial servant of his majesty is not liable to arrest, although he publicly carries on trade, and the debt was contracted in the course of his trade. *King v. Forster.* 2 Taunt. 167
- 3 One who had been appointed consul-general from the Porte, but who had been dismissed from his situation several months, and another person appointed to succeed him, is not privileged from arrest: though at the time of his arrest he had not received any official notification of his dismissal, and continued in fact to exercise his office till after his arrest. *Marshall v. Critico.* 9 E. R. 447 1 Taunt. 106

- 4 *Qu.* Whether a consul is privileged from an arrest? *Clarke v. Critico.* 1 Taunt. 106
- 5 A secretary of a foreign minister is privileged from arrest, though his name be not registered at the office of the Secretary of State. *Hopkins v. De Roebeck.* 3 T. R. 79
- 6 All persons who have a relation to a cause which calls for their attendance in Court, whether they are compelled to attend by process or not, are entitled to privilege from arrest, *eundo et redeundo*, provided they come *bonâ fide*. *Meekins v. Smith.* 1 H. B. 636
- 7 In which description *bail* is included. 1 H. B. 636
- 8 And *barristers* upon the circuit. *ib.*
- 9 So also a plaintiff, who was attending the sittings in expectation of his cause being tried, is privileged from arrest while waiting in the vicinity of the Court before the day of trial. *Childerston v. Barrett.* 11 E. R. 439
- 10 *Bail* attending to justify are entitled to protection from arrest on *mesne* process. *Rimmer v. Green.* 1 M. & S. 638
- 11 A defendant in a cause, attending an arbitrator to be examined as a witness under a rule of Court, is privileged from arrest, *eundo, morando, et redeundo*. *Spence v. Stewart, Bart.* 3 E. R. 89
- 12 The Court refused to discharge a person in custody by process of the Sheriff's Court, in a cause afterwards removed into this Court, because he was arrested while attending commissioners of bankrupt to prove a debt. *Kinder v. Williams.* 4 T. R. 377
- 13 The clause in the Mutiny Act, s. 63. which exempts soldiers from arrest in cases where the demand is under 20*l.* is confined to civil actions. 2 T. R. 274; 5 T. R. 156
- 14 A volunteer drill-serjeant sworn and receiving constant pay, as described by 44 G. 3. c. 54. s. 20, 21. is not privileged from arrest for a debt under 20*l.* *Rickman v. Studwick.* 8 E. R. 105
- 15 The acceptor of a bill, which becomes due and is paid by him after the bankruptcy of the drawer, cannot arrest the drawer within the time allowed him by stat. 5 G. 2. c. 30. s. 5. for attending the commissioners to be examined. *Darby v. Baughan.* 5 T. R. 209
- 16 If a bankrupt surrender within 42 days after notice, &c. the commissioners may, by their own authority, afterwards enlarge the time for taking his examination, during which enlarged time he is privileged from arrest. *Davies v. Trotter.* 8 T. R. 475
- 17 A bankrupt attending upon notice for that purpose, a meeting of the commissioners to declare a dividend of his estate, is protected from arrest at the suit of a creditor during such attendance, although several years after his last examination. *Arding v. Flower.* 8 T. R. 534
- 18 The Court will not discharge a defendant out of custody on filing common bail, on the ground that he has become insane since the arrest. *Kernot v. Norman.* 2 T. R. 390
- 19 Nor even on the ground that he was insane *at the time* of the arrest. *Nutt v. Ferney.* 4 T. R. 121
- 20 And the Court of C. P. thought they could not, and accordingly refused to do it, though a commission of lunacy had issued against him previous to the arrest. *Steel v. Alan.* 2 B. & P. 362
- 21 Neither will the Court discharge the *bail* on the ground of the defendant's having become a lunatic since the commencement of the action. *Ibbotson v. Lord Galway.* 6 T. R. 133
And see tit. Bail.
- 22 An arrest within the king's palace, by an officer of the Palace Court, of a person not of the household, against whom a writ has issued out of that Court, is good, though no leave to make the arrest has been obtained from the Board of Green Cloth; and no indictment will lie against the officers making it. *Rex v. Stobbs.* 3 T. R. 735
- 23 If a person having committed a felony in a foreign country comes into England, he may be arrested here, and conveyed and given up to the magistrates of the country against the laws of which the offence was committed. Per *Heath J. Mure v. Kaye.* 4 Taunt. 43
For the privileges of a married woman from arrest, see tit. Baron & Feme.

III. ILLEGAL, ON SUNDAY.

- 1 *A.* was arrested at the suit of *B.* and discharged, the sheriff not knowing that there was also a detainer in his office at the suit of *C.*: on the *Sunday* following he was arrested at *C.*'s suit, and discharged by the Court, by vir-

- tue of stat. 29 Car. 2. c. 7. s. 6. The arrest on the *Sunday* being considered as an original taking, and not as a re-taking after an escape. *Atkinson v. Jamieson*. 5 T. R. 25
- 2 One who was convicted of a penalty under the Lottery Act, cannot be apprehended on a *Sunday* for nonpayment of the forfeiture, it not being a constructive breach of the peace; though the defendant might have been indicted in a criminal manner on the Act, in which case he might have been arrested on a *Sunday*. *Rex v. Myers*. 1 T. R. 265
- 3 A rule nisi for an attachment for nonpayment of money pursuant to the master's *allocatur* cannot be served on a *Sunday*. *McIlham v. Smith*. 8 T. R. 86
- 4 Where a writ is returnable on a *Sunday*, it must be executed at latest on the *Saturday*: and where a defendant in such case was arrested on the *Monday* morning, and detained till the writ was renewed, the arrest was held to be illegal. *Loveridge v. Plaistow*. 2 II. B. 29

IV. RE-ARREST, WHEN ALLOWED.

- 1 In general, a defendant cannot be held to bail twice for the same cause; but if he be discharged out of custody the first time for some act for which the plaintiff is not answerable, *e. g.* an alteration in the warrant to arrest by the sheriff's officer, without the plaintiff's knowledge, in such case the defendant may be again held to bail for the same cause of action. *Housin v. Barrow*. 6 T. R. 218
- 2 *Secus*, if for default of the plaintiff in not declaring in time, and the second writ be for the same cause of action in substance; though the first affidavit to hold to bail were adapted to a demand in trover for goods, and the second for money had and received, upon a supposition that the goods had been sold by the defendant for the plaintiff, and the money received to his use. *Inlay v. Ellefsen*. 3 E. R. 309
- 3 A defendant, who has been arrested in a foreign country, may be arrested here again for the same cause of action. *Maule v. Murray*. 7 T. R. 470
- 4 Defendant, having given a bond conditioned for the payment of a sum of money, if a sentence of a Vice-Admiralty Court should be affirmed on appeal, and the appeal having been dismissed for want of prosecution, defendant was arrested and holden to bail; the appeal being restored upon petition, the action was suspended and the bail discharged; but being again dismissed, a new action on the bond was commenced, and the defendant was again arrested and holden to bail. From this second arrest the defendant applied to be discharged; but the Court of C. P. rejected the application. *Woodmeston v. Scott*. 1 N. R. 13
- 5 *A.* having been arrested at the suit of *B.*, gave him a draft for part of the demand, and agreed to settle the remainder in a few days; the draft was dishonoured: on which *B.* again arrested him on the same affidavit; and it was held regular. *Puckford v. Maxwell*. 6 T. R. 52
- 6 Plaintiff having recovered judgment and levied part under a *fi. fa.*, arrested the defendant for the residue in an action on the judgment, he not having been arrested in the original action; and the Court of C. P. refused to discharge him. *Hesse v. Stevenson*. 1 N. R. 133
- 7 Where a cause, in which the defendant has been holden to bail, is referred to arbitration, and the arbitrator awards to the plaintiff a sum exceeding 10*l.* the defendant may be holden to bail again in an action upon the award. *Collins v. Powell*. 2 T. R. 756
- 8 A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution, cannot be held to bail again upon bills of exchange given by him before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution, till default made in payment of the bills. *Daniel v. Dodd*. 8 E. R. 334
- 9 The defendant having been holden to bail, but afterwards discharged on a common appearance, on account of the plaintiff having declared on a different cause of action from that mentioned in the writ and affidavit, the Court of C. P. held that he might be holden to bail again, in an action on the judgment. *De-la-Cour v. Read*. 2 H. B. 278

10 If a defendant, being arrested upon process in K. B. give a warrant of attorney to confess judgment, and be afterwards holden to bail in C. P. in an action upon that judgment, that Court will discharge him upon a common appearance. *Salkeld v. Lands.*

2 B. & P. 416

11 An attachment for non-payment of money to *A.*, having issued against *B.*, and the process being in the hands of an officer who had not been able to serve *B.* therewith, *B.* was met by *A.* in the street, and carried by violence to the chambers of *C.*, who was *A.*'s attorney, and there detained, while the original process was sent for and served upon him; the officer also was sent for, (but not by *A.*), and on *B.*'s leaving the chambers of *C.* he was arrested: the Court of C. P. held this arrest illegal, and discharged *B.* *Birch v. Prodger.*

1 N. R. 135

V. OFFICERS, DUTY ON WARRANT.

1 In an action against a member of parliament, for a breach of privilege, the speaker may issue his warrant to the proper officer, under which, if the party refuse to open his door and admit the officer, after demand made and notification of his business, the officer may break into the house, as he may in all cases of executing process of contempt issued by courts of justice. *Burdett, Bart. v. Abbott.*

14 E. R. 154

2 The officer, charged with making such arrest, may, if he find it necessary to the execution of his warrant, and to prevent personal danger to himself and his ordinary assistants, from a mob assembled in extraordinary numbers, and with a shew of force to overawe the civil power, call in the assistance of the military. *Burdett v. Colman.*

14 E. R. 188

3 A warrant of the Chief Justice of K. B. to arrest a party, "to the end that he may become bound, &c. to appear at the next session of Oyer and Terminer, &c." means the next session after the arrest, and not after the date of the warrant: Therefore, the officer executing it, may justify an arrest even after the lapse of several sessions subsequent to the date of the warrant: It is not necessary to renew such war-

rant every session if not executed before. *Mayhew v. Parker.*

8 T. R. 110

4 An officer, to whom a warrant is intended to be directed, cannot arrest the party before he has the warrant: If he do, the Court will discharge the defendant out of custody. *Hall v. Roche.*

8 T. R. 187

5 Whether the officer be not bound to produce the warrant to the party arrested if it be demanded? *id.*

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6 The bail-bond was ordered to be delivered up to be cancelled, because the defendant was arrested before the officer had any warrant, and before the writ was delivered to the sheriff.

Hall v. Roche.

id. 187

7 If the sheriff make a warrant to four, jointly and not severally, and one make the arrest, the Court will not interfere to discharge the defendant on motion. A warrant to four jointly and not severally, clearly will not authorize an arrest by one. *Boyd v. Durand.*

2 Taunt. 161

8 The sheriff having directed a warrant to *A.* and all his other officers to arrest *B.*, *A.* afterwards inserted the name of *C.*: Held, that the warrant was illegal, and the arrest by *C.* consequently void. *Housin v. Barrow.*

6 T. R. 122

N. B. For the duty of sheriffs on arrest, see *tit. Sheriff.*

VI. OFFICERS, FEES OF.

1 Justices in sessions have no authority to fix the bailiff's fees for arrests in civil suits: nor will the Court allow more than the usual fee of one guinea, though a larger sum has been in fact paid under the sanction of a table of fees settled by the sessions, and acted upon in practice for many years. *Boldero v. Mosse.*

3 T. R. 417

2 In an action on 32 G. 2. c. 28. against a sheriff's officer, for taking a larger fee upon an arrest than is allowed by law, the plaintiff must prove the sum allowed by law, the stat. 23 H. 6. c. 9. not being the rule; and the Court of C. P. will not set aside a nonsuit grounded on the want of such evidence, in order to enable the plaintiff to recover the excess under the money counts, since he might have obtained redress by a summary application. *Martin v. Slade.*

2 N. R. 59

3 A sheriff's officer is not liable to the

penalties of 32 G. 2. c. 28. s. 1. for carrying a person taken in execution to prison within twenty-four

hours; that clause only relating to persons arrested on mesne process. *Evans v. Atkins.* 4 T. R. 555

ARTICLES OF THE PEACE.

1 One, against whom articles of the peace are exhibited, is not entitled to read affidavits in his behalf, to contradict the facts sworn to against him in such articles, and prevent his giving security. *Rex v. Doherty.*

13 E. R. 171

2 Where a person exhibits articles of the peace, and swears that her life is in danger, the truth of the facts cannot be controverted. *Lord Vane's case.*

13 E. R. 171, *notd.*

3 There ought to be a reasonable foundation on the face of the articles, to induce a fear of personal danger, before the Court will require sureties of the peace. *id.* 172

4 A wife may sue a *supplicavit* in chancery against her husband, and to find sureties not to beat or evil intreat her, *aliter quam causa regiminis et castigationis.* *id.* *ibid.*

5 The facts stated in the articles are to

be considered as true till the contrary appears upon a proper prosecution.

13 E. R. 172

6 Where there are articles of separation between the husband and wife, if the husband afterwards confirm her, she may have a *habeas corpus*, and be set at liberty. *id.* 173

7 Upon articles of the peace being exhibited, the Court may require bail for such a length of time as they shall think necessary for the preservation of the peace, and are not confined to a twelvemonth. *Rex v. Bowes.*

1 T. R. 696

8 Where the Court had at first required bail for fourteen years, they afterwards lessened the time to two years on its appearing to them that an information was depending against the defendant on the same account, which must necessarily be determined within that time. *id.* *ibid.*

ASSUMPSIT.

I. CONSIDERATION,

(a) *Sufficient.*

(b) *Illegal.*

II. INDEBITATUS, FOR WORK AND LABOUR.

III. — WHERE MAINTAINABLE IN RESPECT OF SPECIAL CONTRACT.

IV. — FOR MONEY PAID.

(a) *On express and implied promises.*

(b) *In consideration of services and works.*

V. — FOR MONEY HAD AND RECEIVED.

(a) *To try the right to an Office.*

(b) — *recover money paid by mistake.*

(c) — *on failure of consideration.*

(d) *To recover money paid on an Illegal Contract.*

(e) — *under Legal Process.*

(f) *To recover money obtained by Fraud.*

(g) — *from Trustees and third Persons.*

VI. PLEADINGS.

VII. EVIDENCE.

(a) *Consideration, sufficient.*

1 A moral obligation, is a good consideration for a promise to pay. *Lee v. Muggeridge.* 5 Taunt. 46

2 A breach of trust, may be the ground of an *assumpsit.* *Smith v. Jameson.*

5 T. R. 603

3 A. having proposed to sell goods to B., gave him a certain time at his request to determine whether he

would buy them or not; *B.* within the time determined to buy them, and gave notice thereof to *A.*; yet *A.* was not liable in an action for not delivering them: for *B.* not being bound by the original contract, there was no consideration to bind *A.* *Cooke v. Oxley.* 3 T. R. 653

- 4 A master is not liable upon an implied *assumpsit* to pay for medical attendance on a servant who has met with an accident in his service. *Wennal v. Adney.* 3 B. & P. 247

- 5 *N. B.* And see a learned note by the reporters respecting the validity of an express promise founded on merely a moral obligation. *id.* 249

- 6 The law will not raise an implied promise in the parish where a pauper is settled, to reimburse the money laid out by another parish in which he happened to be, in providing necessary medical assistance for him. *Atkins v. Banwell.* 2 E. R. 505

- 7 An agreement between parties to a suit in Chancery binding themselves, their executors, and administrators, made an order of that Court, and acted upon therein as such, may be the ground of an *assumpsit* at law. *Smith v. Whalley.* 2 B. & P. 482

- 8 The defendant promised to pay the plaintiff 5*l.* if he could provide a tenant for certain premises, and get him 350*l.* for his lease. The plaintiff procured one *S.*, with whom the defendant entered into an agreement, and received 50*l.* as a deposit: *S.*, not completing his engagement, the defendant consented to release him, but retained the 50*l.*: Held, that this was a substantial performance of the condition on the part of the plaintiff, and that he was therefore entitled to recover the 5*l.* *Horford v. Wilson.* 1 Taunt. 12

- 9 The defendant, on occasion of there being a great run upon a banking-house, went to the bank and told the holders of notes issued by the bank, who were waiting for payment, that he had come to a resolution to support the bank with 30,000*l.*, at which the holders then present were satisfied, and said they would take no more money than was necessary, and would keep the rest of their notes till they got again into currency; and afterwards the defendant signed the following written paper, "I do hereby autho-

rize *G. B.* to assure the inhabitants of *Pembroke* and its vicinity, that I do hereby undertake to be accountable for the payment of the notes issued by the *Milford Bank*, as far as the sum of 30,000*l.* will extend to pay:" Held, that the bank having afterwards stopped payment, the defendant was not liable upon this undertaking to an action by an individual holder, who had taken the notes after notice of such undertaking, but before the stoppage. *Phillips v. Bateman.* 16 E. R. 356

- 10 The law will not raise an *assumpsit* upon a judgment obtained by default in one of the colonies, against a party, who, upon the face of the proceedings, appeared only to have been summoned by nailing up a copy of the declaration at the court-house door in the colony; it not appearing that he had ever been present in the colony, or subject to the jurisdiction of the colonial court, although by a law of the colony, if the defendant be absent from the island, such a mode of summoning shall be a good service; for such absence must be intended of one who once had been present and subject to the jurisdiction. *Buchanan v. Rucker.* 9 E. R. 192

- 11 A captain of a troop, is not liable for subsistence furnished to the men during the time of his absence, and while another officer is in the actual command of the troop, by whom the orders for subsistence are issued, and the subsistence money is received from government, though such captain was still entitled to a profit upon the sum issued on that account, and the troop still continued under his military orders. *Myrtle v. Beaver.* 1 E. R. 135

- 12 The captain of a troop, for which forage is furnished, by the orders of a clerk appointed by such captain, is not liable for such forage, though present with the troop at the time; it not appearing that he had received any money for this purpose from the paymaster, to whom it is issued by government, and upon whom the captain is entitled to draw for a certain sum regulated by the returns of the preceding month. *Rice v. Chute.* 1 E. R. 579

Secus if he had in effect received the money. *Rice v. Eccritt.*

1 E. R. 583

13 If a bankrupt, after obtaining his certificate, promise to pay a prior debt *when he is able*, in a general *indebitatus assumpsit* brought on that promise, the Court of C. P. (*dissent. Loughborough C. J.*) held, that the plaintiff must prove the ability of the defendant to pay, at the time of the action brought on the subsequent promise. *Besford v. Saunders*. 2 H. B. 116

(b) Illegal.

1 Where the plaintiff, a druggist, after the 42 G. 3. c. 38., but before the 51 G. 3. c. 87., sold and delivered drugs to the defendant, a brewer, knowing that they were to be used in the brewery: Held, that he could not recover the price of them in an action of *assumpsit*. *Langton v. Hughes*. 1 M. & S. 593

2 A promise made by a friend of the bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received, and not accounted for, he would pay such sums as the bankrupt had received and not accounted for, is void, as being against the policy of the bankrupt laws. *Nerot v. Wallace (in error)*. 3 T. R. 17

3 *Quare*. If the creditors had consented to the agreement made by the assignees, whether that would have varied the case? *id.* 23

4 The vendor of goods abroad, having packed them up by order of the buyer in a particular manner for smuggling them into this country, and knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods into this country. *Waymell v. Reed*. 5 T. R. 599
And see *Biggs v. Lawrence*. 3 T. R. 454
Clugas v. Peneluna. 4 T. R. 466

5 The statute 17 G. 3. c. 42., which requires bricks for sale to be of certain dimensions, and gives a penalty for the breach of that regulation, being passed to protect the buyer against the fraud of the seller, if bricks be sold and delivered under the statutable size, unknown to the buyer, the seller cannot recover the value of them. *Law v. Hodgson*. 11 E. R. 300

6 An agreement, to pay a *per centage* upon the day on which any money should be received by the defendant, through the means of the plaintiff's information, does not entitle the plaintiff to the stipulated reward upon the transfer of *stock*, in consequence of such information; although he might afterwards receive the dividends thereon. *Jones v. Brindley*. 1 E. R. 1

7 N. B. The Court animadverted upon the immorality of such bargains: and imperfect evidence having been given of the receipt of dividends *due at the time of the transfer*, refused to suffer that evidence to be supplied by affidavit. *id.* 3

N. B. For underwriting policies contrary to stat. 6 G. 1. c. 18. s. 12. see tit. Insurance. I. (b).

II. FOR WORK AND LABOUR.

1 A request to a tradesman to shew the defendant's house, and the defendant would make him a handsome present, is evidence of a contract to pay a reasonable compensation for the work and labour bestowed in that service. *Jewry v. Busk*. 5 Taunt. 302

2 Plaintiff was employed to wash clothes for defendant who was a prostitute, knowing her to be such: the Court of C. P. held that the use to which the clothes might be applied could not bar the plaintiff of an action for work and labour. *Lloyd v. Johnson*. 1 B. & P. 340

3 *Indebitatus assumpsit* lies to recover *del credere* commissions for guaranteeing sums insured upon policies; such commissions being due upon entering into the contract of guarantee. *Caruthers v. Graham*. 14 E. R. 578

4 If a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover upon a *quantum valebant*, for the work, labour, and materials. *Ellis v. Hamlen*. 3 Taunt. 52

5 A lessor contracted to pay his tenant at a valuation for certain erections pursuant to a plan to be agreed on, provided they were completed in two months: no plan was agreed on, and after the condition broken, the lessor encouraged the lessee to proceed with the work: Held, that the lessee might recover as for work and labour on an implied promise arising out of so many of the facts as were applicable to the new agreement. *Burn v. Miller*. 4 Taunt. 745

6 Where the plaintiff declares upon a *quantum meruit* for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims: And if it appear that the plaintiff had been paid on account as much as the work was worth, he cannot recover: And so it seems, that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it: And, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, it appears that the defendant may be let into such defence even without notice. *Basten v. Butler*.

7 E. R. 479

III. INDEBITATUS, WHERE MAINTAINABLE IN RESPECT OF SPECIAL CONTRACT.

- 1 Where an act is to be done by each party under a special agreement, and the defendant, by his neglect, prevents the plaintiff carrying the contract into execution, the plaintiff may recover back any money he has paid under it in an action for money had and received. *Giles v. Edwards*. 7 T. R. 181
- 2 *Assumpsit* for money had and received, lies when a payment has been made on a contract which is put an end to. *Towers v. Barrett*. 1 T. R. 133
- 3 But if it continue open, the plaintiff can only recover damages for the breach of it; and then he must state the special contract. *id. ibid.*
- 4 The difference between those cases where the contract is open, and where it is not so, is this: if the contract be rescinded, as where by the terms of it, it is left in the plaintiff's power to rescind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded; the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie; but if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of it; and then he must state the special contract. 1 T. R. 133
- 5 But a contract cannot be rescinded by

one party for the default of the other, unless both can be put in *statu quo*, as before the contract. *Hunt v. Silk*.

5 E. R. 449

Therefore, where *A.* agreed in consideration of 10*l.*, to let a house to *B.*, which *A.* was to repair and execute a lease of, *within ten days*, but *B.* was to have immediate possession, and execute a counterpart, and pay the rent; *B.* took possession, and paid the 10*l.* immediately: but *A.* neglected to execute the lease and make the repairs *beyond the period of the ten days*, notwithstanding which *B.* still continued in possession: Held, that on account of *B.*'s intermediate possession of the premises under the agreement, he could not, by quitting the house, *for the default of A.*, rescind the contract, and recover back the 10*l.* in an action for money had and received, but could only declare for a breach of the special contract. 5 E. R. 449

6 Where a person will not rely on the promise which the law will raise, but takes a bond as a security, he cannot resort to an action of *assumpsit*. *Toussaint v. Martinant*. 2 T. R. 100

Therefore, if a surety bound with his principal, for payment of money by instalments, take a bond from the principal conditioned for payment of the amount of the instalments before the first of them will become due, and before that time the principal becomes bankrupt, and obtains his certificate, and afterwards the instalment bond is discharged by the surety, he cannot maintain an action against the principal for money paid to his use.

2 T. R. 100

7 The assignee of a *Scotch* bond may maintain an action of *assumpsit* in the Court of K. B. against the obligor, in his own name. *Innes v. Dunlop, Bart.* 8 T. R. 595

8 The plaintiffs, having contracted by charter-party sealed, to let a ship, then in the *Thames*, to freight to the defendants for eight months, to *commence from the day of her sailing from Gravesend* on the voyage then stated; and having covenanted that she should sail from the *Thames* to any *British* port in the *English* channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London*; afterwards agreed by *pa-*

- rol with the defendants, that the ship, instead of loading at some port in the Channel, should load in the Thames, and that the freight should commence from her entry outwards at the Custom-house: Held, that this subsequent parol contract was distinct from, and not inconsistent with the contract by deed; being anterior to it in point of time and execution, and might therefore be enforced by action of *assumpsit*. *White v. Parkin*. 12 E. R. 578
- 9 Upon an *indebitatus assumpsit*, brought for board, schooling, &c. furnished for *J. W.* at the request of the defendant, the plaintiff is entitled to recover for a quarter over the time which *J. W.* staid, on the ground of a quarter's notice not having been given, that being one of the terms mentioned in the particulars of the school. *Eardley v. Price*. 2 N. R. 333
- 10 An action of *assumpsit* may be maintained upon an express promise for the amount of a balance struck on a partnership account, though there was a covenant between the parties to account. *Moravia v. Levy*. 2 T. R. 483, n.
- 11 *A.* agreed with *B.* to let him land rent free, on condition that *A.* should have a moiety of the crops; while the crop was on the ground it was appraised for both parties: *A.* declared in *indebitatus assumpsit* for a moiety of the value of the crop sold to *B.* without stating the special agreement; and held that he might well do so, as the special agreement was executed by the appraisement, and the action arose out of something collateral to it. *Poulter v. Killingbeck*. 1 B. & P. 397
- 12 Where an agreement between an out-going and an in-coming tenant was that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expense of repairing the gates and fences of the farm, and that the value of the hay, &c. and of repairs, should be settled by third persons: Held, that the balance settled, to be due to the out-going tenant for his hay, &c. after deducting the value of the repairs, might be recovered by him in a count upon a general *indebitatus assumpsit* for goods sold and delivered; having failed upon his count on the special agreement, for want of including in it that part of the agreement which related to the valuation of the repairs. *Leeds v. Burrows*. 12 E. R. 1
- 13 *Indebitatus assumpsit* lies for goods, which the defendant had by fraud procured the plaintiff to sell to an insolvent, and which the defendant had gotten into his own possession; for he could not set up the sale, because his own fraud had procured it, and the mere possession, unaccounted for, raises an *assumpsit* to pay. *Hill v. Perrott*. 3 Taunt. 274
- 14 Where goods were sold upon a contract, that the vendee was to pay for them in three months by a bill of two months: Held, that the contract was for a credit of five months, and therefore that *assumpsit* for goods sold and delivered could not be brought at the end of three months, upon the neglect of the vendee to give his bill at two months; the remedy being by an action for damages for the breach of the contract in not giving the bill. *Mussen v. Price*. 4 E. R. 147
- 15 *S. P.* in *Miller v. Shave*, where *Chambre, J.* also held, that after the time of credit expired, *indebitatus assumpsit* would lie. 4 E. R. 149
- 16 If goods be bought, to be paid for by a bill at two months, and the vendor accordingly draw upon the vendee for the value, who refuses to accept; *semble*, that the vendee cannot be sued in an action for goods sold and delivered, but upon the special contract only. *Dutton v. Solomonson*. 3 B. & P. 582
- But certainly he cannot be sued in that form of action, till after the expiration of the two months. *id. ibid.*
- 17 The plaintiff, having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the defendant having agreed to deliver soil, he, the plaintiff, paid 2*l.* 5*s.* for earnest, but that the defendant refused to deliver the soil: Held, that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force. *Cooke v. Munstone*. 1 N. R. 351
- 18 *A.* having a horse to sell, agreed to let *B.* have him for 30 guineas, if he liked him, and that he should take him a month upon trial: *B.* accordingly took him, and kept him about a

fortnight, and then told *A.* he liked the horse, but not the price, and *A.* desired him, if he did not like the price, to return the horse; *B.* however kept him 10 days more, and then returned him, but *A.* refused to receive him, and brought an action on the contract for 30 guineas, the price of the horse: Held, that he could not maintain such action. *Ellis v. Mortimer.* 1 N. R. 257

- 19 Where a plaintiff is precluded from recovering upon a promissory note for want of a proper stamp, if he can give other evidence of the consideration of his demand, he may recover on the common counts. *Tyte v. Jones.* 1 E. R. 58, n.

And see *Alves v. Hodgson.* 7 T. R. 241

- 20 The defendant, in consideration of his having procured a man to serve on board a ship for a particular voyage, received from the plaintiff four guineas, and afterwards signed a note, by which he engaged to pay the plaintiff four guineas, if the said man, a seaman, did not proceed in the said ship upon the intended voyage; the man was discovered not to be a seaman, and the captain of the ship refused to receive him on board: Held, that the above note did not amount to an undertaking on the part of the defendant, that the man was a seaman, but that it was merely a stipulation for his personal service: and therefore the sum might be recovered in an action for money had and received. *Levy v. Haw.* 1 Taunt. 65

- 21 *Assumpsit* lies to recover the balance of a banker's account, however voluminous it may be; and the plaintiff in such case is not obliged to bring account. *Tomkins v. Wiltshire.* 1 Marsh. 115

IV. INDEBITATUS, FOR MONEY PAID.

(a) *On express and implied Promises.*

- 1 *Assumpsit* for money paid, laid out, and expended, will not lie, when the money has been paid *against the express consent* of the party, for whose use it is supposed to have been paid: Therefore, where two parishes had been a long time united, and had had a joint sexton, who was paid by both, and afterwards one of them claimed a right of electing a separate sexton, of which they had given notice to the other, that other parish cannot main-

tain an action for money paid, laid out, and expended, to the use of the first parish for their *quota* of the sexton's salary. *Stokes v. Lewis.*

1 T. R. 20

- 2 Neither can the right of the sexton be tried in such case without his being a party to it. *id. ibid.*
- 3 Neither is the payment of the salary, a joint obligation on the two parishes, for the sexton in such case cannot bring his action against one of the parishes for the whole sum. *id. ibid.*
- 4 But it will lie where one is compelled to make a payment for which another is liable: Thus, where the goods of a stranger on the premises of another, were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them: the Court held that the stranger might maintain *assumpsit* for money paid to the use of the original lessees, who were bound by their covenants to the landlord, although some of them, had to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. *Exall v. Partridge.* 8 T. R. 303
- 5 But it was held, that an under-tenant, whose goods were distrained and sold by the original landlord for rent due from his immediate tenant, could not maintain an action for money paid to the use of such tenant; for, on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant. *Moore v. Pyrke.* 11 E. R. 52
- 6 If an officer permit a prisoner to go at large, on his promise to pay the debt to the creditor, in consequence of which, the officer is obliged to pay the creditor himself, he cannot recover back the money from the debtor on an action for money paid to his use; having been guilty of a breach of duty, out of which he cannot derive a cause of action. *Pitcher v. Bailey.* 8 E. R. 171
- 7 If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, *with the privity and consent of the other*, the whole sum, he may recover a moiety from that other in au

action for money paid to his use; notwithstanding stat. 7 G. 2. c. 8.; which avoids and declares illegal all stock-jobbing transactions. *Petrie v. Han-nay*. 3 T. R. 418

N. B. The principle of this decision is questioned in *Aubert v. Maze*.

2 B. & P. 371

And see also *Steers v. Lashley*.

6 T. R. 61

And *Brown v. Turner*. 7 T. R. 730

8 But in such a case of an illegal trans-action, if one partner pay money for another, without an express authority he cannot recover it back. *Webb v. Brooke*. 3 Taunt. 11, 12. 3 T. R. 418

9 Where persons engaged in stock-jobbing, are also concerned in making real transfers of stock, and the balance is paid upon the whole by one for both of them, a moiety of the money paid on the real transactions may be recovered, even under circumstances in which the other part could not.

id. ibid.

10 If *A.* recover in *assumpsit* against two defendants, and levy the whole damages on one, that one may recover a moiety against the other in an action for money paid to his use. *Merryweather v. Nixon*. 8 T. R. 186

11 Secus, if *A.* recover in *tort* against two. *id. ib.*

12 If a carrier, by mistake, delivers to *B.* goods consigned and sold to *C.*, and *B.* appropriates the goods, and the carrier on demand, without action, pays *C.* their value, the carrier may recover it against *B.* as money paid to *B.*'s use; but not as the price of goods sold and delivered to *B.* *Brown v. Hodgson*. 4 Taunt. 189

13 By stat. 51 G. 3. c. 126., one of two candidates for the city of *Westminster*, is only liable to the bailiff, for a moiety of the expenses of the hustings. *Morris v. Lord Cochrane*.

1 M. & S. 283

14 But a person who is nominated and elected to serve in parliament for the city of *Westminster*, without being present at, or in any way interfering himself, or by his agents with the election, or holding himself out, or authorizing any one else to hold him out as a candidate, but afterwards takes his seat in the House of Commons, is not chargeable under the above statute. *Morris v. Burdett, Bart.*

2 M. & S. 212

(b) In consideration of Services and Works.

1 Where an advertisement respecting a stolen child, promised a reward to the person who would give information where the child was, so as that he might be restored to his parents, and the plaintiff communicated to the defendant her suspicion where the child was, in order to put the matter into his hands for his benefit, if he chose to run the risk, and the child was afterwards restored to its parents by the exertions of the defendant acting upon the plaintiff's communication: Held, that the plaintiff could not recover from the defendant, to whom the reward had been paid, either the whole or any portion of it. *Fallick v. Barber*. 1 M. & S. 108

2 Where a person performed work for a committee, under a resolution entered into by them, "that any service to be rendered by him should be taken into consideration, and such remuneration be made as should be deemed right:" Held, that an action would not lie to recover a recompense for such work; the resolution importing, that the committee were to judge whether any remuneration was due. *Taylor and another, assignees, &c. v. Brewer*. 1 M. & S. 290

V. INDEBITATUS, FOR MONEY HAD AND RECEIVED.

(a) To try the Right to an Office.

1 The action for money had and received to recover fees, was introduced in lieu of an assize. 6 T. R. 681

2 Therefore, money given to *A.*, and claimed by *B.*, as perquisites of office, cannot be recovered by *B.* in an action for money had and received; unless such perquisites be known and accustomed fees, such as a legal officer could have recovered from *A.* *Boyer v. Dodsworth*. 6 T. R. 681

3 *Assumpsit*, for money had and received does not lie by the nominee of a perpetual curacy for the profits thereof, till he has had the bishop's licence. *Powell v. Milbank*. 1 T. R. 399, n.

4 But it does lie by the nominee of a donative before the bishop's licence, against a person who receives the rents and profits. *Rex v. Bishop of Chester*. 1 T. R. 408

5 But, where a donative had been twice augmented, it should seem the nomi-

nee cannot maintain such action without the bishop's licence. 1 T.R. 404

(b) *To recover Money paid by Mistake.*

1 Where a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought to pay, he cannot recover it back again in an action for money had and received. *Bize v. Dickson.* 1 T. R. 286

2 Neither can he recover back a sum paid for a debt, which would otherwise have been barred by the statute of limitations, or a debt contracted during his infancy. *id.* 287

3 But, where money has been paid under a mistake, which there was no ground in conscience to claim, the party may recover it back again in an action for money had and received to his use. *id. ibid.*

4 Money paid by one, with full knowledge, or the means of such knowledge in his hands, of all the circumstances, cannot be recovered back again on account of such payment having been made under an ignorance of the law. *Bilbie v. Lumley.*

2 E. R. 469

5 *Quare.* Where such payment was made under an uncertainty of the facts? *Chatfield v. Paxton*, cited.

2 E. R. 471 *noté*

And see *Lothian v. Henderson.* 3 B. & P. 520. *Stevens v. Lynch.* 12 E. R. 28

6 If a person, with knowledge of the facts, but under a mistake as to the law, pays over to another, claiming it as a right, money which he was not compellable to pay, he cannot, upon discovering what his legal right was, recover it back, there being nothing against conscience in the other parties retaining it: Therefore, where the captain of a king's ship, brought home in her public treasure upon the public service, and treasure of individuals for his own emolument; he received freight for both, and paid over one third of it, according to an usage heretofore established in the navy, to the admiral under whose command he sailed: Discovering, that the law does not compel captains to pay to admirals one third of the freight, the captain brought an action for money had and received, to recover it back from the admiral's executrix: Held, that he could not recover back the private

freight, because the whole of that transaction was illegal, nor the public freight, because he had paid it with full knowledge of the facts, although in ignorance of the law, and because it was not against conscience for the executrix to retain it. *Sir Charles Brisbane, Knt. v. Dacres, executrix of Admiral Dacres.* 5 Taunt. 143

(c) *On Failure of Consideration.*

1 The action of *assumpsit* for money had and received, is like a bill in equity; and therefore the party must shew that he has conscience and equity of his side; so that it lies not against one who was known to be only a surety in an annuity bond for the payment of the annuity, to recover the consideration money after the annuity had been set aside for want of a memorial, though the surety had joined in a receipt for the money.

Straton v. Rastall. 2 T. R. 370

2 *A.*, supposing himself the legal representative of a lessee for years, sold the term, and delivered the lease to the purchaser, but without any assignment or formal conveyance, saying, "*the premises were his, and if any thing happened, he would see the purchaser righted*;" it was held that *A.* was liable to the purchaser in an action for money had and received, the rightful administrator of the tenant for years having ousted the purchaser by ejectment. *Cripps v. Reade.*

6 T. R. 669

Under a limitation in a marriage settlement, to the husband for life, then to the wife for life, then to the heirs of the body of the wife and their heirs, the wife took an estate tail.—And though it was recited in the deed, that the husband's father conveyed in consideration of the marriage, and "for settling and establishing the lands, &c. to the uses thereafter expressed;" and subsequent uses were added, in the deed, the Court would only take notice of the legal estate; and the husband and wife having levied a fine, and having agreed to sell the estate to a purchaser from whom they had received a deposit; the Court held that they could make a good title; and therefore were not liable to repay the deposit-money, in an action for money had and received. *Alpass v. Watkins.* 8 T. R. 516

4 *A.*, by his will devised to *B. C. D.* and *E.* two parcels of land upon trust, to sell and divide the money among his brother's and sister's children: *B. C. D.* and *E.*, the latter being one of twenty-four persons entitled under the will to a share of the money, were proceeding to sell, when it was agreed by the three first trustees, and the twenty-three other persons entitled to the money, that *E.* should become the purchaser of the two parcels of land, paying 300*l.* for one, and 700*l.* for the other: A conveyance was accordingly prepared and executed by *B.* and *C.* only, upon which *E.* took possession of the lands, and paid the purchase-money, which was divided among the several persons entitled under the will: *E.*, being afterwards evicted from the smaller parcel, in consequence of a defect in the title derived under the will, brought an action for money had and received against one of the twenty-three persons, to recover the share of the 300*l.* received by him, at the same time refusing to give up the parcel of land for which 700*l.* had been paid: Held, that the purchase of the two parcels formed distinct contracts; and that he was entitled to recover. *Johnson v. Johnson.* 3 B. & P. 162

5 *A.*, having sold certain leasehold premises to *B.*, assigned them by indenture, containing a proviso that *B.* should not assign over until the whole of the purchase-money should have been paid: The premises, having been taken in execution for a debt of *B.*, who had not paid the purchase-money, were sold by the sheriff to *D.*, who paid down a deposit, and agreed to complete the purchase on having a good title: Held, that the non-payment of the purchase-money by *B.* was a sufficient objection to the title, and that *D.* might recover back his deposit in an action for money had and received. *Elliott v. Edwards.* 3 B. & P. 181

(d) On an illegal Contract.

1 Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of usury brought by *B.* against *A.*, on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received: For the prohibition and penalties of the stat. 18

Eliz. c. 5. attach only on the "inform-
" er or plaintiff; or other person su-
" ing out process in the penal action,
" making composition," &c. contrary
to the statute; and not upon the party
paying the composition; and therefore,
the latter does not stand, in this re-
spect, *in pari delicto*, nor is *particeps*
criminis with such compounding in-
former or plaintiff. *Williams v. Hed-*
ley. 8 E. R. 378

And such recovery may be had, al-
though *E.*'s assignees had before re-
covered from *B.* the money so received
by him as money received to their use;
(the money paid by way of composi-
tion, being at the time stated to be *E.*'s
money); there being no evidence at the
trial of this cause to shew that *A.* the
plaintiff was privy to that suit. *id. ibid.*

2 Where money had been paid for in-
suring tickets in the lottery, the Court
of C. P. (*dissent. Loughborough, C. J.*)
held that it might be recovered back
from the office-keeper, in an action for
money had and received. And that
Court were of opinion that a contract de-
clared by a statute to be illegal, was not
made good by a subsequent repeal of
the statute. *Jaques v. Wilby.* 1 H. B. 65

3 An action for money had and received,
will not lie to recover back from the un-
der-writer the premium of a re-assur-
ance (void by stat. 19 G. 2. c. 37.) after
capture. *Andrée v. Fletcher.* 3 T. R. 266

4 Where the plaintiff, who was not an
authorized army agent, negotiated the
sale and purchase of a commission be-
tween *G. C.* and the defendant at a
price above that allowed by his Ma-
jesty's regulations, and the defendant,
who was purchaser of the commission,
after having paid a sum exceeding the
regulation price to *G. C.*, retained 38*l.*,
the remainder of the price agreed upon,
with directions from *G. C.* to pay it over
to the plaintiff for his agency, which
he promised the plaintiff to do: Held,
that the plaintiff could not recover
against the defendant the 38*l.* as mo-
ney had and received to his use, for
he could not be in a better situation
than *G. C.* and by 48 G. 3. c. 15. s. 100.
G. C. could not have recovered beyond
the regulation price. *Davis v. Edgar.*
4 Taunt. 63

5 A person having voluntarily offered to
pay a sum of money for the use of the
poor, in order to avoid a prosecution,
which offer was acceded to, and the

money accordingly paid by the party to such use, may countermand the application of the money before it is so applied, and recover it back in an action for money had and received.

Taylor v. Lenday. 9 E. R. 49

- 6 The Court of C. P. held, that if *A.* actually receive money of *B.* to the use of *C.* on an illegal agreement between *B.* and *C.*, this money may be recovered by *C.* in an action for money had and received: And it is doubtful how far the case is varied though *A.* be a party to the contract. *Tenant v. Elliot.*

1 B. & P. 3

Farmer v. Russel. 1 B. & P. 296

- 7 A testator having borrowed money on a *respondentia* contract prohibited by law, his executors, the plaintiffs, refunded the money to the lenders, the defendants: Held, that the executors could not maintain an action for money had and received to recover back this money, notwithstanding the defendants could not have compelled them to pay it. *Munt v. Stokes.*

4 T. R. 561

- 8 The plaintiffs, a Frenchman and a Swiss, carrying on trade at Lisbon under the name of the defendant, a Portuguese, shipped a cargo from thence to a port of *France*, which cargo being captured by a British cruiser, and libelled for condemnation in the Court of Admiralty, as French and enemy's property, was ordered to be restored to the defendant on his putting in and establishing, with the plaintiff's privity and consent, a claim to it as his own property: the Court held that the plaintiffs were, by thus colluding with the defendant to withdraw from the Admiralty the decision of the then question, by establishing a false fact, estopped from maintaining an action for money had and received against the defendant for the proceeds, by shewing the true fact, that the property was their own, and that the defendant was their agent. *De Metton v. De Mello.*

12 E. R. 234

- 9 Where credit was given by insurance-brokers, in an account delivered in by them to an underwriter for the premiums of re-assurances, after which the assured gave notice to the brokers not to pay the money over to the underwriter, and indemnified them for withholding it: Held, that the underwriter could not maintain an action

against the brokers to recover such premiums as for money had and received by them to his use, the transaction being illegal, and the money not having been actually paid, but only credit given for it on account. *Edgar v. Fowler.*

3 E. R. 222

- 10 *A.*, in consideration of 200 guineas, paid by *B.*, gave a bond for the payment of an annuity to the latter of 100 guineas, till the hop duties should amount to a certain sum; before this event had taken place, *A.* brought an action to recover back the 210*l.* of *B.*: Held, that the action was maintainable. *Tappenden v. Randall.* 2 B. & P. 467
- But in such action, being for money had and received, only the net sum without interest could be recovered. *ib.*

- 11 If a wager be deposited with a stakeholder, on the event of a battle to be fought by the parties laying the wager, and it be not paid over, though the battle be fought, either party may recover from the stakeholder the sum deposited by him. *Cotton v. Thurland.*

5 T. R. 405

- 12 It might perhaps be otherwise if the money has been paid over to the winner. (*Per Kenyon, C. J.*) 5 T. R. 409

- 13 In a subsequent case, the Court of K. B. held that whenever money has been paid upon an illegal consideration, it may be recovered back by the party who has improperly paid it; and that therefore, where the plaintiff had given the defendant 100*l.* to receive 300*l.* in case of a peace within a certain time, he might recover back his 100*l.* though after the event of the wager was decided, by which if the wager had been legal he would have won his 300*l.* *Lacaussade v. White.*

7 T. R. 535

- 14 A stakeholder, receiving country bank-notes as money, and paying them over wrongfully to the original staker after he had lost the wager, is answerable to the winner in an action for money had and received. *Pickard v. Banks.*

13 E. R. 20

- 15 But, where money deposited on an illegal wager had been paid over to the winner by the consent of the loser; the Court held that the latter could not afterwards maintain an action against the former to recover back his deposit. *Howson v. Hancock.*

8 T. R. 575

- 16 A plaintiff, who by the defendant's

authority lays illegal bets in the defendant's name, and losing, pays them without a subsequent *express direction so to do*, cannot recover from the defendant the amount of the money so paid. *Clayton v. Dilly*. 4 Taunt. 165

17 Money deposited upon an illegal wager, laid on a future event, may be recovered back again before the period of time has elapsed, on the expiration of which the decision of the wager depends. *Aubert v. Walsh*.

3 Taunt. 277

18 The plaintiff, having paid a premium on an illegal bet, on a future event made with the defendant, claimed, before the risk was determined, to be allowed to prove as a debt under a commission of bankrupt which had afterwards issued against the defendant, the amount of the premiums, but was refused by the commissioners: The commission being afterwards superseded, the plaintiff, after the risk determined, sued the bankrupt to recover back the premiums without further notice: Held, that the claim made upon the assignees was sufficient notice to the defendant of the plaintiff's intention to rescind the illegal contract. *Busk v. Walsh*. 4 Taunt. 290

19 A person who deposits in the hands of a stakeholder, a sum, as a wager on the event of a boxing-match between himself and another, may, after committing a breach of the peace by fighting, recover back his deposit from the stakeholder, having demanded it before it was paid over. *Smith v. Bickmore*.

4 Taunt. 474

(e) Under legal Process.

1 Where money has been paid by the plaintiff to the defendant under the compulsion of legal process, and it is afterwards discovered that the money was not due, the plaintiff cannot recover it back in an action for money had and received. *Marriott v. Hampton*.

7 T. R. 269

2 *Assumpsit*, for money had and received, lies against an overseer of the poor, to recover money in his hands, which had been levied on a conviction which was afterwards quashed. *Feltham v. Terry*, cited in *Birch v. Wright*. 1 T. R. 387

3 *Assumpsit* may be maintained to recover back money paid upon a compromise, after another action has been brought for it by the defendant against the plaintiff, and an interlocutory

judgment had, and a writ of inquiry executed thereon; it appearing afterwards, that there was no real consideration for the first payment, and it having been made ultimately under a compromise, and not under the compulsory judgment of a Court. *Cobden v. Kendrick*.

4 T. R. 432

4 Goods, distrained by the plaintiff were delivered by him to the defendant on his promising to pay the rent: Held, that an action for money had and received would not lie for the value of the goods, though the defendant did not pay the rent. *Leery v. Goodson*.

4 T. R. 687

5 But it was held by the Court of C. P. that such an action does lie to recover back money which has been obtained through fear of process by distress, by an excess of authority, although it has been paid over to a third person who was the proper officer to whom it should have been paid, supposing such distress had been legally made. *Snowdon v. Davis*.

1 Taunt. 359

6 Where goods were taken in execution by the sheriff on a *fi. fa.*, and whilst they remained in his hands unsold, an extent came at the king's suit tested after the entry of the sheriff under the *fi. fa.*, and the sheriff thereupon seized the said goods subject to the former seizure, and afterwards sold them under a *venditioni exponas* issued upon such extent, and paid over the proceeds of such sale by order of the Court of Exchequer: Held, that at all events, without determining whether the king's extent was, under the circumstances, entitled to priority, the plaintiff could not maintain money had and received against the sheriff for the proceeds of such sale. *Thurston v. Mills*.

16 E. R. 268

7 If two opposite parties require a witness to attend, and he receives payment from both of them, although the payment made by the successful party is afterwards repaid him by the loser in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received. *Crompton v. Hutton*.

3 Taunt. 230

(f) Obtained by Fraud.

1 In an action for money had and received, if the defendant shews a deed of assignment of the money to himself, and a receipt for the consider-

ation money indorsed, it is a good discharge, though no money passed at the time, and though there are pregnant evidences of suspicion that the consideration is falsely recited, and that the money never was paid. *Rowntree v. Jacob.* 2 Taunt. 141

- 2 *A.*, having a navy bill, which purports to be for 1,800*l.*, pays it to *B.* for that sum; *B.* passes it to *C.*, who presents it at the Navy Office for payment, when, it appearing that it was originally drawn for 800*l.* only, and that the sum had been fraudulently altered to 1,800*l.*, the Navy Office detained the bill, issuing a fresh one for 800*l.*, *C.* demands and receives of *B.* the remaining 1000*l.*: Held, that *B.* is entitled to recover the 1000*l.* from *A.* though all the parties were equally ignorant of the fraud. *Jones v. Rydc.* 1 Marsh. 157

- 3 So, though the full apparent amount of the bill should have been paid by the office, on presentment. *Bruce v. Bruce.* 1 Marsh. 165

- 4 A bill of exchange with a forged acceptance, purporting to be payable at the house of *A.* and Co., bankers, in London; with whom the supposed acceptor keeps cash, is indorsed to *B.* for a valuable consideration; *B.* indorses it to his agent in London, who presents it on the 23d of April at the house of *A.* and Co., for payment: *A.* and Co. pay it, and send it on the 30th of April to the supposed acceptor who disavows it: *A.* and Co. immediately give notice of the forgery to *B.* and demand payment, which *B.* refuses: All parties are ignorant of the fraud: Held, that *A.* and Co. by paying the bill, without ascertaining that the acceptance was genuine, were precluded from recovering the amount from *B.* in an action for money had and received. *Smith v. Mercer.* 1 Marsh. 453

(g) *From Trustees and third Persons.*

- 1 Where money in litigation between two parties, has by mutual consent been paid over to a person in trust for the party entitled, it can only be sued for and recovered, by the party entitled to it, from the trustee, and not from the original party who was indebted, though he agreed to waive all objections, to form. *Ker v. Osborne.* 9 E. R. 378

- 2 *A.* deposits goods with *B.* for sale, and then assigns his property to trustees for his creditors; the trustees at *B.*'s request, pay the duties on the goods, which when sold, do not produce sufficient to repay them: Held, that the trustees are entitled to recover the money advanced by them, together with the proceeds of the goods; though *A.* had before the assignment, agreed that they should go in liquidation of a claim which *B.* had upon him. *Livesey v. Willis.* 1 Marsh. 130

- 3 The creditors of a bankrupt entered into a deed of composition to receive 8*s.* in the pound in full discharge of their debts, and agreed to release every thing beyond that to the bankrupt, and join in a petition to the chancellor to supersede the commission; one of the creditors having two distinct debts due from the bankrupt, for one of which he held bills for the full amount, received his dividend of 8*s.* in the pound on both debts, and then recovered the full value of some of the bills: Held, that the bankrupt was entitled to recover the money so obtained on the bill in an action for money had and received. *Stock v. Mawson.* 1 B. & P. 286

- 4 *A.*, being indebted to *B.* for brokerage, and *B.* indebted to *C.* for money lent, *B.* gives an order to *A.* to pay *C.* the sum due from *A.* to *B.* as a security, on which *C.* lends *B.* a farther sum; and the order is accepted by *A.*; on the refusal of *A.* to comply with the order, *C.* may maintain an action against *A.* for money had and received. *Israel v. Douglas.* 1 H. B. 239

- N.B. (*See Taylor v. Higgins.* 3 E. R. 169 in which the Court of K. B. is said to have disapproved of this decision.)

- 5 *A.*, being indebted to *B.* in 700*l.* applied to *C.* to lend him that sum, who agreed so to do, provided *A.* would allow him to deduct therefrom 80*l.* due from *B.* to himself upon stock-jobbing transactions; accordingly *C.* advanced 620*l.* and *A.* gave him a promissory note for 700*l.*; *A.* then paid over to *B.* the 620*l.* who gave him a discharge for the whole 700*l.*; the promissory note for 700*l.* given by *A.* being paid when due, *B.* brought an action against *C.* to recover 80*l.* as money had and received by *C.* to his use: Held, that *B.* could not maintain the action, but that it must be

brought by *A.* if by any one. *Scholey v. Daniel.* 2 B. & P. 540

- 6 Where the holder of a Bill of Exchange, who held it in trust for plaintiff, sued the drawer, and pending that suit, became bankrupt, and his assignees afterwards brought an action against the drawer in the bankrupt's name; in which action, the sheriff having been guilty of an escape on mesne process, the assignees recovered against the sheriff in an action for the escape, damages to the amount of the bill: Held, that the plaintiff might maintain money had and received against the assignees for the damages so recovered, allowing to them the costs and expenses. *Dissentiente* Lord *Ellenborough*, *C. J. Randall v. Bell.*

1 M. & S. 714

Kelly, residing abroad, having remitted bills on *England* to the defendants, his bankers, in *London*, with directions in the letters inclosing such bills, to pay the amount in certain specified proportions to the plaintiff and other creditors of *Kelly*, who would produce their letters of advice from him on the subject; and desiring the amount paid to each person to be put on the back of their respective bills; and that every bill paid off should be cancelled; and the plaintiff, having before the bills became due, given notice to the defendants that he had received a letter from *Kelly* ordering payment of his debt out of that remittance, and having offered them an indemnity if they would hand over one of the bills to him; but the defendants refused to indorse the bill away, or to act upon the letter; admitting, however, that they had received the directions to apply the money: and in fact the defendants did afterwards receive the money on the bills when due: Held, that they did not by the mere act of receiving the bills, and afterwards the produce of them, with such directions, and without any assent on their part to the purposes of the letter, and still more against their express dissent, bind themselves to the plaintiff so to apply the money in discharge of his debt due to him from *Kelly*; and consequently that the plaintiff, (between whom and the defendant there was no privity of contract express or implied, but on the contrary it was repudiated,) could

not maintain an action against the defendants as for money had and received by them to his use: But that the property in the bills and their produce still continued in the remitter. *Williams v. Everett.* 14 E. R. 582

- 8 But money paid into a banking-house for the purpose of taking up a particular bill, which was lying there for payment; though the banker's clerk said at the time, that he could not give up the bill till he had seen his master; was held to be money had and received to the use of the then owner and holder of the bill, and could not be applied by the bankers to the general account of the acceptor who paid in the money. *De Bernales v. Fuller.* 14 E. R. 590, *noted*
- 9 *A.*, with a view to accommodate *B.*, lent him a bill drawn by himself upon, and accepted by *C.*, who had effects of *A.* in his hands; *B.* indorsed it to *D.* who indorsed it over; the day before the bill became due, *B.* paid the amount to *A.*, who on hearing that *C.* had failed, gave *B.* a check for the amount of the bill, and sent him with it to *D.* to enable him to pay the bill when due; four days after that time, *A.* learning that payment had not been demanded, desired *D.* not to pay the bill, as no notice of non-payment had been given by the holder, and offered to indemnify him; notwithstanding this, *D.* afterwards paid the bill: Held, that he paid it in his own wrong; and that *A.* was entitled to recover back from him the money he had so sent to him, in an action for money had and received. *Whitfield v. Savage.* 2 B. & P. 277

VI. PLEADINGS.

- 1 In *assumpsit*, it is sufficient if the declaration shews so much of the terms beneficial to the plaintiff in a contract, as comprehends the point for the defendant's failure in which the plaintiff sues. *Cotterell v. Cuff.* 4 Taunt. 285
- 2 It is not necessary in declaring in *assumpsit* on an agreement, to set forth the whole of it, if the part omitted do not qualify that which is stated. *Tempest v. Rawling.* 13 E. R. 630
- 3 A count in a declaration, stating that the plaintiff retained the defendant, who was a carpenter, to repair a house before a given day; that the defendant accepted the retainer, but

did not perform the work within the time, *per quod* the walls of the plaintiff's house were damaged, cannot be supported; for no duty resulted from his situation as a carpenter, and it was not stated that he was to receive any consideration, or that he entered upon his work. *Elsee v. Gatward*. 5 T. R. 143

- 4 Declaration, that "in consideration that the plaintiff had taken the defendant's goods on board his ship to be carried to *A.*, the defendant promised to pay the money due for freight and carriage of the same on the delivery of the bill of lading; that the bill of lading was delivered, by reason whereof the defendant became liable to pay a large sum, to wit, 20*l.* for freight and carriage of the said goods." Held bad on demurrer, because it did not appear that any thing became due for freight on the delivery of the bill of lading. *Blakey v. Dixon*. 2 B. & P. 321

2*u.* Whether, in alleging the promise to pay in the above case, the plaintiff should not have stated the specific sum, or have said, so much as should be reasonably due? *ib.*

- 5 Where the plaintiff declared that *A.*, since deceased, was indebted to him so much, and that after his death, in consideration of the premises, and that he, at the instance of the defendant, would *forbear and give day of payment* for the debt, (not stating to whom he was to *forbear*), the defendant promised, &c.: Held, on demurrer, to be no consideration for the promise; for a promise can only be sustained on a consideration of benefit to the defendant, or of detriment to the plaintiff; and unless there were some person, whom the plaintiff could have sued for his debt, his *forbearance* was no detriment to him. *Jones v. Ashburnham et Ux.* 4 E. R. 455

- 6 Declaration stated, that plaintiff at the request of *E. B.* and *M. B.* sold and delivered to them goods of a certain value, and that in consideration thereof, and also in consideration that the plaintiff, at the request of the defendant, would *forbear and give day of payment* of the said sum of money: defendant by a certain note or memorandum in writing signed by him, undertook to pay him the money, and then alleged, that plaintiff relying on the promise of defendant, did *forbear and give day of payment* of the

said sum, &c. After verdict for plaintiff, the Court refused to arrest the judgment, on the ground of the declaration not stating to whom the forbearance was given. *Marshall v. Birkenshaw*. 1 N. R. 172

- 7 *Indebitatus assumpsit* for board, schooling, clothes, &c. with a count on a *quantum meruit* for the same, and also a count, stating that in consideration that the plaintiff had taken *J. W.* as a scholar into an academy kept by him, and that he had left it without having given due notice, the defendant promised to pay so much as the plaintiff reasonably deserved to have: Held, that under these counts the plaintiff was entitled to recover for a quarter over the time which *J. W.* stayed, on the ground of a quarter's notice not having been given, that being one of the terms upon which he was taken. *Eardley v. Price*. 2 N. R. 333
- 8 By a Navigation Act, it was enacted, that on a certain day the first general meeting of the proprietors should be held, at which the company should execute deeds under their common seal for each distinct share, "*which deeds should respectively vest a certain share in each proprietor*;" the plaintiff declared in *assumpsit* against the defendant, for not completing a contract for the purchase of some shares, and averred that on a day prior to the first general meeting "*he was lawfully entitled to so many shares*:" Held, that this was a material averment, and the ground of a nonsuit, as it could not be proved; though there was another clause in the Act, by which certain persons by name (of whom the plaintiff was one) were made a corporation for the purposes of the Act: and the money subscribed was to be divided into so many equal shares, which were *thereby vested* in the person so subscribing, &c. *Latham v. Barber*. 6 T. R. 67

- 9 If *A.* and *B.* agree to exchange horses, and *B.* give a sum of money to *A.* to bind the bargain, *A.* may maintain an action against *B.* for not delivering his horse, without alleging any delivery of, or offer to deliver his own to *B.*; for the payment of earnest money vests the property of the plaintiff's horse in *B.* *Bach v. Owen*. 5 T. R. 409
- 10 But in such an action *A.* must allege a demand on *B.* for his horse; stating

that B. did not deliver, *though often requested so to do*, is not sufficient. 5 T. R. 409

11 In an action, for not delivering corn at S. pursuant to an agreement, whereby the defendant, in consideration that the plaintiff had bought of him a certain quantity at a fixed price, undertook to deliver it to the plaintiff at S. within one month from the time of the sale, the plaintiff must aver a readiness to pay the price, or what is equivalent thereto. *Morton v. Lamb.*

7 T. R. 125

12 In such a case, the delivery of the corn, and the payment of the price were concurrent acts to be done at the same time; and each must aver performance, or a readiness to perform his part, before he can maintain an action against the other. *id. ibid.*

13 Upon breach of a contract for the purchase of 100 bags of wheat, 40 or 50 of which were to be delivered on one market day, and the remainder on the next market day, the plaintiff cannot declare as upon an absolute contract for the delivery of the 40 bags on the first day, &c. though forty bags were then in fact delivered: but the contract must be stated in the alternative, according to the original terms of it. *Penny v. Porter.* 2 E. R. 2

The same where the contract was to deliver goods within 14 days, or as soon as a certain vessel arrived. *Shipham v. Saunders, (cited)* 2 E. R. 4 *notá*

14 In an action, for the non-delivery of malt, which the defendant had undertaken to deliver on request at a certain price, it is sufficient for the plaintiff in his declaration to aver such request, and that he was ready and willing to receive the malt, and to pay for it according to the terms of the sale, but that the defendant refused to deliver it, without averring an actual tender of the price. *Rawson v. Johnson.*

1 E. R. 203

15 If A. agree to buy of B., and B. to sell to A., goods at a certain price, to be delivered between such a day and such a day, and B. fail to deliver the goods within the time, it is sufficient for A., in declaring on the contract, to aver, that he was during all the time, and still is, ready and willing to receive and pay for the goods; without making any allegation of an actual tender and refusal. *Waterhouse v. Skinner.*

2 B. & P. 447

16 Where, in consideration of the purchase of hay by the plaintiff of the defendant, the latter promised to deliver to and suffer the plaintiff to take it away as he wanted it, *when requested*, an allegation that the defendant, after suffering the plaintiff to take away a part, sold and disposed of the residue to other persons, supersedes the necessity of alleging a request to deliver the residue. *Bowdell v. Parsons.*

10 E. R. 359

17 In declaring upon a contract, not under seal, consisting of several distinct parts and collateral provisions, it is sufficient to state so much of it as contains the entire consideration for the act, and the entire act or duty which is to be done (including the time, manner, and other circumstances of its performance,) in virtue of such consideration, the breach of which act or duty is complained of; but such part of the contract, which respects only the liquidation of damages, after a right to them has accrued by a breach of the contract, is not necessary to be set forth in the declaration, but is only matter of evidence, to be given to the jury in reduction of damages: 'Therefore, *assumpsit* may be maintained in the common form of declaring against a carrier for the loss of goods, which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract proved by general notice fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff, that the carrier *would not be accountable for more than 5*l.* for goods, unless entered as such and paid for accordingly.*'

Clarke v. Gray. 6 E. R. 564

18 A count stated, that whereas heretofore, &c. the plaintiffs had agreed to purchase, and the defendants to sell and deliver to them at a certain rate or price per pound, to be paid in a manner then stipulated between them, 40 bags of wool, to be delivered by the defendants to the plaintiffs at a time, which before the making of the promise of the defendants after mentioned had elapsed, but which wool had not been delivered; and thereupon, in consideration of the premises, and also in consideration, that the plaintiffs would still receive and pay for the said wool, at the rate or price and in the manner last aforesaid, on the delivery of it

within a reasonable time: the defendants promised the plaintiffs to deliver the said wool accordingly within such reasonable time as aforesaid: and then alleged, that though the plaintiffs, for a reasonable time after the defendants' promise, were ready and willing to receive and pay for the wool at the rate and price and in manner last aforesaid, yet the defendants would not deliver, &c: Held, that this was too general, and bad upon special demurrer, inasmuch as no price and manner of payment were mentioned, which was referred to in, and incorporated with, and made part of the consideration of the new promise declared on; and without such price being stated, no measure was given to the jury, for estimating the damage to the plaintiffs by the non-delivery of the goods. *Andrews v. Whitehead.* 13 E. R. 102

- 19 Declaration stated, that H. S. being possessed of land, on which hops were growing, agreed to sell to F. W. all the hops then growing on the said land at 10*l.* per *cwt.* to be paid by F. W. to H. S. to be delivered in pockets by the said H. S. to F. W. at *Whitstable*, in *Kent*; that in consideration that F. W. undertook to accept and pay for the hops, H. S. promised to deliver them at the place and manner aforesaid, in a reasonable time next after they should be picked and gathered; that the hops were picked and gathered, and amounted to 2 *cwt.* and although a reasonable time for delivery had elapsed, and although said F. W. was during that time and afterwards ready and willing to accept and pay for the hops at the rate and in manner &c. yet H. S. had not delivered them: The Court of C. P. held, that it was not necessary, for the plaintiff to aver any request or motive to deliver at any particular time, or any tender of the price, it appearing that the first act was to be done by the vendor. *Bristow v. Waddington in error.* 2 N. R. 355

- 20 A declaration, stated that in consideration that the plaintiff had sold to the defendant a certain horse of the plaintiff, at and for a certain quantity of certain oil, to be delivered within a certain time, which had elapsed before the commencement of the suit, the defendant promised to deliver the said oil accordingly: Held, well

enough after verdict. *Ward v. Harris.* 2 B. & P. 265

- 21 The first count of a declaration in *assumpsit*, stating an agreement between two persons, omitted the mutual promises: On motion in arrest of judgment, held that the agreement imported a promise. *Mountford v. Horton.* 2 N. R. 62

- 22 Defendant agreed to pay to plaintiff within two months 1,500*l.* and in consideration thereof, plaintiff agreed to deliver up all securities in his possession, under which he claimed any debt against the estate of J. W., deceased, to execute a general release of all claims on the estate of J. W. for matters between plaintiff and J. W. to the day of his decease, and between the trustees and representative of J. W. to the date of the agreement, except 600*l.* and interest due on a bond given by J. W. which defendant agreed to pay to the person entitled thereto. In *assumpsit*, stating mutual promises to perform the agreement, plaintiff averred that he was ready and willing to deliver up all securities under which he claimed any debt against the estate of J. W. deceased, and to execute a general release of all claims on the estate of J. W. for matters between the plaintiff and J. W. deceased, to the day of his decease, and assigned for breach non-payment of the 1500*l.* and 600*l.* or either of them: Held, that the release described in the declaration, was not co-extensive with that agreed to be given, and that this defect could not be cured by a verdict: But, as in this case it appeared that the payment of the money was intended to precede the release, therefore the averment was not well necessary, and the declaration well enough. *Smith v. Woodhouse, in error.* 2 N. R. 233

- 23 A contract for the purchase of a certain parcel of hemp, the exact amount of which, not being known at the time, was described in the contract as about eight tons, may be declared on as a contract for eight tons, the certain quantity, which it was afterwards proved to be, which quantity was laid under a *videlicet.* *Gladstone v. Neale.* 13 E. R. 410

- 24 In an action of *assumpsit* against a wharfinger, to whom goods were sent to be shipped, for neglecting to take out a suttance, for want of

which the goods were seized, it is not necessary to aver or prove that the goods were condemned by a sentence *in rem*. *Baker v. Liscoe*. 7 T. R. 171

In such a case it is sufficient to aver, that "for want of such sufferance the said goods were seized as forfeited, whereby the same became wholly lost to the plaintiff;" and proof of a seizure in fact by the officer, for a just cause of forfeiture will sustain the declaration.

id. ibid.

25 *A.*, having recovered judgment against *B.*, and a *fi. fa.* being delivered to the sheriff, in consideration that *A.* at the special instance and request of *C.* had requested the sheriff not to execute the writ, *C.* promised to pay *A.* the debt and costs, together with the sheriff's poundage, bailiff's fees, and other charges: On a judgment by default, and error brought, the promise was holden to be binding on *C.*, though it was not averred that the sheriff did in fact desist from the execution, nor what the amount of the poundage, &c. was, nor that the defendant had notice of said amount. *Pullen v. Stokes (in Cam. Scac.)* 2 T. B. 312

26 In *assumpsit*, by the vendor against the vendee of land, for not accepting it and paying the purchase-money, the plaintiff averred that he was seized in fee of the land, and that the defendant agreed to purchase it *on having a good title*, and that his title to the land was made good, perfect, and satisfactory to the defendant, and that he, the plaintiff, had been always ready and willing, and offered to convey the lands to the defendant, but that the defendant did not pay the purchase-money; and, on demurrer held that such general allegation of title in the plaintiff, and that his title was made good and satisfactory to the defendant, and that the plaintiff was ready and willing, and offered to convey to the defendant, were tantamount to performance of the agreement on his part, so as to entitle him to recover for a breach of the defendant's part, in not paying the purchase-money. *Martin v. Smith*. 6 E. R. 555

27 By the conditions of the sale of a copyhold estate, it was stipulated that the purchaser should pay down a deposit, and sign an agreement for the payment of the residue of the purchase-money at a certain time, *on having a good title*, and that he should

have a *proper surrender*, on payment of that residue: In an action brought by the seller, for the non-performance of the conditions on the part of the purchaser, it was held by the Court of C. P. to be insufficient to state, that the seller had been *always ready and willing, and frequently offered to make a good title to the said estate, and to make a proper surrender on payment of the purchase-money*: The declaration ought to have averred that the seller *actually made a good title and surrendered the estate to the purchaser, or a tender and refusal*; and also to have shewn what title the seller had. *Phillips v. Fielding*. 2 H. B. 123 (But see 1 H. B. 270: 6 E. R. 555.)

VII. EVIDENCE.

1 In an action for not delivering goods according to agreement, after demand made, it is not necessary to adduce evidence in support of the averment, that the plaintiff was ready and willing to accept and pay for the goods.

Wilks v. Atkinson. 1 Marsh. 412

2 An averment, that the plaintiff was ready and willing to transfer, and requested the defendant to accept stock, which he refused, can only be satisfied by shewing an actual tender and refusal, or that the plaintiff waited at the Bank on the day when it was understood that the transfer was to be made, until the close of the transfer-books, which was the latest time when it could be made. *Bordenave v. Gregory*. 5 E. R. 107

3 An averment, that stock was to be transferred *on request*, is not proved by evidence that it was to be transferred on a certain day. *Bordenave v. Bartlett*. 5 E. R. 111

4 An admission by a defendant, that so much was agreed to be paid to the plaintiff for the sale of standing trees, made after the trees had been felled and taken away by the defendant, will support a count upon an account stated, though not for goods sold and delivered. *Knowles v. Michel*. 13 E. R. 249

5 In an action against a tenant, upon promises, that he would occupy a farm in a good and husbandlike manner according to the custom of the country; an allegation, that he had treated the estate contrary to good husbandry and the custom of the country, is proved by shewing that he had treated it

contrary to the prevalent course of good husbandry in that neighbourhood; as by tilling half his farm at once, when no other farmer tilled more than a third; though many tilled only a

fourth: And it is not necessary to shew any precise definite custom or usage in respect to the quantity tilled. *Legh v. Hewett.* 4 E. R. 154

ATTACHMENT.

I. FOR NON-PAYMENT OF COSTS.

II. ——— CONTEMPT.

III. INTERROGATORIES ON.

I. FOR NON-PAYMENT OF COSTS.

- 1 No rule for an attachment (either in K. B. or C. P.) shall be absolute in the first instance, except for non-payment of costs on an *allocatur*. *Chaunt v. Smart.* 1 B. & P. 477
- 2 The ten days after a demand of costs under a recognizance, taken by virtue of stat. 5 W. & M. c. 11. s. 2, 3, must elapse, before an attachment can be granted against the party refusing to pay them. *Rex v. Ireland.* 3 T. R. 512
- 3 Though the plaintiff discontinue on the common rule on payment of costs, he is not liable to an attachment for non-payment. *Stokes v. Woodeson.* 7 T. R. 6
- 4 Where plaintiff sued as a pauper, and defendant put off the trial on undertaking to pay the costs of the day, an attachment was granted by the Court of C. P. for non-payment. *Rice v. Brown.* 1 B. & P. 39
- 5 If a defendant in a penal action, obtain a rule to stay proceedings on paying a sum agreed upon between him and the plaintiff, it is an undertaking by him to pay that sum, and for the non-payment of it the Court will grant an attachment. *King q. t. v. Clifton.* 5 T. R. 257

II. CONTEMPT.

- 1 If a plaintiff having sued out a *feri facias*, the defendant pays the plaintiff's attorney the debt and costs, without the writ being delivered to the sheriff, it is no contempt of the Court to attach the same money in the hands of the plaintiff's attorney, for a debt due from the plaintiff to the defendant: But *quære*, Whether the debt is such, whereon an attachment can be supported? *Gwinnes v. Brown.* 4 Taunt. 472

- 2 Where a *mandamus* has been granted for the election of a mayor, under stat. 11 G. 1. c. 4. s. 2.; and a rule made that public notice should be affixed in the market-place, which has been done accordingly, the Court will grant an attachment for disobeying the *mandamus*, against a member of the corporation who was served with a copy of the rule, notwithstanding, neither the original *mandamus* or rule was shewn to him; for the public notice directed by the Act, is *primâ facie* sufficient. *Rex v. Edyvean.* 3 T. R. 352
 - 3 Though the application for the attachment would be well answered, if the party could shew that he had no notice of the *mandamus*. 3 T. R. 352
 - 4 Where a rule had been granted for a *quo warranto* information against A. as mayor of B., on the relation of some of the corporators, and another rule *in that cause* for inspecting all the corporation books, papers, &c. directed to the town-clerk, an inspection of such only as related to the election and office of mayor was held a sufficient compliance with the latter rule, so as to protect the town-clerk, acting *bonâ fide*, from an attachment as for a contempt of the Court. *Rex v. Babb.* 3 T. R. 579
 - 5 The Court of C. P. will compel a plaintiff to produce deeds by attachment. *Bateman v. Phillips.* 4 Taunt. 157
- N. B. For attachment against Sheriffs, see *tit. Sheriff.*
See also *Award—Attorney—Witness.*

III. INTERROGATORIES ON.

- 1 When a defendant is brought up on an attachment for a rescue, it is the practice of the Court to put interrogatories to him, though he do not deny the charge in the affidavits, unless the prosecutor wave putting them. *Rex v. Horsley.* 5 T. R. 362
- 2 When an attachment issues in order to compel a person to answer upon interrogatories, the name of the cause

must be inserted in the list of peremptory motions for the next term. *Reg. Gen. H. 34 G. 3.* 5 T. R. 547

3 Interrogatories to be exhibited to a

person; against whom an attachment has been ordered, must be signed by counsel. *Reg. Gen. M. 34 G. 3.*

5 T. R. 474

ATTORNEY.

I. QUALIFICATIONS OF ADMISSION.

II. CERTIFICATE.

III. PRIVILEGE AND DISABILITY OF.

IV. SUMMARY JURISDICTION OF THE COURT OVER.

V. PROCEEDINGS IN ACTIONS BY AND AGAINST.

VI. TAXATION AND PAYMENT OF BILLS OF COSTS.

VII. LIEN FOR COSTS.

I. QUALIFICATIONS OF ADMISSION.

- 1 No attorney, employed as a writer or clerk by any other attorney, shall during such employment, take or have any clerk under articles; and no service to such attorney shall be deemed good. No person articulated to an attorney shall serve the agent of such attorney under such articles longer than one year of his clerking: and such service beyond that time shall not be good. Any person applying to be admitted an attorney of K. B. who has not been admitted an attorney or solicitor of any other Court, shall for one full term, previous to application to be admitted, cause his name and place of abode, and the name and place of abode of the attorney to whom he was articulated, to be affixed in legible characters on the outside of the Court of K. B., where public notices are usually affixed, and in a conspicuous place in the chambers of each of the Judges of the Court, and in the King's Bench Office: otherwise he cannot be admitted an attorney. *Reg. Gen. T. 31 G. 3.* 4 T. R. 379
- 2 This rule extends to services performed before, as well as after Michaelmas Term. *M. 32 G. 3.* 4 T. R. 492
- 3 The stat. 2 G. 2. c. 24. requiring, (as a previous qualification to being admitted as an attorney), that the party shall continue in the service of the attorney to whom he was articulated for five years, is not complied with by the clerk serving part of the time with another at-

torney with his master's consent, and the rest of the time with his master. *Ex-parte Hill.* 7 T. R. 456

- 4 No person can be admitted an attorney, unless one full term previous to the term in which he applies to be admitted, he enter in a book at each of the Judge's chambers his name and place of abode, and also the name and place of abode of the attorney to whom he has been articulated. *Reg. Gen. T. 33 G. 3.* 5 T. R. 368

- 5 Every person admitted an attorney of C. P. (not being an attorney of K. B. or a solicitor in Chancery, or in the Exchequer), must, before he is sworn, file with the secondary his articles of clerkship, with the affidavit of the execution thereof, and of due service under the same, and that the notices have been given, required by the rule 31 G. 3. 1 B. & P. 90

II. CERTIFICATE.

- 1 A common informer may recover penalties against an attorney, for not entering his certificate according to the provisions of 37 G. 3. c. 90. s. 26, though no such power is expressly given to him by that statute; for the 25 G. 3. c. 80. which gives that power, and the 37 G. 3. c. 90. are *in pari materia*. *Davis v. Edmonson* (in error). 3 B. & P. 382
- 2 The stat. 37 G. 3. c. 90. s. 26. requiring a proctor to take out a certificate for practising under a certain penalty, gives no action to a common informer for the recovery of it: the 6th section of that Act, incorporating the power of suing, &c. given by former statutes, only referring to penalties in respect of duties created by prior sections of that Act. *Barnard v. Gostling.* 2 E. R. 569
- 3 It seems that two proctors may be sued together for not obtaining and entering their certificates, and that one may be acquitted and the other convicted. *id. ibid.*
- 4 But, on error brought in the Ex-

chequer Chamber, both points were over-ruled. *Barnard v. Gostling*.

1 N. R. 245

- 5 *Quare*. Whether it be not bad to sue under the statute for not having obtained and entered a certificate, without distinguishing which of those two omissions the person sued has been guilty of? *id. ibid.*

- 6 The stat. 25 G. 3. c. 80. which gives a penalty against attorneys prosecuting or defending without a certificate, a suit in any Court holding pleas, where the debt or damage shall amount to 40s. or more, does not extend to the sheriff's court; though an attorney prosecute a suit there by virtue of a writ of justices for more than 40s. *Cross v. Kaye*. 6 T. R. 663

- 7 An attorney, who has ceased to practise after the passing of 25 G. 3. c. 80. and before the operation of 37 G. 3. c. 90. § 31. commenced, may be re-admitted without paying any penalty or arrears of duty. *Ex-parte Scrope*. 2 Taunt. 398

III. PRIVILEGE AND DISABILITY OF.

- 1 An attorney, when plaintiff, may lay the venue in *Middlesex*; but when defendant, he has no privilege to change the venue to *Middlesex*. *Yardley v. Roe*. 3 T. R. 573
- 2 Attornies, plaintiffs, are not by the London Court of Conscience Act, 39, 40 G. 3. c. 104. compellable to sue there a defendant residing in London, though an attorney, for a debt under 5l. *Board v. Parker*. 7 E. R. 46
- 3 The Court of C. P. held that an attorney should not be allowed his privilege, unless he shew that he has practised within a year previous to his arrest. *Dyson v. Birch*. 1 B. & P. 4
- 4 The privileges of an attorney, only continue while he is a practising attorney, and while he has the certificate required by 25 G. 3. c. 80. *Brooke v. Bryant*. 7 T. R. 25
- 5 And therefore it was ruled that an attorney, who had not practised for several years, might be arrested, though after the suing out of the writ, and before the arrest, he recommenced his practice, and took out his certificate. 7 T. R. 25
Fairman v. Bryant. S. P. 7 T. R. 26
- 6 An attorney plaintiff, cannot sue an at-

torney defendant, by attachment of privilege, and hold him to bail; if he do, the defendant may plead his privilege in abatement, or the Court will discharge him out of custody, and stay the proceedings, without costs. *Barber v. Palmer*. 6 T. R. 524

Nichols v. Earle. 8 T. R. 395

- 7 If an attorney sue as a common person, the Court of C. P. will give the defendant leave to plead that the cause of action arose within the jurisdiction of the Court of Requests, together with other matters. *Tagg v. Mudan*. 1 B. & P. 629

- 8 So, in such case, if a sum under 40s. be recovered, and the defendant reside in *Middlesex*, they will allow him to enter a suggestion under the 23 G. 3. c. 33. s. 19. (the *Middlesex* County Court Act.) *Parker v. Vaughan*. 2 B. & P. 29

- 9 An attorney sued with his wife, for a debt incurred by her *dum sola*, loses his privilege. *Roberts v. Mason and Ur*. 1 Taunt. 254

- 10 An attorney shall not have his privilege in a proceeding on the custom of foreign attachment in *London*. *Ridge v. Hurdcastle*. 8 T. R. 417

- 11 An attorney, when in prison, may sue by attachment of privilege for a debt of his own, notwithstanding the stat. 12 G. 2. c. 13. s. 9. *Kaye v. Deneu*. 7 T. R. 671

- 12 An attorney, who is a justice of the peace for a borough, if sued by original for an act done in his office as magistrate, may plead his privilege in abatement. *Duffy v. Oakes*. 3 Taunt. 166

- 13 An attorney of K. B. in pleading his privilege against being sued by original, improperly stated the custom of that Court to be, not to compel its attornies to answer an original writ, unless first prejudged from their office, (which is the custom in C. P. but not in K. B.): the Court, however, held, that, enough appearing to sustain the plea of privilege, they would take notice that an attorney could only be sued by bill, and would reject the custom, which had no foundation, as surplusage. *Stokes v. Mason*. 9 E. R. 424

- 14 The plea of an attorney, to an action sued against him by bill, stating his privilege not to be compelled to answer any bill to be exhibited against

him in the custody of the marshal, &c. and concluding that the Court would not take further cognizance of the action aforesaid against him, (instead of praying judgment of the bill, and that it might be quashed), will not be taken as a plea to the jurisdiction, but only as objecting to the Court's taking cognizance of the action against one of its attorneys in that form: and therefore the Court will adjudge the bill to be quashed. *Chatland v. Thornley.*

12 E. R. 544

15 The undertaking of the defendant's attorney, in order to procure his discharge, to put in bail or pay the debt, is not within stat. 23 H. 6. c. 10.; which avoids all undertakings made for a prisoner's discharge, except bonds taken by the sheriff for the prisoner's appearance &c. because it is given to the plaintiff in the action, and not to the sheriff. *Rogers v. Reeves.* 1 T. R. 418

16 If A. be indebted to B. and pay such debt to the attorney of a person suing A. in B.'s name, but without his authority, A. is notwithstanding obliged to pay B. again; and A.'s remedy is against the attorney who trusted to the counterfeited warrant of attorney from B. although he conceived that he was acting under the real authority of B. *Robson v. Eaton.* 1 T. R. 62

17 A solicitor in chancery may practise in the equity side of the exchequer, without being admitted a solicitor in the latter court. *Meddowcroft v. Holbrooke.* 1 H. B. 50

18 But a solicitor of the equity side of the Court of Exchequer is not entitled to practise in the Court of Chancery; nor, if he does, can he maintain an action for the amount of his bill. And *semble*, that a solicitor of the Court of Chancery cannot, by consent in writing, authorize a solicitor of the Court of Exchequer to practise there in his name. *Vincent v. Holt.* 4 Taunt. 452

19 If the plaintiff and defendant collusively settle the debt and costs upon an execution, in order to defraud the plaintiff's attorney of his costs, the plaintiff's attorney cannot sue out a second execution on the same judgment to levy his costs, but must apply to the Court. *Graves v. Eades.* 1 Marsh. 113

20 An attorney may sue by attachment of privilege, though his certificate has expired and not been renewed, if it be within a year from the expiration of

the certificate, and though he has been in prison for above a year before the suing out of the writ. *Prior v. Moore.* 2 M. & S. 605

IV. SUMMARY JURISDICTION OF THE COURT OVER.

1 The Court, under circumstances, will entertain a summary jurisdiction over an attorney of the Court in obliging him to deliver up deeds, &c. on satisfaction of his lien, though they came into his hands as steward of a Court, and receiver of rents. *Hughes v. Mayre.* 3 T. R. 275

2 But, if it appear that a third person is interested in the deeds, the Court will take a security from the person to whom they are delivered, to produce them on demand for the inspection of such third person. *id. ibid.*

3 The Court refused to proceed summarily against a steward, who was an attorney, to compel him to account before the master for receipts and payments in respect of a mortgaged estate, and to pay the balance to his employer, and to deliver up, upon oath, all deeds, writings, &c. relative to the estate; this being the proper subject of a bill in equity, and not a case for a *mandamus*, to compel a steward of a manor to deliver up Court-rolls, &c. in lieu of which, this summary mode of proceeding has been adopted, where the steward of the Court is an attorney. *Cocks v. Harman.* 6 E. R. 404

4 The Court refused to compel an attorney to deliver up, on payment of his bill, a lease put into his hands for the purpose of his making an assignment of it; there being no cause in Court, nor any criminal conduct imputed to him. *Lowe's case.* 8 E. R. 237

5 The Court of C. P. will in a summary manner take the deeds relating to a manor, and the Court-rolls out of the hands of a steward, who is an attorney of the Court, at the instance of the lord. *Ex-parte Grubb.* 5 Taunt. 206

6 But that Court refused to make any order on an attorney to deliver up a deed, which he held as party and trustee. *Pearson v. Sutton.* 5 Taunt. 364

7 After verdict, the Court of C. P. refused to compel an attorney to discover his client's place of abode. *Hooper v. Harcourt.* 1 H. B. 534

8 If a person required to answer the

matters of an affidavit, swear to an incredible story, the Court will grant an attachment against him, though he positively deny the mal-practices imputed to him. *In the matter of Crosley.* 6 T. R. 701

9 If a defendant's attorney, without sufficient ground, directs an application under the stat. 43 G. 3. c. 46. that the plaintiff, having holden defendant to bail, and recovered at trial less than ten pounds, shall pay the defendant's costs, the Court of C. P., in discharging the rule, will direct the costs of the motion to be paid by the attorney. *Rolfe v. Rogers.* *Rogers v. Burgess.* 4 Taunt. 191

10 If a cause, which is meant to be defended, is called on, and tried as an undefended cause, in consequence of the defendant's attorney neglecting to deliver his briefs, the Court of C. P. will grant a new trial, compelling the defendant's attorney to pay the costs as between attorney and client, out of his own pocket. *De Rouffigny v. Peale.* 3 Taunt. 484

11 The defendant, in putting in bail, misinstructed the filazer as to the christian name of one of the two plaintiffs: the plaintiff's attorney thereupon swore that there was no bail in that action, and moved that the defendant's attorney might pay debt and costs for superseding the defendant: The Court of C. P. discharged the rule with costs to be paid by the attorney so swearing. *Clarke v. Gorman.* 3 Taunt. 492

12 An attorney, having omitted to perfect certain fines, in obedience to the rule of Court of Trinity Term 52 G. 3., the Court granted an attachment against him, with costs of the application made at the instance of the cyrographer. *Gruggen v. White.* 4 Taunt. 881
(And see *tit. Fine*).

13 On the defendant's arrest, his attorney procured his enlargement, by undertaking to give a bail-bond to the sheriff in due time; which he afterwards neglected to do, and the plaintiff recovered against the sheriff for the escape: Held, that such undertaking being contrary to the statute 23 H. 6. c. 9. the Court would not proceed summarily against the attorney, to make him pay the debt and costs for his breach of faith. *Sedgeworth v. Spicer.* 4 E. R. 568

And see *Rex v. Southerton.* 6 E. R. 143

V. PROCEEDINGS IN ACTIONS, BY AND AGAINST.

1 A plaintiff is bound by the acts of his attorney's agent in town. *Griffiths v. Williams.* 1 T. R. 710

2 Where there is an agent in town, all notices are given to him, and are not sent into the country. *Per Buller, J.* 1 T. R. 711

(But see *Hayes v. Perkins.* 3 E. R. 568)

3 When an attorney sues by attachment of privilege, his name need not be indorsed on the writ; for stat. 2 G. 2. c. 23. s. 22. which requires the name of the plaintiff's attorney to be indorsed on the writ, only extends to cases where the attorney sues for another person. *Fields v. Lewen.* 4 T. R. 275

4 An attorney plaintiff may sue by common process, and indorse his own name on the copy as the attorney, and may afterwards declare by another attorney. *Jackson v. Barnard.* 7 T. R. 35

5 If the plaintiff, an attorney, by attachment of privilege, sue a defendant resident in *Wales*, for words spoken there, and lay the venue in the *Welch* county, (in order that the cause may be tried in the next *English* county), and the judge at the trial certify that the defendant was resident in *Wales*, &c., that fact, thus certified, may be suggested on the judgment roll, in order to entitle the defendant to enter judgment of nonsuit under stat. 13 G. 3. c. 51. *Evans v. Jones.* 6 T. R. 500

6 A bill may be filed against an attorney in the vacation. *Waghorne v. Fields.* 5 T. R. 173

7 And the day of filing it may be inserted in the memorandum. *Dods worth v. Bowen.* 5 T. R. 325

8 An attorney defendant is only entitled to four days' notice to plead, though he reside more than 20 miles distance from *London*. *Munn v. Fletcher.* 5 T. R. 369

9 In an action by an attorney for words spoken of him in his profession, he need not prove that he is an attorney by his admission, or by a copy of the roll of attorneys; proof that he acted as such is sufficient. *Berryman v. Wise.* 4 T. R. 366

10 A copy of a bill filed against an attorney, partly printed and partly written, on one sheet of paper,

stamped with a 4d. stamp, which contained several printed counts, with two of them struck out, and was otherwise obliterated, and exceeded 17 common law folios, was held to be irregular, as not being a copy written in the usual and accustomed manner, on which the duty of 4d. per sheet is imposed by stat. 48 G. 3. c. 149. *sched.* 2. And it appearing that the bill was framed in the same manner, with the same obliterations, the Court also set that aside as being contrary to the practice of the Court. *Hartop v. Jukes.* 1 M. & S. 709

- 11 No action lies as for a disturbance of a solicitor retained at a public meeting to solicit a bill in parliament; there being no wrongful act by the defendant stated; but only that the defendant, who was the chairman of the meeting, and one of the committee appointed for the dispatch of the business, conspired with others to disturb the plaintiff in his said employment and business, and procured other solicitors to be employed. *Thompson v. Noel.* 15 E. R. 501

- 12 An attorney, employed by a petitioning creditor before the choice of assignees, and continued by the assignees afterwards, having delivered his bill to the assignees, including all the charges incurred by order of the petitioning creditor in the first instance, and having received a certain sum, on account of his bill generally, from the assignees, is bound, as the assignees themselves were, by the 25th section of 5 G. 2. c. 30. to appropriate the sum so received in reduction of the charges incurred by order of the petitioning creditor, and for which he was originally responsible; and therefore the amount of such charges, covered by the sum so received, cannot be set off by the attorney, against a debt due from him to the petitioning creditor on his own account. *Phillips v. Dicus.* 15 E. R. 248

- 13 The solicitor, under a commission of bankruptcy, is not liable in the first instance to the messenger, whom he nominates for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger. *Hartop v. Jukes.* 2 M. & S. 438

VI. TAXATION AND PAYMENT OF BILLS OF COSTS.

- 1 An attorney may deliver a bill of costs containing such abbreviations of *English* words as are usual and intelligible. *Reynolds v. Caswell and wife.* 4 Taunt. 193
- 2 If any part of an attorney's bill be for business done in the Court, the bill must be delivered a month before the action is brought, otherwise the plaintiff cannot recover, though some of the items be for business not taxable. *Winter v. Payne.* 6 T. R. 645
Hill v. Humphreys. 2 B. & P. 343
- 3 *Semle*, this rule would hold, though some of the items were wholly unconnected with the plaintiff's professional capacity. 2 B. & P. 345
- 4 But if an attorney have a demand for taxable business, and also for conveyancing, and deliver no bill, it seems he might recover for the conveyancing only. 2 B. & P. 345
- 5 Charges for "drawing an affidavit of debt, and getting it sworn," are for business done in the Courts. 6 T. R. 645
- 6 A *dedimus potestatem*, charged in an attorney's bill, is a sufficient item to enable the Court of C. P. to refer the bill for taxation, though, with this exception, it be entirely for conveyancing. *Ex-parte Prickett.* 1 N. R. 266
- 7 An attorney, not having delivered any bill to his client before action brought, but having delivered a bill of particulars of his demand under a judge's order, after action brought, is entitled to recover items of charge for money paid for his client's use, having no reference to his business of an attorney: although other items in the bill of particulars might be taxable. *Mowbray v. Fleming.* 11 E. R. 285
- 8 The Court will refer an attorney's bill to be taxed, though *all* the business be done at the quarter sessions. *Ex-parte Williams.* 4 T. R. 496
- 9 An attorney cannot maintain an action for such a bill, unless he has first signed and delivered it. *Clarke v. Donovan.* 5 T. R. 694
- 10 To maintain an action by one attorney against another, for business done by the plaintiff for the defendant, *before* the defendant became an attorney, it is not necessary for the plaintiff to leave his bill signed, the

- stat. 12 G. 2. c. 13. applying to the case of both parties being attorneys when the action is brought. *Ford v. Maxwell.* 2 H. B. 589
- 11 So, when the bill has been delivered a proper time before the action brought, and never referred for taxation, the defendant cannot on the trial, dispute the reasonableness of the charges. *Anderson v. May.* 2 B. & P. 237
- 12 And a copy of the bill is good evidence, without notice to produce the original. *id. ibid.*
- 13 On the taxation of costs, the Court of C. P. held delivery of an attorney's bill to be conclusive evidence against an increase of charge in a subsequent bill, on any of the items contained in it; and strong presumptive evidence against any additional items. *Love-ridge v. Botham.* 1 B. & P. 49
- 14 Before an attorney can bring an action for his fees, he must leave the bill with his client. *Brookes v. Mason.* 1 H. B. 290
- 15 An attorney's bill for obtaining a bankrupt's certificate, must be signed and delivered a month before he can sue thereon. *Collins & Waller v. Nicholson.* 2 Taunt. 321
- 16 Obtaining the Lord Chancellor's signature, is business done in a Court. 2 Taunt. 321
- 17 A party, in a cause, having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery of a bill signed by the first attorney under the statute 2 G. 2. c. 23. s. 23. which delivery was accordingly made to the second attorney in the cause: Held, that this was a sufficient delivery to the party to be charged therewith, within the words and meaning of that statute, so as to enable the first attorney to bring his action against the client for the amount of such bill. *Vincent v. Slaymaker.* 12 E. R. 372
- 18 And as the statute requires that the bill should either be delivered to the party personally, or "left at his dwelling or last place of abode:" Leaving it at his counting-house is not a good delivery. *Hill v. Humphreys.* 2 B. & P. 343
- 19 In an action on an attorney's bill, the *nisi prius* roll is good *prima facie* evidence, that the action was not commenced till the expiration of a month after the delivery of the bill. *Webb v. Pritchett.* 1 B. & P. 363
- 20 The Court of C. P. refused to stay proceedings in an action on an attorney's bill brought subsequent to the order of a judge of K. B. for its taxation, but previous to the taxation having taken place. *Stevenson v. Watson.* 1 B. & P. 365
- 21 An attorney is not liable to pay the costs of taxing his bill under the stat. 2 G. 2. c. 23. s. 23. where the deduction of one sixth is occasioned, not by the particular items being taxed, but by a whole branch of it being disallowed. *White v. Milner.* 2 H. B. 357
- 22 Where, upon the taxation of an attorney's bill, a sum was deducted, less than one sixth of the amount of the bill delivered, including disbursements, to pay which the client had advanced money to the attorney, the Court of C. P. ordered the client to pay the costs of taxation. *Hindle v. Shackleton.* 1 Taunt. 536
- 23 Negligence in the conduct of a cause, cannot in general be set up as a defence to an action on an attorney's bill. *Templer v. McLughlan.* 2 N. R. 136
- 24 An attorney's bill may be referred for taxation, though it is his executor who sues on it. *Penson, Executor, v. Johnson.* 4 Taunt. 724
- 25 A mistake in the date of items in an attorney's bill, which does not mislead, does not vitiate the delivery of the bill a month before action brought. *Williams v. Barber.* 4 Taunt. 806

VII. COSTS, LIEN FOR.

- 1 An attorney has a lien for his general balance on papers of his client which come to his hands in the course of his professional employment; therefore, where C. gave his attorney a specific sum for the purpose of satisfying a debt, for which an execution had issued against his goods at the suit of B., and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by C. with B. as a security for the debt: Held, that the attorney had a lien on it for his general balance due from C.; and that such lien was not extinguished, by his having taken acceptances from C. for the amount of that balance before the lease came to

- his hands, some of those acceptances when the lease did come to his hands having been dishonoured, and one of them taken up by the attorney. *Stevenson and another, assignees, &c. v. Blakelock, Gent.* 1 M. & S. 535
- 2 The lien of the plaintiff's attorney upon the debt and costs recovered in the cause after affirmance upon a writ of error, must be satisfied before the defendants are entitled to set them off, against a judgment recovered by them in another cause against the plaintiff; and costs in error are costs in the cause. *Middleton v. Hill.* 1 M. & S. 240
- 3 Though the Court will not interfere on behalf of an attorney, and prevent the plaintiff's settling his own cause without first paying the attorney's bill, yet, when the adverse party, against whom a judgment has been obtained, applies to get rid of that judgment, the Court will take care that the attorney's bill is satisfied. *Mitchell v. Oldfield.* 4 T. R. 123
- 4 An attorney has a lien for his bill of costs, on money levied by the sheriff under an execution on a judgment recovered by his client, and is entitled to have it paid over to him, notwithstanding the sheriff has had notice from the party, against whom the execution issued, to retain the money in his hands, and that the Court of C. P. would be moved to set aside the judgment for irregularity; and notwithstanding a docket has been struck against the client becoming a bankrupt. *Griffin v. Eyles.* 1 H. B. 122
- 5 If the defendant's attorney pay to the plaintiff the debt and costs recovered after notice from the plaintiff's attorney, not to do so till his bill has been first satisfied, the former is liable to pay over again to the latter, the amount of his lien on such debt and costs of the suit. *Read v. Dupper.* 6 T. R. 361
- 6 An attorney has a lien upon a sum awarded in favour of his client, as well as if recovered by judgment; and, if after notice to the defendant, the latter pay it over to the plaintiff, the plaintiff's attorney may compel a re-payment of it to himself; and he shall not be prejudiced by a collusive release from the plaintiff to the defendant. *Ormerod v. Tate.* 1 E. R. 464
- 7 A plaintiff may, without consulting his attorney, compromise an action with the defendant, and take on himself the payment of the costs to the attorney, if there be no fraudulent conspiracy to cheat the attorney of his costs. *Chapman v. Hurw.* 1 Taunt. 341
- 8 If a plaintiff collude with a defendant's bail and his attorney to deprive the plaintiff's attorney of his costs, by settling a debt and accepting a part payment without the intervention of the plaintiff's attorney, the Court of C. P. will not restrain the plaintiff's attorney from proceeding against the bail in order to recover such costs. *Swain v. Senate.* 2 N. R. 99
- 9 The lien of the plaintiff's attorney on the debt and costs recovered in the cause, must be satisfied before the defendant is entitled to set off the costs recovered by him in another cause against the plaintiff, on a summary application to the Court. *Randall v. Fuller.* 6 T. R. 456
- 10 The plaintiff having charged the defendant in execution, died: the defendant's wife took out administration to the plaintiff; the Court ordered the defendant to be discharged out of custody; saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne v. Erle.* 8 T. R. 407
- 11 Upon an order being obtained for taxing an attorney's bill, and delivering up papers for the purpose of changing the attorney, the attorney to whom the money is to be paid is entitled to the possession of the original order. *Alger v. Hefford.* 1 Taunt. 38
- 12 The rights between party and party are paramount to the rights between one of the parties and his attorney: Therefore, where one party owing rent had obtained a verdict on a variance, and had become insolvent, the Court permitted the avowant to amend, and to pay the costs of the former trial into Court, as a fund for payment of his rent, in derogation of the plaintiff's attorney's lien. *Brown v. Sayce.* 4 Taunt. 320
- 13 The lien which an attorney has on the papers in his hands, is only commensurate with the right which the party delivering the papers to him, has therein. *Hollis v. Claridge.* 4 Taunt. 807
- 14 Every one, whether attorney or not, has, by the common law, a lien on the

specific deed or paper delivered to him to do any work or business thereon, but not on other muniments of the

same party, unless the person claiming the lien be an attorney or solicitor. *Hollis v. Claridge*. 4 Taunt. 807

AUCTION.

I. RIGHTS AND LIABILITY OF AUCTIONEER.

II. PRIVILEGES OF PURCHASER.

III. DUTY, WHEN PAYABLE.

I. RIGHTS AND LIABILITY OF AUCTIONEER.

- 1 An auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, whether it be for a purchase of an interest in land, or of goods: His authority is given by the buyer bidding aloud. *Emmerson v. Heelis*. 2 Taunt. 38
- 2 And he is duly authorized to sign a contract for the purchase of a real estate, on behalf of the highest bidder. *White v. Proctor*. 4 Taunt. 209
- 3 And his writing down the name of the highest bidder in the auctioneer's book is a sufficient signature to satisfy the statute of frauds. *id. ib.*
- 4 And if the highest bidder is agent for another, the auctioneer's signature of the bidder's name will bind the principal: At least, if the principal is present, and consulting with the agent during the sale, and makes no objection before the entry made in the book. *id. ibid.*
And see Frauds, Stat. of.
- 5 An auctioneer, employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against a buyer, though the sale were at the house of such third person, and the goods were known to be his property. *Williams v. Millington*. 1 H. B. 81
- 6 An auctioneer, receiving money as a deposit on the sale of an estate by auction, knowing that there is a defect in the vendor's title, is answerable to the purchaser for the deposit, though he should have paid it over to the vendor: *Semble*, that he is a mere stake-holder, and not to be considered as agent for both parties, and that he is liable, at all events, till the contract

be completed. *Edwards v. Hodding*. 1 Marsh. 377

- 7 The selling goods by auction within the city of London, by an auctioneer who has paid the duty of 20s. for a license, required by the stat. 17 G. 3. c. 50. but who has not been admitted as a broker by the Court of the mayor and aldermen, does not make him liable to the penalty of the 6 Anne, c. 16. for acting as a broker without being so admitted. *Wilkes v. Ellis*. 2 H. B. 555

II. PRIVILEGES OF PURCHASER.

- 1 A bidder at an auction, under the usual conditions, that the highest bidder should be the purchaser, may retract his bidding any time before the hammer is down. *Payne v. Cave*. 3 T. R. 148
- 2 If the owner of goods, or an estate, put up to sale at an auction, employ puffers to bid for him without declaring it, and there is only one real bidder, who by means of the puffer is induced to purchase at a high price, such purchaser shall not be compelled to complete the contract: and the stat. 28 G. 3. c. 37. makes no difference. *Howard v. Castle*. 6 T. R. 642
And see Blachford v. Preston, ob dict. 8 T. R. 93, 95
- 3 If the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract; without waiting to see whether the vendor may ultimately be able to establish a good title or not. *Wilde v. Fort*. 4 Taunt. 334
- 4 A purchaser is not bound to accept a doubtful title. *id. ibid.*
- 5 A. buys a house at an auction, and deposits part of the purchase-money, the remainder to be paid upon the vendor's making a good title. It turns out that the vendor's title is good in law, but bad in equity: Held, that A.

is entitled to recover back the deposit in an action at law. *Maberley v. Robins.* 1 Marsh. 258
And see *Elliott v. Edwards.* 3 B. & P. 181 N. B. See *Vendor and Purchaser.*

III. DUTY, WHEN PAYABLE.

- 1 Where an agent of the owner at an auction for the sale of an estate put it up in so many lots at certain prices, and no person bidding for the same, he put it up again in fewer lots at other certain prices; and still no person bidding, he put it up all together in one lot, at a certain price; and on no person's bidding, the estate was withdrawn from sale: Held, that this is not a bidding of the owner by an agent, so as to subject the party to the Auction Duty for want of a notice in writing to the auctioneer (previous to the auction) of such agency, as required by stat. 19 G. 3. c. 56. and 28 G. 3. c. 37. in order to excuse the owner from the payment of the Auction Duty. *Cruso v. Crisp.* 3 E. R. 337
- 2 An auctioneer was employed to sell an estate, the lowest price of which was fixed by the owner, and written down by him on a piece of paper, which

was put under a candlestick at the time of sale, with the privy of the auctioneer, but not signed by the owner, nor any notice in writing given to the auctioneer of the price so set down, nor had the auctioneer given the previous notice of the sale to the collector of the duty as required by the Acts of 19 G. 3. c. 56., and 28 G. 3. c. 37. but being asked at the sale, whether he had taken the proper precautions to avoid the duty, in case there were no sale, he said that it was his mode to fix a price under the candlestick, and if the bidding did not come up to that price *it was no sale or duty*: Held, that the duty having attached, though there were no sale, for want of taking the precautions required of the owner by the statutes under such circumstances, and the auctioneer having been sued for the duty on his bond to the crown, and compelled to pay it, he could not recover it over against the owner, he having warranted that proper precautions had been taken, to prevent the duty attaching in the event, though both parties were mistaken in the law. *Cupp v. Topham.* 6 E. R. 392

AUDITA QUERELA.

- 1 The defendant in *audita querelâ* cannot move in arrest of judgment, but must either demur at the time of filing the writ of *audita querelâ*, or, if the verdict be given against him, must bring a writ of error, or move for a new trial. *Giles v. Nathan.* 1 Marsh. 226
- 2 The Court of C. P. will always give relief in a summary way, where a party would be entitled to it, on an *audita querelâ.* *Lister v. Mundell.* 1 B. & P. 427

AWARD.

I. SUBMISSION.

II. ARBITRATORS AND UMPIRE.

- (a) *How appointed.*
- (b) *Their power and duty.*

III. REFERENCE.

- (a) *Subject of.*

I. AWARD.

- (a) *Where confirmed.*
- (b) *When set aside.*

- (c) *Performance, how enforced.*
- (d) *Costs, how payable.*

I. SUBMISSION.

- 1 The Court have no authority by 9 & 10 W. 3. c. 15. to make a parol submission to an award a rule of Court. *Ansell v. Evans.* 7 T. R. 1
- 2 But they have jurisdiction under that statute, though the submission bond were to make the award, instead of

the submission, a rule of Court. *Pedley v. Westmacot.* 3 E. R. 603

- 3 The Court refused to make a submission to an award a rule of Court; part of the matter agreed to be referred, having been made the subject of an indictment. *Watson v. McCullum.*

8 T. R. 520

- 4 If a bond of submission to arbitration between the trustee of a wife and her husband recite, that a suit for separation has been instituted between the husband and wife in the Commons, and that in order to put an end to any contest about the terms of separation, it had been agreed that all matters should be referred to I. S., and either of the parties should be "at liberty to apply to the Court to make the award a rule of Court;" such submission may be made a rule of the Court of C. P. under stat. 9 & 10 W. 3. *Soilleux v. Herbst.* 2 B. & P. 444

And see *Thompson v. Charnock.*

8 T. R. 139

- 5 A submission to arbitration of *all matters in difference between the parties in the suit*, is not confined to the subject-matter in the particular action depending, but will extend to cross demands between the parties, though not pleaded by way of set-off; and the costs being to abide the event makes no difference. *Malcolm v. Fullarton.*

2 T. R. 645

But a reference of *all matters in dispute in the cause between the parties*, is confined solely to the matters in dispute in that suit. *id.* 644

And see *Subject of Reference.* *Post.* 90

- 6 Where parties by bond, agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of Court, it is competent to either, even since the stat. 9 & 10 W. 3. c. 15. to revoke by deed his submission at any time before such submission shall be made a rule of Court; and he is not liable to an attachment for contempt of Court, in not obeying an award which had been made by the arbitrators, after their having received notice of such deed of revocation. *Milne v. Gratrix.*

7 E. R. 608

II. ARBITRATORS AND UMPIRE.

(a) How appointed.

- 1 If A. and B., in consideration of a sum of money paid by one to the other,

enter into partnership, and covenant, in case of the dissolution of the partnership, to submit all matters relating thereto to arbitrators, to be chosen by the partners, *one by each*; this does not authorize the *administratrix* of one of the partners to name an arbitrator; nor would it authorize the arbitrators to determine whether any part of that sum should be refunded. *Tattersall v. Groote.* 2 B. & P. 131

- 2 *Semble*, no action can be maintained for refusing to nominate an arbitrator, in pursuance of a covenant to refer matters to arbitration. *id. ibid.*

- 3 Where the parties named two arbitrators, who were to choose a third, and the award was to be made by the three, or any two of them; and each of the arbitrators proposed to the other a third, who was admitted to be a fit person, but not being able to agree which of the two proposed should be selected, they agreed to decide the choice by lot: Held, that this was within their authority, and that an award made by such third arbitrator, in conjunction with the one by whom he had been originally proposed, could not be impeached on that account. *Neale v. Ledger.* 16 E. R. 51

- 4 If the bond be, that if arbitrators do not make their award by the day named, then to abide the award of an umpire to be chosen by the arbitrators, the time for the arbitrators to appoint an umpire, commences when the time for their making their award expires. *Beck v. Sargent.* 4 Taunt. 292

- 5 Arbitrators may choose an umpire either before or after the time limited for making their own award, if the umpire be chosen within the time limited for his umpirage. *Harding v. Watts.* 15 E. R. 556

- 6 Arbitrators having power to choose an umpire, may elect one immediately previous to entering upon the examination of the matter referred to them. *Roe d. Wood v. Doe.* 2 T. R. 644

(b) Their Power and Duty.

- 1 Where an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once. *Payne v. Deakle.*

1 Taunt. 509

- 2 If an arbitrator has power to enlarge the time for making his award to any

- other day, the Court will expound it to mean to any other days. *Berrett v. Parry*. 4 Taunt. 658
- 3 Where a cause was referred under a judge's order, with a proviso that the arbitrator should make his award on or before a day certain; but if he should not be then prepared, that the time should be enlarged from time to time, as he might require, and a judge of the Court might think reasonable and just: Held, that the time for making the award was duly enlarged, by the arbitrator indorsing on the order, on the day preceding the expiration of the original time, that he required further time; although the judge's order, granting such further time, was not obtained until a day subsequent. *Reid v. Fryatt*. 1 M. & S. 1
- 4 An arbitrator, to whom the question of the right of two rectors to the tithe of certain lands, was referred, had power to devise all means to prevent future litigation between the parties, and to settle all matters in difference between them, and to determine what he should think fit to be done by either of the parties, touching the matters in dispute: Held, that he did not exceed his power, by awarding undivided moieties of the tithes to the two rectors. *Prosser, Clerk, v. Goringe*. 3 Taunt. 426
- 5 It is competent to arbitrators to inquire whether a ransom, for which the plaintiff seeks to be repaid, were justified by an extreme necessity, within the stat. 45 G. 3. c. 72. s. 16. *Miller v. Robe*. 3 Taunt. 461
- 6 If arbitrators have power to examine the parties in the cause, they may waive the objection taken to the competency of a witness that he has such an interest that he ought to have been made a party: And such witness may be examined by the arbitrators. *Lloyd v. Archbowl*. 2 Taunt. 324
- 7 If an arbitrator be appointed to arbitrate a certain measure contemplated between two parties, as a dissolution of partnership, he is not necessarily bound to direct that the partnership shall be dissolved. *Simmonds v. Swaine*. 1 Taunt. 549
- 8 If an arbitrator chooses to put the law out of the question, and to award the payment of a conscientious demand, arising out of a transaction which he knows to be illegal, he may do so. *Delver v. Barnes*. 1 Taunt. 48
- 9 Where, in an action by the assignee of a bankrupt, the petitioning creditor's debt was to be proved by a deed of reference between himself, the bankrupt, and others, their partners, of all accounts between them, or any two of them; and by an award (*inter alia*) of a separate debt of above 100*l.* due from the bankrupt to the petitioning creditor, who was also the assignee: Held, that it was not sufficient to prove the execution of the deed by the petitioning creditor and the bankrupt, without proving also the execution by the other partners (by whom it appeared on the face of it, to have been also executed;) for the consideration to each to execute his own submission was the submission of all the others, and without proof of that, the arbitrators had no authority to make their award between any of the parties. *Antram, Assignee, &c. v. Chace*. 15 E. R. 209
- 10 Assignees of a bankrupt, having received 1500*l.* from a debtor to the bankrupt as a debt due to his estate, and having commenced an action against him for a further demand on the same account, to which he had only pleaded the general issue, agree with him to refer all matters in difference between the parties in the cause; the arbitrator has power to award that the assignees shall repay a part of the sum already received, if it appear to have been paid by mistake. *Malcolm v. Fullarton*. 2 T. R. 645
- 11 Where a verdict is taken for a certain sum, subject to the award of an arbitrator, he cannot award a greater sum than that for which the verdict was taken; and if he do, no *assumpsit* by implication will arise to pay even to the extent of the verdict so taken. *Bonner v. Charlton*. 5 E. R. 139 And see *Prentice v. Reed*. 1 Taunt. 151
- 12 After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award. *Irvine v. Elnon*. 8 E. R. 54
- 13 It seems, that under a reference of all matters in difference, the arbitrator will not of necessity be confined to the amount of the damages for which the verdict is taken. *Pearse v. Cameron*. 1 M. & S. 675

- 14 Where an arbitrator has power to order what he shall think fit to be done by either of the parties respecting the matters in dispute: *Quære*. Whether he might not direct them to consent to an application to the Court for enlarging the damages given by the verdict? *Prentice v. Reed*. 1 Taunt. 151
- 15 The Court said, that an arbitrator may award costs without any express authority for that purpose. *Roe d. Wood v. Doe*. 2 T. R. 644
- 16 Upon a submission by bond of all matters in difference between the parties in a cause, without making any mention of costs, the arbitrator has no authority to award costs, as between attorney and client. But the plaintiff, waiving his costs, and having only demanded the principal sum awarded, took his attachment for that sum. *Whitehead v. Firth*. 12 E. R. 165
- 17 Where the costs of the cause and of the *special jury* are separately submitted, the arbitrator must distinctly adjudicate upon each, or the award is void. *George v. Lousley*. 8 E. R. 13
And see post, 96.
- (d) *Costs, how payable.*
- III. SUBJECT OF REFERENCE.
- 1 It was recommended that where the parties intend to refer *all* disputes, the terms of the reference be "*of all matters in difference between the parties*;" and when the reference is only intended to be of the matter in the particular cause, it be "*of all matters in difference in the cause*." *Per Buller, J. Smith v. Muller*. 3 T. R. 626
- 2 A motion, that an award should be referred back to the same arbitrator to reconsider it, on the ground that he had not sufficient materials before him when he made it, must be made before the last day of the next Term after such award made, according to stat. 9 & 10 W. 3. c. 15. s. 2.; although the arbitrator be not charged with corruption or undue means. *Zachary v. Shepherd*. 2 T. R. 781
- 3 The Court will not presume that matters in difference, submitted to arbitration, by an assignee of debts, (and who was made attorney to receive the same), arose subsequent to the deed under which the assignee was empowered to submit the same; but such matter may be pleaded by way of defence to an action for the money awarded. *Banfill v. Leigh*. 8 T. R. 571
- 4 Where a verdict is taken for the damages in the declaration, subject to a reference of all matters in difference, the Court will not give leave to increase the sum in the declaration and rule of reference, on an affidavit that a larger sum will probably be proved before the arbitrator. *Pearse v. Cameron*. 1 M. & S. 675
- 5 To debt on bond, conditioned to perform an award, under a reference of all matters in difference between the parties, it is a good plea in bar, that at the time of the submission, certain negotiable bills of exchange, drawn by the defendant and accepted by the plaintiff, were then outstanding, and that an indemnity of the defendant against such bills was a matter in difference between the parties, which was notified to the arbitrators before the award made, and that they made no award concerning it, and that some of the bills had not been paid by the plaintiff, and the defendant was still liable to the holders; though it appeared by the award set forth, that the arbitrators stated therein, that they had heard the allegations of the parties, and examined all the accounts, bills of exchange, &c. and all other evidence and proofs produced to them, touching the matters in difference, and awarded of and concerning the same, that the defendant should pay to the plaintiff 1,500*l.* in full of all claims and demands upon him, &c.; and so proceeded to award concerning other specific matters; but without mentioning such outstanding bills, or any indemnity concerning the same. *Mitchell v. Staveley*. 16 E. R. 58
- 6 Under a submission to an arbitrator of all matters in difference between landlord and tenant, the arbitrator awarded, *inter alia*, that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord by a certain day, upon the tenant being paid or allowed a certain sum in satisfaction for it: Held, that the property in the hay did not pass to the landlord on his tender of the money, by the mere force of the award, against the consent of the tenant, who refused to accept the money or deliver up the hay; and therefore that the landlord could not maintain trover for it: but his remedy was upon the award. *Hunter v. Rice*. 15 E. R. 100

IV. AWARD.

(a) Where confirmed.

- 1 Where an award is made after the time originally given to the arbitrators, but authority was given them to enlarge the time, an award within the enlarged time is good, though it do not recite that the arbitrators did enlarge the time. *George v. Lousley*. 8 E. R. 13
- 2 An award, which is required to be made in writing, &c. and ready to be delivered at such a time, is complete if made in writing and ready to be delivered by the arbitrator within the time, though not actually delivered. *Brown v. Vawser*. 4 E. R. 584
- 3 After an award made under the hand of an umpire and ready for delivery, pursuant to the terms of reference of which notice was given to the parties, an alteration by the umpire of the sum awarded, though made on the same day, and before delivery of the award, is void; but the award is good for the original sum awarded, which still was legible, the same as if such alteration had been made by a mere stranger, without the privity or consent of the party interested. *Henfree v. Bromley*. 6 E. R. 309
- 4 The submission being of all matters in difference, an award of so much to be paid by the defendant to the plaintiff on their banking account, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them can be intended unless it be shewn. *Ingram v. Milnes*. 8 E. R. 445
- 5 An award that each party pay his own costs, and that certain actions be discontinued, is final and good, being in effect an award of a *stet processus*. *Blanchard v. Lilly, & Rex v. Blanchard*. 9 E. R. 497
- 6 Where lessees of land and of coal mines found or to be found therein, covenanted forthwith to proceed to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and, as in such cases was usual and customary, and to erect fire engines for the purpose, by the 24th of June, 1806, or in default thereof to pay so much to the lessor as arbitrators should award; and after the

day past without any new pits sunk, &c. the parties named arbitrators to award concerning the damage, loss and delay to the lessor, if any, and whether any rent or other satisfaction should be made to him on that account; and the lessees gave bond to the lessor, conditioned to perform the award, and afterwards the arbitrators awarded that the lessees had not performed their covenant by not having proceeded to sink for the said coal as far as could be accomplished, &c. (in the words of the covenant), on or before the 24th of June, 1806, for which they awarded to the lessor 150*l.* on account of all damages and losses then incurred on account of such breach, and further, that the lessees should sink coal mines and erect fire engines, for getting the coals demised on or before the 24th of June, 1807, and in default thereof, and until the same should be done, they should pay a yearly rent of 200*l.* to the lessor, as a compensation for the lord's share reserved under the lease: Held, that in an action on the bond, it was a sufficient answer by the lessees to save the condition, that they had paid the 150*l.* awarded for the breach of the covenant up to the 24th of June, 1806, and as to the subsequent period, from thence till the 24th of June, 1807, that on divers days between, &c. they did well and truly sink for coal in the lands demised, as far as could and ought to be accomplished, &c. (in the words of the covenant), and were ready and willing to have sunk and completed the pits, and to have erected the necessary fire engines, &c. within the time limited by the award; but that at the time of making the lease, and from thenceforth, there were no mines of coal under the lands as could or ought to be worked by any person acquainted with the nature of collieries, or as in such cases it was usual or customary to work, or as have defrayed the necessary expenses of working and getting the same, all which premises the defendants ascertained and proved by due and sufficient experiments and trials then and there made; but leave was given to amend by taking issue on the sufficiency of the experiments. *Hanson v. Boothman*.

13 E. R. 22

- 7 An Inclosure Act, having directed that the allotments made by the commis-

sioners, should for ever remain for the benefit of the appointees: Held, that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take the same, as if the terms of the award had been specifically enacted: And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodgson.* 8 E. R. 38

- 8 The award of an umpire is not vitiated by the two arbitrators, who were *functi officio*, joining in it. *Beck v. Sargent.* 4 Taunt. 232.

Nor by a stranger joining. *ib.*

- 9 An award, directing one of two things to be done in the alternative, is good, if either of them is capable of being performed; and in such case, it is incumbent on the party to perform that part, which is capable of being carried into execution. *Simmonds v. Swaine.* 1 Taunt. 549

(b) When set aside.

- 1 Where a cause has been referred to arbitration, the Court of C. P. cannot interfere to enter a nonsuit against the arbitrator's direction; but the party objecting to the award must move to set it aside. *Peters v. Anderson.* 1 Marsh. 238
- 2 If, upon a reference, either party is precluded by the terms of the rule from going into evidence of that which he is desirous to try, his remedy is to move to set aside the rule of reference; but he cannot impeach the award. *Doe ex dem. Lord Carlisle, v. Bailiff and Burgesses of Morpeth.* 3 Taunt. 378
- 3 Upon an application for an attachment for non-performance of an award, it is competent to the parties to object to the award, for any illegality apparent upon the face of it, though the time for applying to set it aside is expired. *Pedley v. Goddard.* 7 T. R. 73
- 4 But the Court will not listen to an application to set aside an award for any defect whatsoever, after the time limited by the stat. 9 & 10 W. 3. c. 15. 7 T. R. 73
- 5 Though such defect appear upon the face of the award. *Lowndes v. Lowndes.* 1 E. R. 276

- 6 An award, that the defendant shall pay to the plaintiff such a sum of money, unless, within twenty-one days, (which was after the time limited for making the award), the defendant shall exonerate himself by affidavit from certain payments and receipts, in which case he was only to pay a less sum, is illegal and void, because uncertain and inconclusive. *Pedley v. Goddard.* 7 T. R. 73

- 7 The time limited by the stat. 9 and 10 W. 3. c. 15. s. 2. for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of *nisi prius*. *Synge, Exor. v. Jervoise.* 8 E. R. 466

- 8 If an arbitrator awards a greater sum than the amount of the verdict, and judgment be entered for the whole, and it appears that part of the sum is covered by a countervailing demand which never was in dispute, so that only a balance less than the amount of the verdict is ultimately to be paid over; the Court of C. P. reduced the judgment to the amount of the verdict, and granted execution for the sum really due. *Prentice v. Reed.* 1 Taunt. 151

- 9 If an arbitrator profess to decide upon the law and he mistake it, the Court will set aside the award, although the arbitrator's reasons do not appear upon the face of the award, but only upon another paper, delivered therewith. So it seems it would be, if such reasons appeared in any other authentic manner to the Court. *Kent v. Elstob.* 3 E. R. 18

- 10 Under a submission of all matters in difference between *A.* and *B.*, an award on matters in difference between *A.* and *B.* *C.* and *D.* jointly directing *A.* to pay *B.* a certain sum as a compensation for coals gotten by *A.*, belonging to *B.*, or to *B.* and others, and directing *B.* to give *A.* a bond to indemnify him against the claims of *C.* and *D.*, is bad. *Fisher v. Pimbley.* 11 E. R. 188

- 11 Where a cause, involving a question of law was referred to a barrister, under a rule of Court to settle all matters in difference between the parties: and he made his award thereupon; but the question of law did not appear upon the face of the award; the Court, considering that it was the intention of the parties to refer the decision of

the merits, as well upon the matter of law as of fact, to the arbitrator, refused to open the award again, upon a suggestion of the arbitrator's mistake in point of law upon the construction of a contract between the parties. *Chace v. Westmore.*

13 E. R. 357

- 12 *A.* declared in covenant against *B.* and her husband, for that *B.*, before her intermarriage, covenanted with *A.* by deed to leave certain accounts in difference between them to arbitration, and to abide and perform the award, provided it were made during their lives; and *A.* protesting that *B.* had not, before her intermarriage, performed her part of the covenant, averred that after making the indenture and the intermarriage of the defendants, the arbitrator awarded *B.* to pay *A.* a certain sum; and then alleged a breach for non-payment of such sum. After verdict, on *non est factum* pleaded; held, that upon this declaration, it must be taken that *B.* intermarried after the submission and before the award made; in which case, although the plaintiff could not recover on the breach assigned for non-payment of the sum awarded, because the marriage was a countermand to the authority of the arbitrator; yet, as by the marriage itself, *B.* had, by her own act, put it out of her power to perform the award, the covenant to abide the award was broken; and therefore judgment could not be arrested, on the ground that the marriage was a revocation of the arbitrator's authority, and that so the plaintiff could not recover as for a breach by non-performance of the award. *Charnley v. Winstanley & Ux.* 1 E. R. 266

- 13 Where a cause is referred to arbitration, the death of one of the parties, at any time before the award made, is a revocation of the arbitrator's authority, and the Court of C. P. will set aside an award made subsequently to such death. *Potts v. Ward.*

1 Marsh. 366

- 14 The Court of C. P. refused to set aside an award, upon a statement of facts, from which it could only be inferred that the award was founded upon an incorrect idea of the law of the case. *Delver v. Barnes.* 1 Taunt. 48
- 15 The Court will not set aside the award of an umpire, because he

received the evidence from the arbitrators without examining the witnesses; unless he were requested to re-examine them, before the making of his award. *Hall v. Lawrence.*

4 T. R. 589

- 16 The Court of C. P. refused to set aside an award, on the ground of the witnesses not having been examined on oath; no objection being made at the time of their examination. *Ridout v. Pye.* 1 B. & P. 91

- 17 It is no ground for setting aside an award, that one of the defendant's witnesses was examined by the arbitrator, after the evidence was closed on both sides, and the plaintiff's attorney gone; though by a different testimony from what he gave at first, the arbitrator's opinion was influenced; unless such re-examination was brought about by the management of the defendant's attorney. *Atkinson v. Abraham.*

1 B. & P. 175

- 18 If an award be made on an improper stamp, and no application be made to enforce it, the Court will not set it aside. *Preston v. Eastwood.* 7 T. R. 95
And see tit. Stamps.

- 19 If a debt, arising out of an illegal transaction, due from one of two partners to the other, be referred together with other causes of dispute, to an arbitrator, who awards a sum due from one partner to the other, expressly on account of such debt, the Court of C. P. will set aside that part of the award. *Aubert v. Maze.* 2 B. & P. 371

- 20 After an order of reference has been made with the consent of counsel and attorney, the Court of C. P. will not set it aside on an affidavit by a party expressly denying his attorney's authority to refer, though the application be made before any step taken by the arbitrator, excepting the appointment of a meeting. *Filmer v. Delber.* 3 Taunt. 486

- 21 Partiality and improper conduct in an arbitrator in making his award, without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond conditioned for the performance of the award, but is only matter for application to the equitable jurisdiction of the Court to set aside the award: Neither can a parol agreement between the parties to wave and abandon the award be pleaded to such action. *Braddick v. Thompson.* 8 E. R. 344

22 Where an arbitrator, having by mutual agreement of the parties, closed his examination, refuses the application of the defendant's attorney for another hearing, and makes his award: the Court of C. P. will not set aside the award, on the affidavit of the defendant's attorney, that he is in possession of evidence which would repel that, on which the award was founded. *Ringer v. Joyce*. 1 Marsh. 404

23 A party cannot, in shewing cause against an attachment for not performing an award, impeach the award for defects not appearing on it. *Holland v. Brooks*. 6 T. R. 161

(c) *Performance, how enforced.*

1 An attachment for non-performance of an award, is only in the nature of a civil execution. *Rex v. Myers*. 1 T. R. 266

2 Where a submission to an award is made a rule of Court under the statute, there being no action, the affidavits on which to apply for an attachment for disobeying the award need not be entitled in any cause, but the affidavits in answer must. *Bevan v. Bevan*. 3 T. R. 601

3 But in such case, neither the affidavits in support of, nor those in answer to a rule for setting aside the award need be entitled. *Bainbridge v. Houlton*. 5 E. R. 21

4 The Court granted an attachment for non-performance of an award made a rule of Court, and would not drive the plaintiff to his action on the bond; upon an affidavit that the arbitrators, after having appointed an umpire who refused to act, appointed another, who accepted the authority; but he being objected to by the defendant, the arbitrators each proposed another, but could not agree on the person to be substituted, and another was not substituted, though the respective attorneys agreed on a third, in consequence of which the umpire objected to was called on to proceed, and made his award within time. *Oliver v. Collings*. 11 E. R. 367

5 Where parties by an indorsement in general terms on the bond of submission to arbitration agree that the time for making the award shall be enlarged, such agreement virtually includes all the terms of the original submission to which it has reference, amongst others, that the submission

for such enlarged time shall be made a rule of Court; and consequently the party is liable to an attachment for non-performance of award made within such enlarged time, under the stat. 9 & 10 W. 3. c. 15. *Evans v. Thompson*. 5 E. R. 189

6 If an arbitrator award, among other things, that each party shall pay a moiety of the costs of the arbitration, and of making the submission a rule of Court; and one party, in order to get the award out of the hands of the arbitrator, pay the whole, he may have an attachment against the other party, if he refuse to pay his moiety. *Hicks v. Richardson*. 1 B. & P. 93

7 Disputes existing between the master and owner of a ship, touching the ship's accounts on a certain voyage, they referred all actions and causes of actions to arbitrators, who awarded a balance to be paid by the owner to the master: Held, that upon a rule for an attachment for non-payment of the sum awarded, it was not competent to the owner to claim a deduction of a certain sum, the price and proceeds of certain goods shipped on their joint account, the whole of which price had been paid by the owner in the first instance, on the ground that that particular adventure formed no part of the disputes between them, and had not been submitted to, nor taken into the consideration of the arbitrators; because it was plainly within the terms and scope of the reference; the direct object of which was to make a final settlement of all matters of account between the parties; and it was the owner's own fault if he kept back that item of the account. *Smith v. Johnson*. 15 E. R. 213

8 The Court will not grant an attachment against a peer for not paying money awarded, though the defendant consent that it shall issue, on condition that it shall lie in the office for a certain time. *Walker v. The Earl of Grosvenor*. 7 T. R. 171
And see *tit. PAR.*

9 Nor against a member of parliament. *Catmur v. Sir Edward Knatchbull*. 7 T. R. 448

10 Where an award appears to have been made out of the time originally given to the arbitrator by the rule of Court, but which rule reserved to him the power of enlarging the time; it is

- not enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time, within which the award was made, when served with the rule for the attachment. *Davis v. Vass.* 15 E. R. 97
- 11 Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference, if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award, which cannot therefore be enforced by attachment. *Randall v. Randall.* 7 E. R. 80
- 12 An award, made upon a reference of all matters in difference between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators, nor included in the matters referred. *Ravee v. Farmer.* 4 T. R. 146
- 13 An attachment for not paying a sum of money pursuant to an award, cannot issue before a personal demand has been made; though the time and place of payment be specified in the award. *Brandon v. Brandon.* 1 B. & P. 394
- 14 The Court of C. P. refused to grant an attachment for non-performance of an award pending an action brought on the award; or to allow the plaintiff to waive the action in order to apply for the attachment. *Badley v. Loveday.* 1 B. & P. 81
- 15 An agreement to enlarge the time for making an award, must contain a consent that it shall be made a rule of Court; otherwise no attachment will be granted for not performing an award made under it. *Jenkins v. Law.* 8 T. R. 87
- 16 A submission to an award between A. and B. the parties on the record, having been made a rule of Court, which award not having been made in time, the dispute had been referred to a second arbitrator to settle by B. and C. who were the real parties in the suit, no attachment can issue against B. for not obeying the award made by the second arbitrator, because the reference should be made by the parties on the record; and even if it had, there should have been another rule to make the second submission a rule of Court. *Owen v. Hurd.* 2 T. R. 643
- N. B. As the Court had no jurisdiction in this case, they could not go into the merits, though B. consented to waive the objection. *id.* 645
- 17 If the day for making an award has elapsed without any award made, the Court of C. P. will not grant an attachment for disobedience to the order, unless notice of the enlargement of the time has been served upon the party. *Hilton v. Hopwood.* 1 Marsh. 66
- 18 The Court refused an attachment for non-performance of an award, where the award was made out of the time originally allowed, but authority had been reserved to the arbitrator to enlarge the time, though the award stated upon the face of it, that the arbitrator had enlarged the time so as to cover the award; there being no affidavit of that fact, and it not appearing to them judicially; that the arbitrator had any authority to make the award, without which the Court had no jurisdiction. *Moule v. Stawell.* 15 E. R. 99, *in notâ*
- 19 Where, in an arbitration-bond the time was limited for the arbitrator to make his award, and the declaration stated that such time was afterwards enlarged by mutual consent; it was held that no action could be maintained on the bond to recover the penalty for not performing the award made after the time first limited. *Brown v. Goodman.* 3 T. R. 592, *notâ.*
- 20 Two several tenants of a farm agreed with the succeeding tenant to refer certain matters in difference respecting the farm to arbitration, and jointly and severally promised to perform the award; the arbitrator awarded each of the two to pay a certain sum to the third: Held, that they were jointly responsible for the sum awarded to be paid by each. *Mansell v. Burredge.* 7 T. R. 352
- 21 A. and B. in 1797 assigned to the plaintiff all debts due to them, and gave him a power of attorney to receive and compound for the same; under which the plaintiff in 1799 submitted to arbitration the matters in difference

then subsisting between his principals and the defendants : and the plaintiff and defendants promised to each other to perform the award. The arbitrators having awarded a sum to be paid to the plaintiff as such attorney, he may maintain an action of *assumpsit* for it in his own name. *Banfill v. Leigh.* 8 T. R. 571

22 Where a verdict is taken *pro forma* at the trial for a certain sum, subject to the award of an arbitrator, the sum afterwards awarded is to be taken as if it had been originally found by the jury; and the plaintiff is entitled to enter up judgment for the amount, without first applying to the Court for leave so to do. *Lee v. Lingard.*

1 E. R. 401

Grimes v. Naish.

1 B. & P. 480

Borrowdale v. Hitchener.

3 B. & P. 244, *accordante* :

Hayward v. Ribbons.

4 E. R. 310, *contra*

23 The sum for which the verdict is nominally taken, in such a case, cannot be considered as in the nature of a penalty for which plaintiff may enter up judgment, and thereby levy interest, sheriff's poundage, &c. He can only enter up judgment for the sum found by the arbitrator. 1 E. R. 403 1 B. & P. 480. 3 B. & P. 244. and 4 E. R. 310, *accord.*

24 If, in such case, the award be made before the Term, the defendant can only impeach it within the four first days of Term. 3 B. & P. 244

25 And personal service of the award, is not necessary to warrant the issuing of execution, if the attorney of the defendant has been served with the award.

3 B. & P. 244

26 The Court of C. P. gave leave in the first instance to enter up judgment, on a verdict reduced by award. *Higginson v. Nesbitt.* 1 B. & P. 97

27 If an award is lost, the Court of C. P. will, nevertheless, permit judgment to be entered accordingly, upon affidavit of its contents. *Hill v. Townsend.*

3 Taunt. 45

(d) *Costs, how payable.*

1 Where a cause has been referred by rule of *nisi prius* and the costs directed to abide the event, that must be taken to mean the legal event : Therefore, where, an action of trespass was brought for pulling down the plain-

tiff's gates, and assaulting him, and the defendants justified to all the counts except one, under different rights of way, and pleaded not guilty to the whole; and under the above rule the arbitrator awarded a right of way to the defendants different from any of those pleaded by them, and found five shillings damages to the plaintiff for the assault, as having been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator, the plaintiff can recover no more costs than damages; for the arbitrator's award is not tantamount to a judge's certificate under the 22 and 23 Car. 2. c. 9. *Swinglehurst v. Altham.* 3 T. R. 138

2 Where, by the rule of reference the costs are to abide the event of an award, that includes the costs of the reference as well as of the cause.

Wood v. O'Kelly. 9 E. R. 436

3 The Court of C. P. held that an award of costs sustained in the action, did not include the costs of the reference. *Browne v. Marsden.*

1 H. B. 223

4 But the Court of C. P. held that the general term *costs* in a rule of reference did not include the costs in that reference. *Bradley v. Tunstow.*

1 B. & P. 34

(And see *Willes's Rep.* 64.)

5 If no directions are given by an arbitrator, respecting the costs of the award, they are to be paid by both parties equally. *Grove v. Cox.*

1 Taunt. 165

And see *Arbitrator (b).* ante 89, 90.

6 If arbitrators award an excessive sum to be paid to themselves, the Court of C. P. will refer it to the prothonotary to reduce it. *Miller v. Robe.*

3 Taunt. 461

7 If, upon the reference of an action in the Court of C. P. the arbitrator award the costs of a nonsuit to be paid by the one party, and a larger sum to be paid as a debt by the other party, the party awarded to pay the smaller sum is entitled to a set-off without motion.

And if payment of the smaller sum is enforced by attachment, the Court will set the attachment aside. *Figes v. Adams.* 4 Taunt. 632

The like set-off in case of cross-judgments for debt or damages and costs.

id. ibid.

8 *Quare.* Whether an award upon the

reference of an action, directing the payment of costs of the award, without fixing the amount thereof, is bad in that point for uncertainty; or whether the amount may not be taxed by the officer of the Court? *Barrett v. Parry*. 4 Taunt. 658

9 But it is now settled, that the amount of the fee, which an arbitrator, in a

cause referred in the Court of Common Pleas, awards to be paid to himself for his award, is examinable by the prothonotary. *Fitzgerald v. Graves*.

5 Taunt. 342

N. B. See *Ward v. Mallinder*. 5 E. R. 489 which recognizes the decision of *Swinghurst v. Altham*. ante, page 96

BAIL.

I. TO THE SHERIFF.

(a) *How taken*.

(b) *When and how discharged*.

II. COMMON.

(a) *When and how filed*.

III. SPECIAL.

(a) *How put in and perfected*.

(b) *Exception and justification of*.

(c) *Grounds of opposing*.

(d) *How far liable*.

(e) — *discharged by tender of principal*.

(f) ————— *other means*.

(g) *Setting aside and staying proceedings against*.

IV. BAIL BOND, PROCEEDINGS ON.

V. BAIL, IN CRIMINAL CASES.

I. TO THE SHERIFF.

(a) *How taken*.

1 At common law, the sheriff could not bail any persons indicted before justices of the peace, though he might bail those indicted before him at his *town*. The stat. 23 H. 6. c. 9. was passed to compel him to take bail where he might have done, and neglected to do so. But stat. 1 Ed. 4. c. 2. takes away his power of bailing altogether, and requires him to return all indictments, taken before him at his *town*, to the justices at the next sessions. *Bengough v. Rossiter*. 4 T. R. 505

N. B. This case was affirmed in *Cam. Scac*. 2 H. B. 418. *dissent. Eyre, C. J.* 2 H. B. 426. 435. who allowed, however, that the practice of bailing by the sheriff, in such cases, had been long discontinued.

2 Therefore the sheriff has no authority to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions for a misdemeanour;

he can only take a recognizance for their appearance. 4 T. R. 505

2 H. B. 418

3 An action on the case on stat. 23 H. 6. c. 9. will not lie against a sheriff for refusing to take bail on an attachment out of chancery; that statute referring only to process in courts of common law. *Studd v. Acton*. 1 H. B. 468

4 The security to the sheriff under 23 H. 6. c. 9. must be in the particular form marked out by the statute, otherwise it is void; and this statute requires the bond to be given to the sheriff, as such, for the appearance of the party, and for no other purpose. *Rogers v. Reeves*. 1 T. R. 421

5 The obligation being given to the sheriff's bailiff is bad, for it must be to such officer as has the return of process. *id.* 421, 2

6 The stat. 23 H. 6. c. 9. relating to bail-bonds is a public Act; therefore the Court will take notice of it, though it be not pleaded. *Samuel v. Evans*.

2 T. R. 569

And see 15 E. R. 320

7 And if it appear in a declaration by the assignee of a sheriff on such bond, that the bond is void by the provisions of that statute, the Court on motion will arrest the judgment after verdict against the defendant, upon a plea of *non est factum*. 2 T. R. 569

8 The sheriffs of London, to whom as such, a writ of *special capias* was directed, under which they arrested the plaintiff, cannot be sued for damages for not having taken bail for his appearance, according to the stat. 23 H. 6. c. 9.; the sufficiency of the bail tendered being only alleged to be within *Middlesex and London taken together*; though it was also averred, that from time immemorial, the same persons had always been duly appointed to, and had exercised the office of sheriff

of the two counties at the same time, and that the defendants were sheriffs of both, at the time of the grievance complained of. *Lovell v. Plomer and Goodbehere.* 15 E. R. 320

- 9 It is sufficient to state in the condition of the bond, the names of the parties, and the time and place of the defendant's appearance: if the cause of action be added, it may be rejected as surplusage. *Owen v. Nail.* 6 T. R. 702
- 10 Therefore, where under an original writ in a plea of trespass on the case on promises, the sheriff took a bail-bond conditioned for the defendant's appearance in a plea of trespass; it was held good. *id. ibid.*
- 11 Where the writ was to appear before the King, wheresoever he should then be in England, and the sheriff took a bail-bond for the party's appearance before the King at Westminster on the day named in the writ: Held, to be a substantial compliance with the stat. 23 H. 6. c. 9. so as to entitle the assignee of the sheriff to recover on such bond. *Jones v. Stordy.* 9 E. R. 55

(b) When and how discharged.

- 1 If the defendant, who has given a bail-bond, surrender himself to the sheriff before the return of the writ, the bail-bond may be given up, and it will be considered as if no such bond had been given. *Jones v. Lander.* 6 T. R. 753
- 2 But he must give notice of such surrender. *Maddocks v. Bullock.* 1 B. & P. 325
- 3 And it is optional with the sheriff, whether or not he will accept the surrender, in discharge of the bail-bond, before the return of the writ. *Hamilton v. Wilson.* 1 E. R. 383
- 4 Where a plaintiff being arrested, has remained some time in custody, and then a bail-bond has been taken, it may be cancelled, if the defendant return into the sheriff's custody before the return of the writ. *Stamper v. Milbourne.* 7 T. R. 122
- 5 Where the principal surrendered to the gaoler at the county gaol, in discharge of his bail to the sheriff, before 12 o'clock on the first day of Term, being the return-day of the writ, and the under-sheriff signified his assent to the surrender by return of post the next day, at the distance of 17 miles; the plaintiff having afterwards taken an assignment, with notice of such surrender, and having commenced the proceedings against the bail, the Court ordered the proceedings on the bail-bond to be stayed. *Plimpton v. Howell.* 10 E. R. 100
- 6 After a party arrested on civil process has been discharged, on giving a bail-bond to the sheriff, for his appearance at the return of the writ; it is optional in the sheriff whether he will accept the surrender of the party in discharge of the bail-bond before the return of the writ; and therefore, though notice of such surrender were given to the sheriff, and the gaoler in whose custody the party then was at the suit of another; after which the gaoler let the party out of custody; yet, held that the gaoler was not liable upon his bond of indemnity to the sheriff, as for an escape in the former suit; for the party was not legally in the custody of the sheriff or his gaoler, merely by virtue of such notice of surrender. *Hamilton v. Wilson.* 1 E. R. 383
- 7 Neither the bail to the sheriff, nor a defendant who has given a bail-bond, can be held to bail in an action brought by the sheriff on that bond. *Brander v. Robson.* 6 T. R. 336
Mellish v. Petherick. 8 T. R. 450
- 8 Bail in the original action, after judgment recovered against them on the bail-bond, may be holden to bail in an action on such judgment. *Prendergast v. Davies.* 8 T. R. 85
- 9 If A. being arrested by B. on process of C. P. give bail to the sheriff, and before the return of the writ, being again arrested by C. is committed to the Fleet prison, after which B. takes an assignment of the bail-bond, and proceeds thereon, that Court will stay such proceedings; but will not make B. pay costs, for they will not try upon affidavit whether he knew or not that A. was in custody, but will consider him ignorant of that fact, unless notice of surrender has been regularly given. *Harden v. Hennem.* 3 B. & P. 232
- 10 A bail-bond given to the sheriff of Durham, under a writ issued immediately from this Court to him is not void; though the Court Palatine might have interposed and claimed his privilege. *Jackson v. Hunter.* 6 T. R. 71
- 11 A sheriff's bond, stated to have been taken on the 4th November, conditioned for the defendant's appearance on the morrow of All Souls, [scil. 3d Nov.]

is void by the statute, *Samuel v. Evans*. 2 T. R. 569
And see tit. SHERIFF. (BAIL BOND—Post. Page 106.)

II. COMMON.

When and how filed.

1 The clerk of the bails is directed in future, to mark the bail-pieces numerically as they are received. *Reg. Gen. (K. B.) E. 30 G. 3.*

3 T. R. 660

2 The plaintiff cannot file common bail, according to the statute, after the succeeding Term after the writ is returnable. *Smith v. Painter*. 2 T. R. 719

3 Though judgment has been irregularly signed without filing common bail for the defendant according to the statute, until after the succeeding Term after the writ was returnable, and after the judgment itself has been entered up, yet, the defendant having given a *cognovit* is estopped from objecting to the irregularity, if before the time of making the objection, the plaintiff has filed common bail *nunc pro tunc*.

Davis v. Hughes.

7 T. R. 206

N. B. When a defendant may be discharged on a common appearance, see tit. Practice.

III. BAIL SPECIAL.

(a) *How put in and perfected.*

N. B. For Bail in Error, see tit. Error.

1 In all bailable actions, notice of special bail shall be given. *Reg. Gen. E. T. 49 G. 3.* 1 Taunt. 616

2 Where the action is by original, the defendant has till four days after the *quarto die post* to put in bail. *Frampton v. Barber*. 4 T. R. 377

3 Bail above may be put in, on a *dies non juridicus*. *Buddleley v. Adams*.

5 T. R. 170

4 Where a writ is returnable, the first return of a Term, in a country cause, in C. P., the defendant has eight days after the *quarto die post* to put in bail. *Rolfe v. Steele*. 2 H. B. 276

5 A defendant cannot enter into the recognizance of bail: but each of his bail shall bind himself in double the sum sworn to. *Reg. Gen. C. P. E. 36 G. 3.* 1 B. & P. 530

6 If a man carry on his business at a lodging in one place, and keep a house at another, notice of bail, describing him as of the former place is sufficient. *Weddall v. Berger*. 1 B. & P. 325

7 A description of bail, as of one of the

large villages near London, is too general, if the bail lives in a *lieu commun* within the village. *Rickman v. Hawes*.

5 Taunt. 173

8 The want of a description of bail is cured by the plaintiff's excepting to them. *Bigg v. Dick*. 1 Taunt. 17

And see *Pierson v. Williment*. *id* 18, n.

9 Of the four days allowed to perfect bail in, after an exception, the first is reckoned exclusively, and the last inclusively; so that where the exception was on *Wednesday*, an attachment could not regularly issue against the sheriff till the *Tuesday* following, (*Sunday* being no day); but though the attachment did issue on the *Monday*, the Court would not set it aside, because the bail were not perfected. *North v. Evans*. 2 H. B. 35

10 Where bail are put in *in due time*, the defendant is not bound to give notice, but the plaintiff must search in the filazer's book: Otherwise if they be not put in *in due time*. *Darwins v. Reid*.

1 H. B. 529

11 Bail above may be put in, and the principal be surrendered before the return of the writ, and the plaintiff cannot afterward proceed on the bail-bond. *Hyde v. Whiskard*. 8 T. R. 456
But see *Newton v. Lewis*, and *Huggins v. Dumbidge*. 8 T. R. 457, 8. n.

12 Bail are not regularly put in, unless the name of the proper county be inserted in the bail-piece. *Smith v. Miller*. 7 T. R. 96

13 Bail is not regularly put in, till the allowance of it has been served, even though the plaintiff oppose the justification. *Rex v. Middlesex Sheriff*.

4 T. R. 493

14 Or be otherwise informed of it. *Holland v. White*. 2 B. & P. 341

N. B. This practice proceeds not only on the ground of protecting the revenue, but also on the notion that the defendant must be taken to have waived his justification, unless he serve the rule for the allowance. 2 B. & P. 342

(b) *Exception and Justification of.*

1 It is no exception against bail until the plaintiff give notice of the exception. *Oldham v. Burrell*. 7 T. R. 26

2 In bailable causes, for any cause exceeding 1000*l.* it shall be sufficient for the bail to justify in 1000*l.* beyond the sum sworn to. *Reg. Gen. Mch.*

51 G. 3. K. B.

13 E. R. 62

C. P.

3 Taunt. 341

- 3 If bail to the sheriff be put in above, and exception taken *before* an assignment of the bail-bond, they are bound to justify notwithstanding such assignment. *Hill v. Jones*. 11 E. R. 321
- 4 Bail must actually have become so, before notice of justification is given. *Collier v. Godfrey*. 1 H. B. 291
- 5 Where bail are regularly put in and excepted to, the defendant need not describe them in his notice of justification. *England v. Kerwan*. 1 B. & P. 335
- 6 The defendant has four days exclusive, from the day of the exception, to justify bail; and if an attachment be obtained on the fourth day, the Court of C. P. will set it aside, without first calling on the defendant to justify bail. *Maycock v. Solyman*. 1 N. R. 139
And see 8 T. R. 258.
- 7 Bail above having been put in and exception entered in the vacation, notice of justification for the first day of the next Term must be given *within four days after such exception*; and such notice not having been given, the bail-bond may be assigned, and the bail be proceeded against. *Milson v. King*. 9 E. R. 434
- 8 In the Court of C. P. two days' notice of justification must be given, as well where the bail originally put in, as where added bail, be brought up. *Nutton v. Barrett*. 2 B. & P. 30
- 9 In justifying bail by affidavit, where the same persons are bail in more actions in one, each affidavit ought to state that the bail are worth double the amount of the debts in all the actions wherein they offer to become bail. *Field v. Wainwright*. 3 B. & P. 39
- 10 Bail in the Court of C. P. shall justify at the sitting of the Court only, and at no other time, except on the last day of Term, when bail who may have been prevented from attending at the sitting of the Court, shall be permitted to justify at the rising of the Court. *Reg. Gen. E. T. 51 G. 3*. 3 Taunt. 569
- 11 Notice of bail given on the 10th of November,—on the 12th, notice that other bail would be added, who would justify on the 15th: On the 14th the latter notice countermanded, and notice again given of the original bail: They appearing to justify on the 15th, held that the last notice would be sufficient, if notice of justifi-

cation had been given. — *v. Marshall*. 1 Marsh. 322

- 12 If bail justify without the observation of the counsel instructed to oppose them, the Court will not require them to come up again and justify *de novo*. *Hawkins v. Wilson*. 4 Taunt. 666

(c) *Grounds of opposing.*

- 1 Bail by affidavit rejected, on the ground that one of them was described in the notice of justification as *A. B. generally*, but in the affidavit of justification as *A. B. the younger*. — *v. Meller*. 1 Marsh. 386
- 2 A false addition in the description of bail is a fatal objection. *Wood v. Chadwick*. 2 Taunt. 173
- 3 Neither an attorney, nor a clerk to an attorney can be bail to the action. *Laing v. Cundall*, 1 H. B. 76. Whether the clerk be articulated or not. *Cornish v. Ross*. 2 H. B. 359
- 4 And though he be not clerk to the defendant's attorney. *Redit v. Broomhead*. 2 B. & P. 564
And see *Richie v. Gilbert*, and *Cukish v. Ross*. 1 Taunt. 164, *notis*.
- 5 If bail be put in without any description, one of whom afterwards proves to be a clerk to an attorney, and the other a person in a low situation, the plaintiff may treat the bail as a nullity, and take an assignment of the bail-bond. *Fenton v. Ruggles*. 1 B. & P. 256
Wallace v. Arrowsmith. 2 B. & P. 49
- 6 In K. B. the plaintiff must except to such bail, and cannot treat it as a nullity. *R. v. Sheriff of Surrey*. 2 E. R. 181
Foxall v. Bowerman. 2 E. R. 182
- 7 If bail is added to an attorney, and justifies without opposition, the Court of C. P. will not set aside the allowance of bail. *Bell v. Gate*. 1 Taunt. 162
- 8 Any persons may be bail for the purpose of rendering the principal. *Per Heuth, J.* 1 Taunt. 163
- 9 It is generally speaking no objection to bail that they are indemnified. *Neat v. Allen*. 1 B. & P. 21
- 10 But the Court of C. P. rejected bail, who had received a verbal promise of indemnity from the defendant's attorney; giving time to put in fresh bail. *Greenhill v. Hopley*. 1 B. & P. 108
- 11 It is not sufficient ground to reject a person as bail, that he is described to be "of A. in the county of B., gaol keeper," for he might be a corporation gaol keeper, and so have nothing

- to do with the process of the Court. *Faulkner v. Wise.* 2 B. & P. 150
- 12 The plaintiff may waive the qualification that the bail shall be house-keeper or freeholder. *Saggers v. Gordon.* 5 Taunt. 174
- 13 It is not sufficient for bail to swear they are worth a certain sum "exclusive of their debts." *Horne v. Carr.* 4 Taunt. 704
- 14 An indorser of a bill of exchange may be bail for the drawer, in an action against him upon the same bill. *Harris v. Manley.* 2 B. & P. 526
- 15 It is a sufficient objection to bail, that he hath privilege of Parliament, whereby the plaintiff may be delayed in obtaining payment from him. *Graham v. Sturt.* 4 Taunt. 249

(d) How far liable.

- 1 Where bail is taken under a judge's order (in C. P.) that Court, contrary to the practice of K. B. holds each of them liable to double the sum ordered; considering the order as equivalent to the affidavit in other cases. *Dahl v. Johnson.* 1 B. & P. 205
- 2 The Court of C. P. held that if bail enter into a recognizance, although they are excepted to and never justify, they still remain liable. *Bramwell v. Farmer.* 1 Taunt. 427
- 3 If a plaintiff recover a judgment for money lent and interest, he cannot therefore require the bail to pay him interest on the amount of the judgment as part of his costs. *Waters v. Rees.* 3 Taunt. 503
- 4 Although a bail having rendered, the defendant instigates him to vexatious attempts to obtain his discharge under an insolvent act, the Court will not compel him to pay the costs of the plaintiff's resisting those attempts. *Winstanley v. Head.* 4 Taunt. 192
- 5 Bail being fixed, if one of them, having paid the debt, bring his action against his co-bail for contribution, he must prove the judgment as well as the execution. *Belldon v. Tankard.* 1 Marsh. 6
- 6 Where the defendant in the action gave a *cognovit* for the debt and costs payable by seven instalments; and after the bail were fixed, an Act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were

- payable; and afterwards the principal was discharged under the Act, when only two more of the instalments had become payable: yet, held that the bail were liable for the whole condemnation-money; the entire debt, *quid* debt, being due *instantly*, with a stay of execution only for certain portions at certain times. *Shakespeare v. Phillips.* 8 E. R. 433
- 7 Bail to the sheriff are liable to the plaintiff's *whole* debt (without regard to the sum sworn to) and costs, provided they do not exceed the penalty of the bail-bond. *Mitchell v. Gibbons.* 1 H. B. 76
Stevenson v. Cameron. 8 T. R. 28
- 8 The bail to the action are not liable to pay the costs of a writ of error. *Yates v. Doughan.* 6 T. R. 288
- 9 A. is arrested and held to bail in a civil action, after which an extent issues against him at the suit of the crown, and he is thereupon committed to the custody of the sheriff of London. On an application to the Court by the bail for relief: Held, 1st, that the bail were not entitled to enter an *exoneretur* on the bail-piece: 2d, the crown having refused its consent to the defendant being surrendered, unless he should be immediately remanded to the custody of the marshal, that the Court of C.P. would have no authority so to remand him, after he had been surrendered to the warden of the Fleet: and 3d, that the bail could not surrender the defendant by *habeas corpus*, as a matter of right, without the consent of the Crown; but the Court expressed their readiness to give the bail time for surrendering the defendant. *Hodgson v. Temple.* 1 Marsh. 163
And see Habeas Corpus.
- 10 Where the proceeding upon the recognizance of bail is *by action*, the plaintiff is entitled to the costs of such action, commenced after a return of *non est inventus* to the *capias ad satisfaciendum* against the principal, though the bail rendered their principal before the eight days allowed by the practice of the Court after the return of the process against the bail. *Hughes v. Poidevin.* 15 E. R. 254
- 11 The plaintiff in an action on the recognizance of bail, is not entitled to the costs up to the time of notice of render and staying proceedings, if the bail render their principal within the

eight days allowed by the rule of *Trin.*
 1 *Anne. Cresswell v. Hern.* 1 M. & S. 742
For the liability of bail on an Indemnity Bond, see Sparkes v. Martindale.
 8 E. R. 593

(e) *Discharged by render of Principal.*

- 1 Bail may render the principal before the return of a rule against the sheriff to bring in the body, before they have justified, giving notice of such surrender to the plaintiff's attorney. *Reg. Gen. K. B. T. 33 G. 3. 5 T. R.* 368
- 2 So they may render the principal after an assignment of the bail-bond, though they have not justified. *Edwin v. Allen.* 5 T. R. 401
- 3 Though a rule to bring in the body has been served, bail may render the defendant *without justifying.* *Hall v. Walker.* 1 H. B. 638
- 4 If, on exception to bail, notice be given of other bail; only one of whom justifies, and the names of the former still remain on the bail-piece, such former may surrender the principal. *Rex v. the Sheriff of Essex.* 5 T. R. 633
- 5 Where bail are opposed, and rejected, and the defendant is surrendered on the next day, he may justify new bail, without paying the costs of the former opposition. *Holward v. Andre.* 1 B. & P. 32
- 6 The Court of K. B. held that, though one bail only had justified, and time had been refused to justify apother, they may be competent to surrender. *Anonymous, K. B. E. 40 G. 3. 1 N. R. 138, n.*
- 7 And that even bail rejected while on the bail-piece, are competent to surrender. *Ibid.*
- 8 But the Court of C. P. held that bail rejected are no bail, and cannot surrender. *Mills v. Head.* 1 N. R. 137
- 9 Bail who are excepted to, and do not justify on the day appointed, cannot afterwards surrender the principal, being thereby out of Court; but the defendant being, in point of fact, in custody before the assignment of the bail-bond, the Court set aside proceedings on payment of costs. *Hardwick v. Bluck.* 7 T. R. 297
- 10 But the Court of C. P. has since held that bail may render the principal, after having failed to justify on the day for which notice of justification has been given; and if they do surrender the principal, and the plaintiff, after notice thereof, take an assign-

ment of, the bail-bond and proceed thereon, the Court will set aside the proceedings, with the costs of the assignment. *Seaver v. Spraggon.* 2 N. R. 85

- 11 Bail may render without justifying; and where the rule expires in vacation, a render on the first day of the ensuing Term, *sedente curia*, is good, though notice were not given till afterwards, on the same day, and after a writ of *procedendo* had issued to an inferior Court, where the cause originated. *Wiggins v. Stephens.* 5 E. R. 533
- 12 Bail sued on their recognizance by attachment of privilege, may render the principal on the appearance day of the return. *Fletcher v. Aingell.* 2 H. B. 117
- 13 But the surrender must be before the rising of the Court. *Lardner v. Bassage.* 2 H. B. 593
- 14 The Court will not enlarge the time for bail to render their principal, on the ground that he could not be removed without endangering his life. *Wynn v. Petty.* 4 E. R. 102
Nightingale v. Lowry, cited. 4 E. R. 102, *notá*,
 But see *Winstanley v. Gaitskell.* 16 E. R. 389, *contra*
- 15 Nor on the ground of the unwarrantable arrest, and detention of the principal, by a foreign enemy. *Grant v. Fagan.* 4 E. R. 189
- 16 For the bail are not excused from the performance of the condition of the bond, merely because the render has become impossible, without any default of theirs; but only when it has become so, by the act or law of our own state. *Id.* 190
- 17 But it seems the Court would enlarge the time of render, in order that the examination of the principal, a bankrupt; might be previously completed; no prejudice ensuing therefrom to the plaintiff. *Maude v. Jewett.* 3 E. R. 145
 (See same point, *Glendinning v. Robinson.*) 1 Taunt. 320
- 18 The Court refused to enlarge the time for bail to render the principal, on affidavit that he was a lunatic; it not appearing that he was in such a state as to occasion any immediate peril of life, either to himself or others. *Cock v. Bell.* 13 E. R. 355
- 19 A person may assist bail in taking, and may lawfully detain the principal, although the bail do not continue present. *Pyewell v. Stow.* 3 Taunt. 425

- 20 The bail have eight days in which to render the principal, from the return of that writ, on which there is an *effectual proceeding* against them. *Wilkinson v. Vass.* 8 T. R. 492
- 21 Therefore, where the plaintiff sued the bail on their recognizance, who did not render the principal within eight days, and then the plaintiff died, (after plea and demurrer in that action), and his executors brought another action against the bail; it was ruled, that the bail had eight days from the return of the process, in the second action, in which to render the principal. 8 T. R. 492
- 22 An intervening *Sunday* is to be reckoned as one of the eight days in full Term given to bail, to render their principal after the return of the writ. *Cresswell v. Green.* 14 E. R. 537
- 23 In the Court of C. P. where bail served with process on his recognizance, died before the *quarto die post*, and fresh process issued against his executors, it was held that they had, until the *quarto die post* of the second writ, to surrender the principal. *Meddowscroft v. Sutton.* 1 B. & P. 61
- 24 If an action be brought in K. B. against bail, on a recognizance of bail taken in C. P., they have the same indulgence, (of eight days in full Term after the return of the writ against them), to render the principal, as if the recognizance had been taken in the former Court. *Fisher v. Branscombe.* 7 T. R. 355
- 25 Where, after due notice of render of the principal, the plaintiff still proceeds against the bail, in the action of debt upon the recognizance, because no offer was made by them to pay the costs in the suit against them, nor any rule obtained by them to stay proceedings in the action against them, on payment of costs: Held, the subsequent proceedings irregular, being contrary to the rule of Court, *Trin. 1 Ann.* which says, that on such notice of render, *all further proceedings against the bail shall cease.* *Byrne v. Aguilar.* 3 E. R. 306
- 26 The Court will allow time to the bail, to surrender their principal, where, the principal being in custody, under process of another Court, it appears, on the return made to a *habeas corpus*, issued by the bail, in order to render him, that he cannot be removed out of such custody, without danger to his life, and that such impossibility still continues. *Winstanley v. Gaitskell.* 16 E. R. 389
- (f) Discharged by other means.
- 1 A *cognovit* by the principal, without notice to the bail, does not discharge the bail. *Hodgson v. Nugent.* 5 T. R. 277
- 2 But if a plaintiff accepts from the principal defendant, a *cognovit*, whereby he gives him time for payment, by instalments, he thereby discharges the bail, unless they are parties to the arrangement. *Bowsfield v. Tower.* 4 Taunt. 456
- 3 And if a plaintiff takes a *cognovit*, payable by instalments, and postponing the payment of any instalment, to a later date than the time when the plaintiff could, with diligence, have obtained judgment and execution, the bail are discharged. *Croft v. Johnson.* 5 Taunt. 319 S. C. 1 Marsh. 59
- 4 If the principal die after the return of the *ca. sa.* and before the return be filed, the bail are fixed, and the Court will not stay the filing of the return in favour of the bail. *Rawlinson v. Gunston.* 6 T. R. 284
- 5 The Court will enter an *exoneretur* on the bail-piece, on payment of the sum sworn to, and costs, though less than the sum acknowledged to be due, as well where the action is by original, as by bill. *Jacob v. Bowes.* 6 E. R. 31
- 6 Defendant having been sued, and held to bail by a wrong christian name, the plaintiff having declared against him, and bail having been put in and perfected by the right name, the bail cannot afterwards object to the irregularity, on a motion to enter an *exoneretur.* *Clarke v. Baker.* 13 E. R. 273
- 7 Where the substantive cause of action did not require special bail, without a judge's order, and the plaintiff holds the defendant to bail on the money counts, and did not recover thereon, the Court of C. P., ordered an *exoneretur* to be entered on the bail-piece. *Caswell v. Coare.* 2 Taunt. 107
- 8 Bail cannot plead the bankruptcy and certificate of their principal, in their own discharge. *Beddome v. Holbrooke.* 1 B. & P. 450, n.
- Donnelly v. Dunn.* 1 B. & P. 448
2 B. & P. 43
- 9 The Court refused to order an *exoner-*

etur, to be entered on the bail-piece, on the ground that the debt was contracted, while the defendant was resident in a foreign country, and before he became a bankrupt, by the laws of that country, though he had obtained his certificate there. *Pedder v. M'Master*. 8 T. R. 609

10 N.B. The Court distinguished the above, from the case of *Ballantine v. Golding*. 4 T. R. 185. n.

where plaintiff as well as defendant resided in Ireland, at the time of the defendant's bankruptcy there.

11 If an action be commenced against a bankrupt, after a commission, for business done before the bankruptcy, and the bankrupt afterwards obtain his certificate, the defendant is discharged from the costs as well as the debt, and the Court will enter an *exoneretur* on the bail-piece. *Willett v. Pringle*. 2 N. R. 190

12 If a plaintiff, after judgment obtained, proves his debt, under a commission of bankrupt, sued out against the defendant, and also proceeds against the bail, the bail are thereby entitled to their discharge, under stat. 49 G. 3. c. 121. § 14; and the Court of C. P. discharged them on motion. *Ling v. Gornyn*. 2 Taunt. 246

13 The bail are entitled to be discharged, upon their bankrupt principal's obtaining his certificate, before the time allowed to them by the indulgence of the Court, for rendering their principal, is out; i. e. before the appearance day of the last *scire facias*. But the bail not having applied in time to enter an *exoneretur* on the bail-piece, till after the money levied upon them, they can only be relieved on payment of costs. *Mannin v. Partridge*. 14 E. R. 599

14 If an action be commenced, and the defendant become bankrupt, and obtain his certificate, and afterwards permit judgment to be signed, for want of a plea, after which the plaintiffs proceed against the bail, the Court will not relieve the bail on motion. *Clark v. Hoppe*. 3 Taunt. 46

And *semble*, that they could in no mode, take advantage of the bankruptcy and certificate. *id. ibid.*

15 If plaintiff sue the bail by action, and take them in execution, he cannot

afterwards take the principal, though one of the bail become bankrupt, and be discharged, and the other also be discharged, on payment of 5s. in the pound, and upon an understanding, that the plaintiff was at liberty to proceed against the principal. *Allen v. Snow*. 2 M. & S. 341

16 One of two defendants, having been holden to bail, in *Trinity* Term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former, on the first day of *Easter* Term, not having obtained a rule for time to declare: the Court of C. P. held, that the cause was out of court, and the bail entitled to an *exoneretur*. *Sykes v. Baucens*. 2 N. R. 404

17 The Court permitted an *exoneretur* to be entered on the bail-piece, the defendant being under sentence of transportation for a felony. *Wood v. Mitchell*. 6 T. R. 247

18 The defendant, a seaman, being out upon bail, on process for a debt under 20*l.* was impressed into the King's service, and as he would have been entitled to his discharge, if in custody, by virtue of 32 G. 3. c. 33. § 22, the Court, on application of the bail, ordered an *exoneretur* to be entered on the bail-piece, instead of granting an *habeas corpus*. *Robertson v. Patterson*. 7 E. R. 405

19 The defendant being in custody of a messenger, under an order of the Secretary of State, for the purpose of being sent out of the kingdom by virtue of the Alien Act, 43 G. 3. c. 155., the Court refused to issue a *habeas corpus*, on the application of his bail, to bring him up, that they might render him in their own discharge, on account of the public inconvenience, and probable risk of his passage, which had been taken in a ship, immediately about to sail to his destined port. But they also refused, while he was still in the kingdom, and might possibly be set at large again, to enter an *exoneretur* on the bail-piece: but they said they would remember that the situation of the bail was without any fault of theirs, if any proceedings were taken against them in the mean time. *Folke v. Critico*. 13 E. R. 457

(And see *Hodgson v. Temple*.)

1 Mar. h. 166 *ante*, page 101

20 If an alien defendant be sent out of the kingdom, after he has given a bail-bond, and before the return of the writ, the Court will order the bail-bond to be cancelled. *Postel v. Williams.*

7 T. R. 517

21 If the defendant, an alien, be sent out of the kingdom under the Alien Act, 33 G. 3. c. 4. the Court will permit the bail to enter an *exoneretur* on the bail-piece, unless they are indemnified, or have money in their hands, belonging to the defendant, sufficient to answer the plaintiff's demand.

Merrick v. Vaucher. 6 T. R. 50

Coles v. De Hayne. 6 T. R. 52

22 Bail of an alien who was sent out of the kingdom, applied to be discharged, on payment of 1000*l.*, deposited with them; which sum the plaintiff had recovered by verdict; but the Court held them liable for the costs also. *Coles v. De Hayne.* 6 T. R. 246

(g) *Setting aside, and staying proceedings against.*

N.B. See SCIRE FACIAS, *tit: Recognizance, post.*

1 If bail above be put in and justified, within four days from the ruling the sheriff to bring in the body, the Court of C. P. will set aside all proceedings upon the bail-bond, commenced previous to the time of justification. *Wright v. Walker.*

3 B. & P. 564

2 If, upon the return of *non est inventus* to the *ca. sa.* the plaintiff proceed against the bail, and deliver a declaration conditionally, the bail cannot apply to the Court, to stay proceedings, on payment of the debt and costs of the original action only, but must also pay the costs of the second action, though the bail tendered the original damages and costs, before the end of eight days, from the return of the *ca. sa.*, within which time, by the practice of the Court, they might have discharged themselves, by surrendering their principal. *Perigal v. Mellish.*

5 T. R. 363

3 If the principal be actually in the custody of the sheriff, at the time when the latter, at the instance of the plaintiff, returns *non est inventus* to a *ca. sa.*; the Court of C. P. will set aside such return, together with all subsequent proceedings against the bail, and order the money, levied under an

execution, to be returned to them. *Forsyth v. Marriot & Grover.*

1 N. R. 251

4 If proceedings be commenced upon a recognizance of bail, immediately upon the return of the *ca. sa.* the Court of C. P. will not stay them, but upon payment of the costs, though the principal be surrendered within the four days allowed by the practice of the Court. *Abbott v. Rawley.* 3 B. & P. 13

5 If the principal be surrendered in time, though the bail omit to give regular notice of it to the plaintiff, in consequence of which, he proceeds upon the bail-bond, the bail may apply to set aside the proceedings on payment of costs, even after execution levied, and the money is in the sheriff's hands. *Lepine v. Barratt.*

8 T. R. 222

6 Where a rule to set aside proceedings for irregularity, and to stay proceedings in the mean time, is obtained, the proceedings are suspended for all purposes till the rule is disposed of. *Swayne v. Crammond.*

4 T. R. 176

7 And therefore, the time for putting in bail, remains the same after the rule is discharged, as it was when it was granted. 4 T. R. 176

8 In an action on the recognizance, the Court will stay the proceedings, against both the bail, on payment of the sum sworn to, and costs, though less than the damages recovered, or than the sum named in the process.

Clarke v. Bradshaw. 1 E. R. 86

9 S. P. although it appeared that the defendant in the original action was gone abroad. *Tranel v. Rivaz.*

1 E. R. 91, n.

10 A return of *non est inventus*, procured by the plaintiff against the principal, in order to found proceedings against the bail, is irregular, if the principal were at the same time in custody of the same sheriff who made the return, though at the suit of another person: and the subsequent proceedings against the bail will be set aside.

Burks v. Maine. 16 E. R. 2

11 If, in a joint action against two, the recognizance of bail be drawn up, by mistake, in an action against one only, and the plaintiff, after two writs of *sc. fa.* against the bail, and *nil* returned to them, sign judgment against the bail, and take out execution; the

Court will set aside the judgment and execution for irregularity. *Holt v. Frank.* 1 M. & S. 199

12 A return, by the sheriff, of *non est inventus*, procured by the plaintiff, against the principal, in order to ground proceedings against the bail, is irregular, if the principal be at that time in custody of the same sheriff; on a criminal charge: and the Court set aside the proceedings against the bail, with costs, where the plaintiff knew that the principal was in such custody, at the time of such return. *Ward v. Brumfit.* 2 M. & S. 238

13 Where the plaintiff had taken a *cognovit* from the defendant, with an agreement to receive the debt by long instalments, of which no notice was given to the bail; the Court set aside an execution against the bail, sued out above a year after the judgment, without a *scire facias* to revive it: even if the agreement by the plaintiff, to take the debt by instalments, without the consent of the bail, would not have discharged them; as they could not, after that, have rendered their principal. *Thomas v. Young.* 15 E. R. 617

14 The judgment in an original action, and the judgments in the actions against the bail, may be set aside upon one motion, and one affidavit entitled in the original action. *Winder v. Wood.* 3 B. & P. 118

15 It is no ground for setting aside an execution, which has been signed against bail, that the plaintiff has accepted a composition from the defendant, and suspended the execution of a *ca. sa.* which had been issued against him, though it were without the knowledge or consent of the bail. *Brickwood v. Annis.* 1 Marsh. 250

16 Bail having rendered their principal in time, according to the practice of the Court, are entitled to stay the proceedings in an action on their recognizance, without costs, though the plaintiff commenced his action before he was served with notice of the render. *Smith v. Lewis.* 16 E. R. 168

And see, discharge by render of principal, and liability of bail, ante.

IV. BAIL-BOND, PROCEEDINGS ON.

1 No bail-bond taken in London or Middlesex, under process returnable in C. P. on the first return of a Term, shall

be put in suit until after the 5th day, nor bonds taken elsewhere, until after the 9th day in full Term: nor if under process, returnable on subsequent returns, until after four days and eight days respectively, exclusive of the return day of the process. *Reg. Gen.* C. P. T. 30 G. 3. 1 D. & W. 6

2 If the fourth day for perfecting bail, (in K. B.) be the last day of Term, and the bail be not perfected before the rising of the Court on that day, an assignment of the bail-bond to the plaintiff, in the evening of that day, is regular. *Dent v. Weston.* 8 T. R. 4

3 After default made in not putting in special bail in time, it is not enough that bail are afterwards put in: but the plaintiff may take an assignment of the bail-bond, and proceed thereon, unless the bail be also justified, though not before excepted to. *Turner v. Cary.* 7 E. R. 607

4 Though the proceedings against the bail should be such, as cannot be set aside, on the ground of irregularity, yet the Court of C. P. if the bail apply to their equitable jurisdiction, will, in all cases, stay proceedings on the bail-bond, where the plaintiffs, by their neglect, have forfeited their claim to institute proceedings against the bail. *Pigott v. Truste.* 3 B. & P. 221

5 The plaintiff may proceed against the bail although the original action is out of Court, it not appearing, whether the bail-bond was assigned. *Collett v. Wilson.* 4 Taunt. 715

6 An affidavit, to support a rule nisi for staying proceedings on a bail-bond, should be entitled in the action against the bail. *Roberts v. Giddins.* 1 B. & P. 337

7 If plaintiff take an assignment of the bail-bond, while the cause is pending, his proceeding upon it, after the cause is out of Court, is not an irregularity. *Pigott v. Truste.* 3 B. & P. 221

8 The Court of C. P. held, that the sheriff might sue on a bail-bond, in a different Court from that in which the original action was brought. *Newman v. Fauvitt.* 1 H. B. 631

9 An action on a bail-bond, by the officer to whom the bond was given, must be brought in the Court where the original action was brought. *Donaty v. Barclay.* 8 T. R. 152

10 If the bail apply to stay proceedings

- upon the bail-bond, or against the sheriff, they need not swear to merits, though a trial has been lost. *Hardisty v. Storer.* 1 N. R. 123
- 11 Where two only, of three joint contractors, are sued, the Court of C. P. will not stay proceedings on the bail-bond, unless the defendants will undertake not to plead in abatement. *Gozett v. Johnson.* 2 B. & P. 465
- 12 In an action on a bail-bond, if the issue depends on the date of the appearance, the Court of C. P. upon an application by the plaintiff, will order the day of the appearance to be entered in the filazer's book, although, before the application to the Court, issue has been already joined on the plea of *comperuit ad diem.* *Austen v. Fenton.* 1 Taunt. 23
- 13 The Court of C. P. refused to order a bail-bond, given on an arrest in a penal action to be cancelled, on an affidavit of the defendant, that he was not the person who had incurred the penalty; and they left him to his plea in abatement. *Salter q. t. v. Shergold.* 3 T. R. 572
- 14 The Court of C. P. will not set aside proceedings, and order the bail-bond to be delivered up, because a defendant has been arrested on a special *captus*, in which, as well as in the affidavit to hold to bail, the initials only of his christian name were inserted. *Howell v. Coleman.* 2 B. & P. 466
- 15 The Court of C. P. will not order the bail-bond to be delivered up to be cancelled, because the place where the affidavit to hold to bail was sworn, is not mentioned in the *jurat.* *Symmers v. Wason.* 1 B. & P. 105
- 16 If a non-commissioned officer has been arrested and gives bail, the Court of C. P. will not, after judgment recovered against the bail, set aside the proceedings, and cancel the bail-bond. *Bryan v. Woodward.* 4 Taunt. 557
- 17 A person to whom several debts were due from a bankrupt, arising out of separate sales of goods, proved some of the debts under the commission; another person, who was suggested to be a trustee for him, sued at law upon a note, which the bankrupt had given for another part of the goods sold: the Court of C. P. refused to interfere in a summary way, to stay proceedings on the bail-bond, in this action. *Howell v. Gollidge.* 5 Taunt. 174
- 18 The plaintiff may abandon an attachment obtained against the sheriff, and take an assignment of the bail-bond, and proceed thereon. *Pople v. Wyatt.* 15 E. R. 215
- 19 If a declaration on a bail-bond conclude, "whereby an action hath accrued to the plaintiff, to demand "and have of the *principal*," (instead of the *bail*), and state non-payment by the *principal*; it is bad on a special demurrer. *Morgan v. Sargent.* 1 B. & P. 58
- 20 Proceedings may be stayed on a bail-bond, on payment of costs, though the bail surrender the principal without having justified. *Meysey v. Carnell.* 5 T. R. 534
- 21 Where a judgment against the principal is set aside, upon condition, that the bail-bond shall stand as a security, the bail, if sued upon the bond, are entitled to a rule to plead, and a demand of plea, before judgment can be signed against them. *Evans v. Surman.* 1 N. R. 63
- 22 Final judgment may be entered in an action on a bail-bond, without a writ of inquiry. *Moody v. Pheasant.* 2 B. & P. 446

V. BAIL IN CRIMINAL CASES.

- 1 The Court of Common Pleas cannot apply the forfeited penalties of the recognizances of bail to attachments, to the discharge of the debt and costs of the defendant, in the original action. *Rex v. Davey.* 3 Taunt. 112
- 2 A commitment by a justice of peace, for 14 days, under the Vagrant Act, 17 G. 2 c. 5. is a commitment in execution, and the party is not entitled to be bailed. *Rex v. Brooke.* 2 T. R. 190
- 3 Although it be not necessary to state, in a warrant of commitment for felony, that the act was done *feloniously*; yet unless it sufficiently appear to the Court, that a felony has been committed, they are bound to bail the defendant. *Rex v. Judd.* 2 T. R. 255
- 4 When the House of Lords adjudge, that any matter is a breach of privilege, their adjudication on the party accused is a conviction, and no Court can bail him. *Rex v. Flower.* 8 T. R. 314

5 Though a warrant of commitment for felony be informal, yet if the *corpus delicti* appear in the depositions returned to the Court, they will not bail, but remand the prisoner. *Rex v. Marks.* 3 E. R. 157

6 The Court have a right to bail the ac-

cused in all cases of felony, even of murder, if they see occasion, where there is any doubt either on the law or fact of the case. 3 E. R. 163, 4, 5.

N. B. For the liability of bail on *habeas corpus*, see *tit. HAB. CORP.*

BANK NOTES.

N. B. For the evidence required on an indictment, for uttering a forged bank-note, see *Rex v. Wylie.* 1 N. R. 92
Rex v. Palmer. id. 97. & *Rex v. Crocker.* 2 N. R. 87.

1 Bank notes cannot be followed by the legal owners into the hands of *bona fide* holders for a valuable consideration without notice: Therefore, where a trader after a commission of bankruptcy, wishing to redeem a bill of exchange remitted to his bankers, applied to them by an unknown agent, to take four other bills in exchange; on their refusal, such agent passed the four bills, and obtained bank notes for the same, with which he took up the bill in the usual way; the Court held that the assignees could not recover from the bankers the amount of such bank notes, the produce of the bills, which were part of the bankrupt's estate after his bankruptcy; such bank notes being received by the bankers

bona fide, for a valuable consideration, and without notice of the true owners. *Lowndes v. Anderson.* 13 E. R. 130

2 The holder of a bank note is *prima facie* entitled to prompt payment of it, and cannot be affected by the previous fraud of any former holder in obtaining it, unless evidence be given to bring such fraud home to his privacy: Therefore, where an agent had received a bank note remitted by his principal abroad, which was challenged to be the property of a third person, from whom it had been obtained by fraud, and stopped by the Bank; in trover by such agent against the Bank for the recovery of the note, evidence being given to affect his principal with the fraud, the question was not altered by such agent, who received it on account, having, after notice, made payments for his principal, which turned the balance in favour of such agent. *Solomon v. The Bank of England.* 13 E. R. 135, n.

BANKRUPT.

I. TRADING.

II. ACTS OF BANKRUPTCY.

- (a) *Departing the Realm.*
- (b) *Beginning to keep House.*
- (c) *Absenting himself.*
- (d) *Departing from Dwelling-House.*
- (e) *Fraudulent Concealance.*
- (f) *Lying in Prison.*

III. PETITIONING CREDITOR.

IV. COMMISSION AND COMMISSIONERS.

V. ASSIGNMENT BY COMMISSIONERS.

- (a) *Of Bankrupts' real and personal Property.*

- (b) *Effect of Assignment on Property, of which Bankrupt is the reputed Owner.*

- (c) *— left in his Possession for a particular purpose.*

- (d) *— as Factor or Trustee.*

- (e) *— fraudulently delivered.*

- (f) *— Goods refused acceptance.*

- (g) *— upon the Process of the Crown.*

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- (a) *Actions by and against.*

VII. RELATION TO ACT OF BANKRUPTCY.

- (a) *As to Payments made by, or on Account of Bankrupt.*

VIII. PROOF OF DEBTS.

- (a) *When and how made.*
 (b) *Election of Creditors.*
 (c) *Bills and Notes.*
 (d) *Costs.*
 (e) *Contingent Debts.*
 (f) *Debts payable at a future Day.*
 (g) *Damages.*
 (h) *Creditors by Marriage Articles.*
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IX. BANKRUPT.

- (a) *Rights and Duties of.*

X. CERTIFICATE.

- (a) *Effect of, in discharge of debts.*
 (b) *How pleaded.*
 (c) *How avoided.*
 (d) *Certificated Bankrupt, how discharged.*

XI. COMMISSION, HOW SUPERSEDED.

I. TRADING.

- 1 The Court held, that a person who rented a brick-ground and made bricks thereon for public sale, and bought sand and fuel, being necessary ingredients for converting the earth and clay into bricks, was subject to the bankrupt laws. *Wells v. Parker in error.* 1 T. R. 34

- 2 The special verdict in this case being insufficient, the judgment of the Court was on appeal to the House of Lords reserved, and a *renire de novo* awarded; but which was not proceeded on; and the business ended in a new commission of bankruptcy, to which the plaintiff in error submitted. 1 T. R. 783

- 3 In a subsequent case, the Court held, that a devisee for life of an estate, part of which was a brick-ground, making bricks there for sale generally, with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks, and had occupied the same ground as a brick-maker, for general sale before the

estate came to him by devise: for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state; and it is not a buying of any commodity, to sell it again: nor does it fall within the principle of the bankrupt laws, which were levelled against those, who getting other men's goods into their hands, obtain credit upon and consume the same. *Sutton v. Wheeley.* 7 E. R. 442

- 4 Renting a brick-ground as a distinct occupation, is a mode of purchasing the clay. *Wells v. Parker.* 1 T. R. 40

- 5 If a man exercise a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he shall not be considered as a trader, though he buy necessary ingredients to fit it for the market; but where the produce of the land is merely the raw material of a manufacture, and the manufacture not the necessary mode of enjoying the land, there he is a trader. *id.* 38, 9

- 6 As in the case of a farmer, who makes cheese on his own land, and buys runnet and salt; he is not a trader. *id. ibid.*

- 7 So where a man makes his own apples into cyder. *id. ibid.*

- 8 Proprietors of alum works are not traders. *id. ibid.*

- 9 Neither are the workers of coal-mines. *id. ibid.*

- 10 An innkeeper, who sells liquor out of the house to all customers applying for it, is subject to the bankrupt laws, however inconsiderable the extent of such dealing, and the profits arising from it may be. *Putman v. Vaughan.* 1 T. R. 572

- 11 So is a farmer, who buys and sells horses with a view to make a profit by them, though the instances be few. *Bartholomew v. Sherwood.* 1 T. R. 573, n.

- 12 A farmer and grazier, exercising also the business of a drover, by buying cattle from time to time beyond the occasion of his farms, and selling them again, is exempted from the operation of the bankrupt laws by stat. 5 G. 2. c. 30. s. 40. And the purchase of hay for the support of his cattle, and the sale of part of it again, because it was more than was required for their consumption, will not make him a

trader, for the hay had been purchased for the sake of the cattle, and not to sell again, and the sale of it was quite incidental, because there was more than was requisite for the cattle.

Bolton v. Sowerby. 11 E. R. 274

13 The like point was decided in the Court of C. P. with the additional circumstance that the defendant had resold on the same day, and in the same room, a quantity of oats, and which was to be delivered by the original seller to the new purchaser. *Stewart v. Ball.* 2 N. R. 78

14 The purchase of one lot of timber, with intent to sell again, will make a man a trader. *Holroyd v. Gwynne.* 2 Taunt. 176

15 A person resided in *India*, and traded there, and in the course of that trading drew bills upon *England* for the value of other bills sent thither, upon which he got a profit by the exchange, and in the course of that dealing contracted debts in *England*: Held, that he was a trader within the meaning of the bankrupt laws, and that a commission of bankrupt might issue upon an act of bankruptcy committed by him in *England* after he had quitted *India*. *Inglis v. Grant.* 5 T. R. 530

II. ACTS OF BANKRUPTCY.

(a) *Departing the Realm.*

1 If a trader, whose house of trade was in *Ireland*, (but who had also a house in *London*, where his wife and family resided) having come to *England* to settle his affairs, being informed that one of his creditors intended to arrest him, quitted *England*, and went over to *Ireland* in order to avoid such arrest: the Court of C. P. held, that this was a departing the realm with intent to delay his creditors, sufficient to constitute an act of bankruptcy. *Wildman v. Nunn.* 1 Taunt. 270

(b) *Beginning to keep House.*

1 Where an act is a clear unequivocal act of bankruptcy, it cannot be explained by any subsequent circumstances: But where the act is in itself doubtful, it may be explained. Therefore, where *A.* was denied in the morning by express orders to the holder of a bill which was due, it was a complete act of bankruptcy, though he afterwards paid the bill, before five o'clock in the same day, and though by the custom of merchants

in *London*, the payer of a bill has the whole day on which a bill becomes due, till five o'clock, to discharge it in. *Colkett v. Freeman.* 2 T. R. 59

2 A bill having become due, and the drawer, being pressed for payment, desired the holder to call upon him the next morning at a friend's house and he would pay him; the holder went accordingly, and was denied at the drawer's request: upon being asked by his friend if he was aware that he had committed an act of bankruptcy, he answered with surprise in the negative, and said he did not mean to do so, and went afterwards and paid the bill. Lord Mansfield told the jury, that if they were satisfied that the denial had been with a view to delay the credit at the time, it was an act of bankruptcy; and if so, it could not be purged by paying the bill afterwards. *id.* 62

3 To make a denial to a creditor an act of bankruptcy, the debtor must be denied with intent to defraud or hinder that creditor. Keeping house, with that intent, is not alone sufficient. *Garrett v. Moule.* 5 T. R. 575

4 If a trader gives a general order to be denied, and is denied to a particular creditor, it is such a beginning to keep house as will constitute an act of bankruptcy: although the trader immediately overtakes the creditor, and says he was not afraid of him, but of another creditor. *Mucklow v. May.* 1 Taunt. 479

5 If a trader keeps house, and causes himself to be denied to a tax-gatherer, who calls for the taxes, it is an act of bankruptcy. *Jeffs v. Smith.* 2 Taunt. 401

6 In the case of an act of bankruptcy by the trader's beginning to keep house, the denial of a creditor is usually given in evidence, not to shew the fact of the creditor's being delayed, but as evidence to explain the equivocal act of the trader's keeping in his house, and to shew that he began to keep house with intent to delay his creditors. *Robertson v. Liddell, Bart.* 9 E. R. 487

(c) *Absenting himself.*

1 A trader, having a counting-house in town, and a dwelling-house in the country, left the former, (to which he never returned), taking his books with

him, and slept at his dwelling-house a few nights, when he finally left that also: Held, that having quitted his counting-house without the *animus revertendi*, he began to absent himself from that day, within the meaning of the 13 Eliz. c. 7. s. 1. and thereby committed an act of bankruptcy.

Judine v. Da Cossen. 1 N. R. 234

- 2 Where a trader, upon being arrested for a debt of 135*l.*, escaped from the officer, and fled into the house of another, and was pursued by the officer, and inquired for at the house, but was denied, and the door kept fast, and, whilst he remained there, declared that he did it for fear of other creditors; and when it was dark returned home to his own house, and gave directions to deny him to any one that called, and continued nearly a month in his bed-chamber: Held, that this constituted one or more act or acts of bankruptcy, under the words of the statute, "beginning to keep house," or, "otherwise absenting himself."

Bayly v. Schofield. 1 M. & S. 338

- 3 Where a trader went to his neighbour and told him that he expected to be arrested, and while he remained there, was informed that a sheriff's officer was going towards his house, upon which he concealed himself in the back room, and desired his neighbour to watch, and when told that the officer had gone past his house, and had left the street, immediately returned home: Held, that this was an act of bankruptcy, within the words of 13 Eliz. c. 7. and 1 Jac. 1. c. 15. "otherwise absenting himself, to the intent to delay creditors," although it appeared, that not only no creditor was delayed, but that none could possibly be delayed. *Chenoweth v. Hay.*

1 M. & S. 676

(d) *Departing from Dwelling-House.*

- 1 In order to constitute an act of bankruptcy, by a trader, in departing from his dwelling-house, it is not alone sufficient that a creditor should be thereby delayed, but the departure must also have been with that intent. The word "or" in the stat. 1 Jac. 1. c. 15. must be read "and." *Fowler v. Padget.*

7 T. R. 509

But the Court have now decided, that the departure of a creditor from his house, with an intent to delay his cre-

ditors, is an act of bankruptcy, though no creditor be thereby in fact delayed. *Robertson v. Liddell, Bart.*

9 E. R. 487

And see *Dudley v. Vaughan*, *Hornsby v. Nevill.* *id.* 490, *notis*, and other cases there cited.

- 3 And it is not sufficient to constitute such an act of bankruptcy, that a sheriff's officer who comes to levy a *fi. fa.* on the trader's effects, is refused admittance after the trader had left his house. *Barnard v. Vaughan.*

8 T. R. 149

- 4 Whether a departing the dwelling-house be accompanied with an intent to delay a creditor, is a question of fact for a jury to decide; upon all the circumstances, if it be not accompanied with such intent, it is no act of bankruptcy. *Aldridge v. Ireland.*

1 Taunt. 273, *notd*

- 5 A trader who has no settled house or counting-house, but takes up a temporary abode at a public-house, in the place to which his business carries him, commits an act of bankruptcy, by departing from such public-house, with intent to delay his creditors. *Holroyd v. Gwynne.*

2 Taunt. 176

- 6 A trader left at his house a message for a creditor, who had in his absence called for a debt, that he could spare no money, and would not pay him that day, and would go out of the way and stay till dinner time: Held, that it was for the jury to consider, whether he absented himself to delay a creditor; and this evidence warranted their conclusion that he did not. *Vincent v. Prater.*

4 Taunt. 603

- 7 So, where he absented himself from his house, where his creditors were, to avoid irritation and harsh language. *id. ibid.*

(e) *Fraudulent conveyance.*

- 1 A bill of sale to a particular creditor of all the effects of a trader, in trust to satisfy his debt, and to pay over the surplus, (if any,) to the trader, who then knew himself to be insolvent, is an act of bankruptcy, and such conveyance is invalid, notwithstanding the bill of sale was given by the trader when under arrest, at the suit of the particular creditor for a just debt. *Newton v. Chantler.*

7 E. R. 137

- 2 An assignment by deed, by traders, of all their effects, unless all their credi-

- tors concur, is an act of bankruptcy. *Eckhardt v. Wilson.* 8 T. R. 149
- 3 So is such an assignment when made by partners, unless all the separate creditors of each concur, as well as the joint creditors. *id. ibid.*
- 4 But an assignment by a person residing in *India*, and trading there, and drawing bills on *England*, of all his effects in trust for creditors, in certain proportions, executed by him while resident in *India*, is not an act of bankruptcy. *Inglis v. Grant.* 5 T. R. 530
- 5 Neither is such an assignment fraudulent and void in itself; being intended honestly at the time, and assented to, by the generality of the creditors. 5 T. R. 530
- 6 Neither can the assignment of the bankrupt's effects, by the commissioners, be considered tantamount to a revocation of the trust-deed, by the bankrupt himself, under a clause in such deed, which empowered him to vacate the instrument, if any creditor to a certain amount refuse to subscribe it. 5 T. R. 530
- 7 Those who are privies, and assent to a deed of assignment by a debtor, cannot set it up as an act of bankruptcy. *Bamford v. Baron.* 2 T. R. 594, n.
- 8 But such estoppel, it seems, applies only to the petitioning creditor. 4 E. R. 235, 6
- 9 And a commission of bankrupt being afterwards sued out there on such a deed, upon the petition of a creditor, who had not concurred in such fraudulent deed, and who, together with others who had concurred, was chosen an assignee; it is no objection to an action brought by them as assignees, that some of them had concurred in such deed. *Tappendal v. Burges.* 4 E. R. 230
- 10 A deed, whereby a bankrupt conveys all his property in trust, to be divided amongst his creditors, is an act of bankruptcy; though the creditors with whom such deed was in the first instance concerted, afterwards, and when it was executed, changed their purpose, unknown to the bankrupt, and intended to set it up as an act of bankruptcy. And such deed is operative, though it contain a proviso to be void, if the trustees think fit. 4 E. R. 230
- 11 A deed, whereby a debtor, being pressed, conveys estates in trust, to sell and to pay the pressing creditor, with a further trust to pay his debts to certain relatives, in order to give them an undue preference, in contemplation of bankruptcy, is an act of bankruptcy. *Morgan v. Horseman.* 3 Taunt. 241
- 12 But the deed is valid, so far as relates to the protection of the urgent creditor. *id. ibid.*
- 13 *Quare*, Whether void for the residue? *id. ibid.*
- (f) *Lying in Prison.*
- 1 Where a trader becomes a bankrupt by lying in prison two months, the act of bankruptcy relates back to the arrest, so as to vest his property in the assignees, from that time. *King v. Leith.* 2 T. R. 141
- 2 Yet no commission can be sued out on such an act of bankruptcy, until the expiration of the two months. *Gordon v. Wilkinson.* 8 T. R. 507
- 3 The day of the arrest is to be reckoned the first of the two months. *Glassington v. Rowllins.* 3 E. R. 407
- III. PETITIONING CREDITOR'S DEBT.
- 1 Where the petitioning creditor's debt did not amount to 100*l.* at the time of the act of bankruptcy, but was increased to more than 100*l.* by a promissory note of the bankrupt, due at that time, being indorsed to the petitioning creditor, before he petitioned for the commission, this debt was deemed sufficient to support the commission. *Glaister v. Hewer.* 7 T. R. 498
- 2 A commission of bankrupt, sued out upon the affidavits of four petitioning creditors, whose debts do not appear upon the face of those affidavits to amount to 200*l.*, is not void, though it may be a ground of application to the chancellor, to set aside the commission for irregularity. The provision in the Act 5 G. 2. c. 30. s. 23. respecting such affidavits being directory only, and not conditional. *Hill v. Heale.* 2 N. R. 196
- 3 A creditor of a bankrupt to the amount of 112*l.*, previous to the bankruptcy, receiving 50*l.* after notice of an act of bankruptcy, is not thereby precluded from suing out a commission of bankrupt; for by that act he waves his claim to the payment; and he may still retain the money in his hands for the credit of the bankrupt's estate. *Munn v. Shepherd.* 6 T. R. 79

- 4 *A.*, a creditor of *B.*, to the amount of 115*l.* 3*s.* 8*d.* took his bill for 20*l.* on *C.*, who had not then, nor afterwards, any effects of *B.* in his hands: the bill, when due, was dishonored, and no notice thereof was given by *A.* to *B.*: still *A.*'s demand was not discharged; but he may sue out a commission of bankrupt against *B.*, and his debt will support it. *Bickerdike v. Bollman.* 1 T. R. 405
- 5 A judgment-creditor, who has taken his debtor in execution, cannot afterwards sue out a commission of bankruptcy against him upon the same debt. *Cohen v. Cunningham.* 8 T. R. 123
- 6 A commission of bankrupt founded on the petition of *A.*, a *British* subject, resident in *England*, for a debt due to himself and his partners, *B.* and *C.*, also *British* subjects, but resident and carrying on trade in an enemy's country, cannot be supported. *McCormell v. Hector.* 3 B. & P. 113
- 7 A commission of bankrupt cannot be supported on the petition of one only of two partners, to whom a joint debt is due. *Buckland v. Newsome.* 1 Taunt. 477
- 8 *Quare.* Whether proof of a debt of 161*l.* to one of the petitioning creditors, there being more than three, will support the commission of bankrupt? *Smith v. Milles.* 1 T. R. 475
- 9 A plaintiff, in an action for a breach of promise of marriage, having recovered above 100*l.* damages against a trader, who, between verdict and judgment, committed an act of bankruptcy: Held, that the debt due upon the judgment, after it was entered up, was not a good petitioning creditor's debt, whereon to found a commission against such trader. *Ex-parte Charles.* 14 E. R. 197.
- 10 Bills of exchange to the amount of 100*l.*, drawn and issued by a trader before an act of bankruptcy, but becoming due afterwards, are sufficient when due, to found a petition for a commission of bankrupt against him. *But note*, the bankrupt was in fact indebted to different persons at the time of the act of bankruptcy in more than 100*l.*, even allowing the rebate of interest upon the bills, calculated back to that period. *Brett v. Levett.* 13 E. R. 218
- 11 A debt for money lent, due to a creditor at the time when an act of bankruptcy is committed by the debtor, is sufficient to support a commission against him, though afterwards, and before petitioning for such commission, the creditor obtains judgment against him for a sum of money including such debt; and the affidavit made in order to obtain the commission may be an affidavit of debt for money lent. *Bryant v. Withers.* 2 M. & S. 123
- 12 In an action by a bankrupt against the petitioning creditor, to try the validity of the commission, proof that the bankrupt and petitioning creditor attended the second meeting of the commissioners, and discussed before them the debt due to the petitioning creditor, and produced their accounts, and that the bankrupt objected to part of the petitioning creditor's account, and the commissioners ticked off such items in it as they allowed, and struck a balance of 169*l.* was held to be evidence to be left to the jury, of an implied admission by the bankrupt, from his conduct and demeanour before the commissioners, that such a balance was due, but not of an adjudication by them, by their own authority, or of an award made by them with the consent of parties: and therefore, where it had been so left to the jury; the Court granted a new trial. *Jarrett v. Leonard.* 2 M. & S. 265
- 13 In trover by the assignees of a bankrupt, against the sheriff and an execution creditor, where the defendants had given notice under the stat. 49 G. 3. c. 121. that they intended to dispute the petitioning creditor's debt; proof by the plaintiffs that one of the defendants, the execution creditor, had proved his debt under the commission, is no proof of the petitioning creditor's debt, either against the sheriff or such execution creditor. *Rankin v. Horner.* 16 E. R. 191
And see *Walker v. Burrell.* 3 T. R. 321. *notá*
- 14 To prove a petitioning creditor's debt, an account signed by the bankrupt, charging himself with a balance brought over on a day before the bankruptcy, is not admissible evidence, without positive proof that the bankrupt allowed the account before the bankruptcy. *Lioare v. Coryton.* 4 Taunt. 560
- 15 In proving the title of assignees of a

bankrupt, if the petitioning creditor was the assignee of another bankrupt, it is necessary to prove the title of the petitioning creditor to be such assignee, by all the like proof by which the title of the assignee in question is to be proved. *Doe v. Liston*.

4 Taunt. 741

And see *Antram v. Chace*. 15 E. R. 209
Ante page 89.

IV. COMMISSION AND COMMISSIONERS.

- 1 Where a commission of bankrupt is taken out fraudulently or maliciously, the Lord Chancellor may, under the stat. 5 G. 2. c. 30. order a specific sum, by way of damages, to be paid by the petitioning creditor, to the bankrupt, or assign the bond given by the former, and enable the latter to recover the whole penalty of the bond. *Smith v. Broomhead*. 7 T. R. 300
- 2 The assignment of the bond by the Lord Chancellor, is conclusive evidence of the fraud or malice, in an action brought on such bond, and therefore, in an action on such a bond, the defendant cannot plead, that the commission was not fraudulently or maliciously taken out. 7 T. R. 300
- 3 In a declaration on such a bond, it is not necessary to state, that the commission was fraudulently or maliciously sued out. *id. ibid.*
- 4 In an action, by the assignee, of a bond given to the Lord Chancellor, by the petitioning creditor of a bankrupt, under the stat. 5 G. 2. c. 30. s. 23. (and which was assigned by the Lord Chancellor's order for the assignment,) whereby it appeared, that he had previously ordered a *certain sum*, received by the defendant of the bankrupt, to be refunded, and further ordered the bond to be assigned to the plaintiff, and the costs of the petition to be paid by the defendant; the plea then averred *payment*, before the suing out of the plaintiff's writ of the *particular sum* mentioned, and the costs, *in satisfaction of the damages* sustained by the bankrupt's estate, and no damage *ultra* the sums so paid to the plaintiff: Held, such plea to be no answer to the action: for by such order of the Lord Chancellor must be understood, that the whole penalty of the bond was assigned to the plaintiff, (as creditor and assignee of the estate, under a second commission, and therefore, a party

grieved by the first fraudulent commission), by way of satisfaction, in damages for the injury sustained. But it was also considered to be competent to the Lord Chancellor, to review his former order, even after judgment for the plaintiff for the whole penalty, and to direct the whole, or any part of such penalty, to be applied accordingly. *Smith v. Edmonson*. 3 E. R. 22

- 5 It seems, that such a bond is not within the stat. 8 & 9 W. 3. c. 11. s. 8. by which a jury is to assess damages; because by the stat. 5 G. 2. c. 30. the damages are to be ascertained by the Lord Chancellor; although he may assist his conscience, by directing an inquiry before a Master, or an issue at law. *ib.*
- 6 The notice of intention to dispute a bankruptcy, required by stat. 49 G. 3. c. 121. s. 10. may be served on the assignee, by delivery to his attorney. *Howard v. Ramsbottom*. 3 Taunt. 526
- 7 But service, by leaving the notice with a maid-servant, at the dwelling-house of the assignee, is not sufficient service. *ib.*
- 8 A bankrupt cannot be permitted to set up a prior secret act of bankruptcy, to impeach his commission. either at law, or in equity. *Rex v. Bullock*.

1 Taunt. 71 & 82

- 9 If the title of assignees of a bankrupt's estate, strangers to the record, comes in question incidentally, it must be proved in the same mode as before the stat. 49 G. 3. c. 129., although no notice of contesting the bankruptcy, has been given by the opposite party. *Doe d. Mawson v. Liston*. 4 Taunt. 741
- 10 The defendant, though he has given no notice, that he intends to dispute the proceedings under the commission, may nevertheless give evidence to disprove the act of bankruptcy. *Mills v. Bennett*. 2 M. & S. 556

V. ASSIGNMENT BY COMMISSIONERS.

(a) Of Bankrupts real and personal Property.

- 1 The right to bring a real action, (e. g. a writ of *entry sur abatement*), passes to the assignees, by the usual words of the deed of assignment. *Smith v. Coffin et Ur*. 2 H. B. 451
- 2 By the assignment under the commission, all the bankrupt's property, whether abroad or at home, passes. *Hunter v. Potts*. 4 T. R. 189

- 3 And his after-acquired personal property and debts pass in like manner, by such assignment. *Kitchen v. Bartsch.* 7 E. R. 53
 - 4 If standing timber be sold to a trader, with a proviso, that in case of bankruptcy, the vendor may retake it, such a condition is void, under the stat. 21 Jac. 1. c. 18. s. 11. if the bankrupt has the disposition of the goods. *Holroyd v. Gwynne.* 2 Taunt. 176
 - 5 The Court of C. P. (*dubitante Eyre C. J.*) held, that the assignees of a bankrupt, might recover from the winner, money lost by the bankrupt, before his bankruptcy, at play, in an action of debt, on stat. 9 Anne, c. 14. *Brandon v. Pate.* 2 H. B. 308
 - 6 A patent right, for the exclusive exercise of an invention, obtained from the Crown, by an uncertificated bankrupt, is affected by the previous assignment of the commissioners, and vests in the assignees. *Hesse v. Stevenson.* 3 B. & P. 565
 - 7 And though the assignees execute in their own names, a deed with other creditors, whereby they, and all the creditors who may sign the deed, release the bankrupt from all actions, suits, claims, and demands, against him or his estate, and such deed be not signed by all the creditors, the assignees, are not barred from claiming as assignees the benefit of a patent-right previously obtained by the bankrupt. 3 B. & P. 565
 - 8 Money given by a father, who is a trader, to his son, to advance him in a partnership trading concern, is not within 1 Jac. 1. c. 15. s. 5; and cannot be recovered from the son, by the assignees of the father, who afterwards becomes bankrupt. *Kensington v. Chantler.* 2 M. & S. 36
- (b) Effect of Assignment on Property, of which Bankrupt is the reputed Owner.
- 1 To bring a case within the stat. 21 Jac. 1. c. 19. as to goods and chattels in possession of the bankrupt; he must have been a trader, when he was in possession of the property. *Gordon v. E. I. Company.* 7 T. R. 228
 - 2 A., a dyer, having purchased a plant of B., and being unable to pay the purchase-money, resold it to B., who never took actual possession, but demised it to him for three years; during that time, A. became bankrupt, and the assignees having seized the plant in his possession, under 21 Jac. 1., it was held a good defence to an action of trover, brought against them by B. *Bryson v. Wylie.* 1 B. & P. 83, n.
 - 3 If the furniture of a coffee-house be taken in execution, by a creditor, and without ever being removed, be let by him to the keeper of the coffee-house, who becomes bankrupt while in possession of it, the assignees are entitled to it, and may seize it under the stat. 21 Jac. c. 19. s. 11. *Lingham v. Biggs.* 1 B. & P. 82
 - 4 Goods, the property of a widow and children, were, upon her second marriage, assigned to trustees, in trust, to suffer the husband to enjoy them, on condition he should pay to the trustees, for the use of the children, 800*l.* by yearly instalments of 100*l.*, from July 1789: he continued in possession of them, until 1797, having paid only 250*l.*, the day before his bankruptcy, the trustees repossessed themselves of the goods: The Court held, this was fraudulent, as against creditors, and that the assignee of the bankrupt was entitled to the goods, under the stat. 21 Jac. 1. c. 19. *Darby v. Smith.* 8 T. R. 82
 - 5 A., B., and C., distillers, occupied as partners, certain premises, leased to A. and another, and used in common in the trade, the stills, vats, and utensils, necessary for carrying it on, the property of which stills, &c. afterwards appeared to be in A. On the dissolution of the partnership, which was a losing concern, it was agreed that C. and one J. should carry on the business on the premises; and by deed between the two last and A., it was covenanted and agreed, that A. should withdraw from the business, and permit C. and J. to use, and occupy the distill-house and premises, paying the reserved rent, &c. and the several stills, vats, and utensils of trade, specified and numbered in a schedule annexed, in consideration of an annuity, to be paid by C. and J. to A., and his wife, and the survivor; with liberty for C. and J., on the decease of A. and his wife, to purchase the distill-house and premises for the remainder of A.'s term, and the stills, vats, &c. mentioned in the schedule; and C. and J. covenanted to keep the stills, vats, and utensils, in repair, and deliver them up at the

time, if not purchased: with a proviso for re-entry, if the annuity were two months in arrear. Under this, *C.* and *J.* took possession of the premises, with the stills, vats, and utensils, and carried on the business as before; and made payments of the annuity, which afterwards fell in arrear, more than two months; but *A.*'s widow, and executrix, who survived him, did not enter, but brought an action for the arrears, which was stopped by the bankruptcy of *C.* and *J.*, who continued in possession of the stills, vats, and utensils on the premises. The Court held, that the stills which were fixed to the freehold, did not pass to the assignees under the words *goods and chattels*, in the statute: but that the vats, &c. which were not so fixed, did pass to the assignees, as being left by the true owner, in the possession, order, and disposition (as it appeared to the eye of the world), of the bankrupts, as reputed owners. *Horn v. Baker.* 9 E. R. 215

6 If the printer and publisher of a newspaper, assign his interest therein, to a creditor, as a security, but continue to print and publish as before, and no affidavit of the change of interest be delivered to the commissioners of stamps, and the printer become bankrupt, the right to the paper will pass to his assignees, under the assignment of the commissioners. *Longman v. Tripp.* 2 N. R. 67

7 *A.*, having contracted with a canal company, to build locks and bridges on the canal, as their engineer, purchased timber and other materials for the purpose, which were laid on the company's premises, on the banks of the canal; and on the company's advancing money to him, they took a bill of sale of these goods, and a symbolical delivery of them by a half-penny; afterwards, the company took out execution, upon a judgment confessed by *A.*, and the sheriff seized these goods, and *A.* became a bankrupt: Held, that *A.* had not such a possession of the goods, as would enable his assignees to take them within stat. 21 Jac. 1. c. 19. s. 11; for the best delivery was made, that the nature of the goods would admit of, they being before on the company's premises. *Manton v. Moore.*

7 T. R. 67

8 Also ruled, that the above bill of sale, was not an act of bankruptcy in *A.*

7 T. R. 67

9 If a trader become a bankrupt, between the time of executing a bill of sale of a ship at sea, to the defendant, and the time of the defendant's complying with the requisites of the registry acts, of the 26 Geo. 3. c. 60. and 34 Geo. 3. c. 68. s. 16. though such requisites were completed after the act of bankruptcy, and before the action brought, the property does not pass by the bill of sale; but the assignees of the bankrupt, may recover the ship in trover. *Moss v. Charnock.* 2 E. R. 399

10 Where, by agreement between *B.* and the defendant, *B.* agreed, on payment to him of a sum certain, to convey to the defendant, a dwelling-house, and to deliver possession of all the household furniture and stock, and that after formal possession delivered to the defendant, *B.* should be allowed to remain in possession for three months, without paying rent; which agreement was notorious in the neighbourhood, and the money was paid by the defendant, and a formal delivery made to him, and *B.* afterwards left in possession, according to the agreement, who became bankrupt, whilst he so remained in possession, and before the expiration of the three months: Held, that this was not a possession by the bankrupt, within the stat. 21 Jac. 1. c. 19. s. 11. *Muller v. Moss.* 1 M. & S. 335

11 The stat. 21 Jac. 1. c. 19. s. 11. only transfers to the assignees of a bankrupt, such goods, as by the consent of the true owner, the bankrupt has in his possession at the time of the bankruptcy. Therefore, where the purchaser of goods, lying at a wharf, in the name of the seller, received from him at the time of the sale, an order on the wharfinger for the delivery of the goods, but suffered them to remain in the name of the seller, for several months after; during which time, the seller disposed of a part thereof; but, upon notice of the seller's insolvency, the purchaser carried the order to the wharfinger, and had the goods transferred into his own name; and nine days after that, the seller became bankrupt: Held, that the assignees of the bankrupt were not entitled to these goods; for there was a complete

transfer of the possession, before the bankruptcy. *Jones v. Dwyer*.

15 E. R. 21

- 12 *Quare*. Whether the statute would, at any rate, have extended to goods, the joint property of two traders, but deposited at the wharf, in the name of one only, who, after such sale, in his own name, became bankrupt?

15 E. R. 21

- 13 A custom, that purchasers of hops, from hop-merchants, shall leave them in the merchant's warehouse, for the purpose of re-sale, upon rent, undistinguished from the merchant's stock, is not such a custom of trade as will prevent the hops from becoming the property of the merchant's assignees, in case of bankruptcy, as being in his possession, order, and disposition. *Thackwaite v. Cock*. 3 Taunt. 457

- 14 *Semble*, that a stocking-frame let on hire to a working hosier, in manufacturing districts, is not a chattel within his disposition. *Per Lawrence J.* *id.* 490

(c) Property left for a particular purpose.

- 1 Where a bankrupt is in the possession of the goods of another *bonâ fide*, with the owner's consent, at the time of the bankruptcy, for a *specific purpose*, beyond which, he has not the right of disposition or alteration, that is not such a possession, as entitles the assignees to recover the value of them, under stat. 21 Jac. 1. c. 19. s. 11. *Collins v. Forbes*. 3 T. R. 316

(But see the opinion of *Lawrence, J.* 7 T. R. 237)

- 2 A. and B. came to this agreement, that B. should purchase of A., the light gold coin, which he could send, at a stated price, and that A. should, from time to time, draw upon B. for the money due upon such sale; and that B. should also, from time to time, accept other bills drawn by A., for his own convenience, for which A. was to remit value: after they had acted under this contract for some time, B. became a bankrupt, being under acceptances to a large amount; and A., not knowing of the bankruptcy, sent a quantity of light gold and bills, to enable B. to discharge the acceptances, which parcel was taken by B.'s

assignees: it was held, that A., who had since paid B.'s acceptances, might recover back the gold and bills sent after the bankruptcy, on the ground that they were sent for the *particular purpose of paying these acceptances*. and that, as that purpose was not answered, the property in the gold, &c. remained in A., for whom B. should be considered as the factor or banker.

Tooke v. Hollingworth. 5 T. R. 215

(Affirmed in *Cam. Scac.* 2 H. B. 501)

- 3 If A. and B. have a general running account, consisting of bills drawn by B. on C., in favour of A., and of bills and other securities, deposited by A. with B., and upon the failure of B. and C., A. be obliged to take up the bills received by him from B., whereby the balance of the accounts is in favour of A., still he cannot maintain trover for the bills deposited by him with B., unless they were specifically appropriated to answer B.'s drafts on C. in favour of A., and deposited for that purpose expressly. *Bent v. Puller*. 5 T. R. 494

- 4 A customer paying bills, not due, into his bankers' hands in the country, who credited their customers for the amount of such bills, if approved, as cash (charging interest), is entitled to recover back such bills in specie from the bankers becoming bankrupt; the balance of his cash account, independent of such bills, being in his favour at the time of the bankruptcy: and if payment be afterwards received upon such bills by the assignees, they are liable to refund it to the customer, in an action for money had and received. *Giles v. Perkins*. 9 E. R. 12

- 5 If money, received by an overseer of the poor, be kept apart from his general property, his assignees, under a commission of bankruptcy, cannot claim it. *Rea v. Egginton*.

1 T. R. 370

(d) As Factor, or Trustee.

- 1 A debt, due to a bankrupt, as trustee for another, does not pass under the assignment of his effects by his commissioners. *Winch v. Keely*. 1 T. R. 613
- 2 Therefore, a bankrupt having previously assigned a chose in action, on a valuable consideration, may sue the

debtor in his own name, for the benefit of the assignee. 1 T. R. 619

S. P. Carpenier v. Marnell.

3 B. & P. 40

- 3 And the action *must* be in the name of the bankrupt; it will not lie in the names of the assignees under the commission. *id. ibid.*

- 4 *A.* desires leave to place certain long bills in *B.*'s hands, and to be allowed permission to draw, without renewals, bills of shorter dates, and desires *B.* to calculate the sum to be drawn for, allowing commission; and the long bills indorsed by *A.*, are enclosed to *B.* in the same letter. *B.* answers that, agreeable to *A.*'s wishes, he had discounted the bills, and then specifies the amount to be drawn for. This transaction is not an exchange or sale of bills upon discount, but a deposit of the long bills, on condition of being allowed to draw shorter bills, and *B.* having accepted *A.*'s bills; therefore, *B.* having become bankrupt, whereby *A.*'s bills were dishonoured, and the long bills have remained in *B.*'s hands at the time of his bankruptcy: Held, that *A.* might recover the amount of them, as money had and received to his use. *Parke v. Eliason.* 1 E. R. 544

- 5 If *A.* deposit bills, indorsed in blank, with *B.* his banker, to be received when due, and carried to his account, and the latter raise money upon them, by *pledging* them with *C.*, another banker, and afterwards become bankrupt, *A.* cannot maintain trover against *C.* for the bills. *Collins v. Martin.* 1 B. & P. 649

- 6 *A.*, *B.*, *C.*, and *D.*, were partners in a banking-house at *Liverpool*, and *C.* and *D.* also carried on a separate mercantile concern in *London*; *J. S.* having accepted bills payable at the house of *C.* and *D.*, employed *A.*, *B.*, *C.*, and *D.*, to get them paid accordingly, and agreed to deposit with them good bills, *indorsed by him*, for the purpose of enabling them so to do; *A.*, *B.*, *C.*, and *D.*, debited *J. S.* in account for his acceptances, and credited him for all the bills he deposited; some of the bills so deposited by *J. S.*, were remitted by *A.*, *B.*, *C.*, and *D.*, to *C.* and *D.*, upon the general account between the two houses; and before any of the acceptances of *J. S.* became due, both houses failed, and *J. S.* was obliged to pay all his own ac-

ceptances: Held, that the assignees of *C.* and *D.* were entitled to retain against *J. S.*, the bills remitted to them by *A.*, *B.*, *C.*, and *D.*: Held also, that it made no difference that one of the bills remitted, did not arrive in *London*, until after the bankruptcy of *C.* and *D.*, though sent by *A.*, *B.*, *C.*, and *D.*, before the event. *Bolton v. Puller.* 1 B. & P. 539

(c) *Property fraudulently delivered.*

- 1 If a bankrupt gives a preference to a creditor, under an apprehension, however groundless, of legal process, such preference is valid. *Thompson v. Freeman.* 1 T. R. 155

- 2 The acceptor of a bill of exchange, two days before the expiration of the time, for which the bill was originally drawn, called upon the indorser, and informed him privately, that he was insolvent; the indorser insisted on being paid the amount of the bill, offering at the same time, to become security to the creditors, for so much as the estate should produce; whereupon the acceptor paid it, and four days after became bankrupt: it also appeared, that the bill had been altered so as to make it fall due before this transaction, but without the defendant's knowledge: Held, that this was sufficient proof of fraudulent preference to defeat the payment of the bill. *Singleton v. Butler.* 2 B. & P. 283

- 3 If a debtor, at the instance of his creditor, give goods out of his shop, in part payment of a bond not then due, and shortly afterwards become bankrupt, the mere circumstance of the bond not being due, will not alone vitiate the part payment, on the ground of fraudulent preference. *Hartshorn v. Slodden.* 2 B. & P. 282

- 4 A creditor, knowing his debtor to be in distressed circumstances, and not able to pay his debt, applied to him in the first instance, about two months before his bankruptcy, for a security, and took part of his stock in trade for that purpose; this is not an undue preference, though the creditor did not threaten to sue him in case of a refusal. *Smith v. Payne.* 6 T. R. 152

- 5 Where a trader delivered a quantity of goods to the defendant, who was under acceptances for such trader payable at a future day, which delivery of goods was, clearly, not voluntary by the tra-

der, but made in consequence of the urgency of the defendant to be indemnified in case of non-payment of the acceptances; the transaction being *bond fide* and not colourable, is not such a voluntary preference on the part of the trader, (who afterwards became bankrupt,) as will render the transaction invalid. *Crosby v. Crouch*.

11 E. R. 256

6 Where a trader, being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home, and became a bankrupt; this, inasmuch as the act done did not redeem the trader, even from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy; and is therefore void, as against the assignees of the bankrupt. *Thornton v. Hargreaves*.

7 E. R. 544

7 A. purchases goods of B., on October 8th, for the purpose of exportation; but finding that he must stop payment, and that he cannot apply the goods to the purpose for which they were bought, he returns them to B., on October 16th: on the 17th he stops payment; but expecting remittances from abroad more than sufficient to pay his debts, has no doubt but his creditors will give him time: They however refusing, he is made bankrupt on November 2d. In an action by the assignees against B., for the value of the goods: Held, that the jury were warranted in finding, that the delivery of the goods to B., was not made in contemplation of bankruptcy. *Fidgeon v. Sharp*.

1 Marsh. 196

8 A creditor obtains a preference in contemplation of an intended deed of composition, which would be fraudulent against the creditors under that deed: the composition going off, the creditor may hold his securities against a commission of bankrupt, subsequently issued, and not contemplated at the time of the preference. *Wheelwright v. Jackson*.

5 Taunt. 109

(f) *On Goods delivered, and refused acceptance.*

1 Until an act of bankruptcy, the *ius disponendi* over goods, remains by law with the trader, unless he exercise it by way of voluntary and fraudulent preference of a particular creditor, in contemplation of bankruptcy: Therefore, where traders, having ordered goods from the defendants, which were forwarded, but were afterwards taken possession of by the defendants, upon a claim of right to stop them *in transitu*, called a meeting of their creditors, and took legal advice, by the result of which meeting and advice, they were encouraged to give up the goods, which they accordingly communicated to the defendants: Held, that these circumstances were evidence for the jury to find, that the goods were given up by the traders; and given up by them *bond fide*, and not from any motive of voluntary and undue preference, though they were then in a situation of impending bankruptcy. *Dixon v. Baldwin*.

5 E. R. 175

2 L. bought some tobacco of the plaintiff, to be paid for in ready money, and the same day absconded, to avoid his creditors, leaving orders at his house, to receive the tobacco; the plaintiff's servant afterwards brought the tobacco to L.'s house, without demanding the money: Held, that the bankruptcy between the sale and delivery, did not avoid the sale, so as that the plaintiff could recover back the possession of the goods from the assignees in trover. *Haswell v. Hunt*.

5 T. R. 231, *notd.*

3 Where a sale of goods has been completed by actual delivery to the buyer, who afterwards becomes insolvent, before they are paid for, he cannot rescind the contract, and return the goods, with the consent of the seller, so as to give the seller a preference to his other creditors. *Barnes v. Freeland*.

6 T. R. 80

4 A trader orders bags of wool of defendants, (merchants) in December, which are delivered in February following; and by the course of dealing, the trader has the option of returning the wool, for which he has no call, though previously ordered. The trader being from home when the bags arrive, they are deposited in his warehouse; on his

return he gives directions not to have them opened or entered in his books, but only weighed off to see that they agreed with the invoice, he being then in embarrassed circumstances, and intending not to take them, if he should find himself unable to pursue his business. Afterwards, on the 4th and 5th of *March*, being then avowedly insolvent, he returns the bags, requesting a line of approbation thereof; which approbation is given; after an act of bankruptcy committed: Held, that by the trader keeping possession of the goods so long, his option (which ought to have been exercised on the receipt of them), was gone; and that the assignees were entitled to the property. *Neate v. Ball.* 2 E. R. 117

N.B. For the effect of an assignment on goods, in transitu, see STOPPAGE IN TRANSITU.

(g) *Upon the Process of the Crown.*

1 Soap, and the materials for making soap, which were the property of a bankrupt, may be seized in the hands of the assignees for penalties, incurred under the excise laws, previous to the bankruptcy. *Austin v. Whitehead.*

6 T. R. 436

2 If a soap-maker, having incurred a forfeiture for concealing soap, contrary to stat. 1 G. 1. st. 2. c. 36. become a bankrupt, and a provisional assignment of his estate be made, after which the soap is condemned, and the bankrupt convicted, and thereupon a warrant issues to levy the penalty on his goods generally, such warrant is bad, and cannot justify a seizure of the soap in the hands of the assignees. *id.* 438
And see EXECUTION.

VI. ASSIGNEES.

Actions by and against.

1 Assignees of a bankrupt may sue both in the *debet* and *detinet.* *Winter v. Kretchman.* 2 T. R. 46

A new assignee of a bankrupt may sue in debt upon a judgment recovered by a former assignee, displaced by the Lord Chancellor: which judgment was for damages sustained, for injuries committed as well by the defendant against the bankrupt before his bankruptcy, as also against the assignee, as such, after the bankruptcy:—

For such recovery will be presumed

to have been for injuries done to the bankrupt's estate and effects. And the plaintiff may declare in a general form, as having been duly constituted and appointed assignee, &c. *De Cosson v. Vaughan.* 10 E. R. 61

3 A. gave B. a bond to secure an annuity, and before any payment became due, A. lent B. a sum of money; on which it was agreed that B. should retain the payments of the annuity as they became due till that sum was discharged; then B. became a bankrupt, and the agreement to retain was held a good plea, to an action on the bond by B.'s assignees, for the payments accruing after the bankruptcy: such agreement and retainer being equivalent to a plea of *solvit ad diem.* *Sturdy v. Arnaud.* 3 T. R. 599

4 Assignees cannot make themselves parties to the record in an action commenced, &c. by the bankrupt, in any intermediate stage of the proceedings, but it must be immediately after judgment; though an interlocutory judgment is sufficient for that purpose. *Kretchman v. Beyer (in error).*

1 T. R. 463

5 In covenant by the landlord against the defendants assignees of a bankrupt for breach of covenant, the mere fact that the assignees put the estate up to sale (without stating themselves to be the owners or possessed thereof), they never having been in possession of the premises, and there being no bidder, the premises not being sold; is not sufficient to support an averment that all the estate, interest, &c. of the bankrupt in the premises, came to the defendants by assignment. *Turner v. Richardson.* 7 E. R. 335

6 The Court held, that if after the assignment of a bankrupt's estate, a creditor residing in *England* attach the money of the bankrupt abroad, the assignees might recover it in an action for money received to their use, *Hunter v. Potts.* 4 T. R. 182

7 And the Court of C. P. determined that if after an act of bankruptcy committed, but before an assignment, a creditor of the bankrupt makes an affidavit of a debt in *England*, by virtue of which he attaches, and receives, after the assignment, money so due to the bankrupt abroad, the assignees were entitled to recover in such action. *Sill v. Worswick.* 1 H. B. 665

- 8 And this doctrine was established in the Court of Exchequer Chamber, (*Eyre C. J. dissent. against Rooke J. Thompson B., Heath J., Perryn B., Hotham B., and Macdonald Lord Ch. B.*) upon the following case: *A.* a British subject, a partner in a house at Manchester, residing in America for the purpose of collecting the debts of the house, having notice of a commission of bankruptcy being issued against a debtor of the house, instituted a suit against the debtor in the Court of Pennsylvania, and attached a debt due to the debtor in the hands of his debtor resident in Pennsylvania; finally recovered judgment against the garnishee; and received from him the amount of his debt. The Court, on the authority of *Hunter v. Potts*, determined without argument, that the assignees of the bankrupt debtor might maintain their action against *A.* for money had and received to their use; and this judgment was affirmed in the Exchequer Chamber. *Philips v. Hunter.* 2 H. B. 402
- 9 If a trader become a bankrupt by lying in prison two months after an arrest, his assignees may maintain an action for money had and received against a person, who, having notice that a commission would be issued against him, sold his goods and paid him the produce before the expiration of the two months. *King v. Leith.* 2 T. R. 141
- 10 Money paid by a trader, after a secret act of bankruptcy, to a carrier, for the carriage of goods, may be recovered back by the bankrupt's assignees *in assumpsit* for money had and received. *Bradley v. Clark.* 5 T. R. 197
- 11 Where *R.*, a tradesman, being arrested at the suit of the defendant upon a *ca. sa.*, placed goods in the hands of the sheriff's officer to raise money upon them, who accordingly pledged them, and five weeks afterwards paid over the amount to the defendant: Held, that the assignees of *R.*, who had committed an act of bankruptcy before the arrest, might recover the money paid to the defendant in an action for money had and received, although the defendant was not privy to the taking of the goods by the sheriff's officer, and although the money paid to the defendant was not the identical money raised by the pledge. *Allanson v. Atkinson.* 1 M. & S. 583
- 12 When the assignees of a bankrupt have recovered a sum of money from the bankrupt's banker, received by him, and paid over to a creditor of the bankrupt with knowledge of the bankruptcy, they cannot recover the same sum from the creditor, though he received it after notice of the bankruptcy. *Vernon v. Anson.* 2 T. R. 287
- 13 But the assignees had their option at first to bring the action against the banker, or against the person to whom the banker paid the money under the above circumstances. 2 T. R. 287
- 14 A trader in prison, employed an auctioneer to sell goods, who sent him the proceeds by the hands of the defendant; the trader became bankrupt by lying two months in prison: Held, that his assignees could not recover from the defendant, who was a mere bearer, the money he had so received and paid over. *Coles v. Wright.* 4 Taunt. 198
- 15 The defendant having, for securing a debt, taken an indorsement of the bills of lading of certain cargoes, which was void because made after an act of bankruptcy committed by the indorser, effected for his own account an insurance on the cargoes; and a loss happening, he recovered against the underwriters on a count averring interest in the assignees of the indorser, then a bankrupt: Held, that the assignees could not recover over this money, as had and received by the defendant for their use. *Grant v. Hill.* 4 Taunt. 380
- 16 *A.* become bound as a surety for *B.*, who in order to indemnify him, agreed that he should retain out of any money that should be due from him to *B.*, in respect of any dealings between them in trade, so much as he should pay on the bond; *B.* afterwards sold goods to *A.* of a less value than the money secured by the bond, and then became a bankrupt, and *A.* was obliged to satisfy the bond: Held, that the assignees of *B.* could not recover in an action for goods sold and delivered, there being nothing due to the bankrupt's estate on the original contract. *Dobson v. Lockhart.* 5 T. R. 133
- 17 If a creditor accompany the sheriff's

officer in levying an execution, which is afterwards avoided by a commission of bankruptcy, trover may be maintained against him by the assignees; though the money remain in the hands of the sheriff's broker. *Mendum v. Edmonson*. 1 B. & P. 369

18 If any person, during a bankrupt's examination take any thing out of his effects, and convert it into money, though for the necessary subsistence of the bankrupt and his family, the assignees may maintain trover against such person. *Thompson v. Councell*. 1 T. R. 157

19 A merchant pledges for value the bills of lading of an expected cargo, his property, in the profits of which his agents abroad were interested in a certain proportion. His agents, without the knowledge of the owner or the pawnees, dispose of part of the cargo abroad, after which the owner becomes a bankrupt: he induces the agents to replace the goods disposed of by others, of which the agents give him bills of lading, and he sends them to the pawnees, to make good their security: Held, that the assignees of the bankrupt might recover the substituted goods in trover against the pawnees. *Meyer v. Sharpe*. 5 Taunt. 74

20 Where J. S. obtained bills of exchange from the defendant, upon a fraudulent representation, that a security given by him to the defendant (which was void), was an ample security; and on the next day having resolved to stop payment, informed the defendant that he had repented of what he had done, and had sent express to stop the bills, and would return them, and three days afterwards committed an act of bankruptcy, after which he returned to the defendant all the bills (except one, which had been discounted), and also two bank-notes, part of the proceeds of such discount, and the defendant delivered back the security, and afterwards a commission of bankruptcy issued against J. S., the assignees under which commission brought trover against the defendant for the bills and bank-notes: Held, that the defendant was entitled to retain them. *Gladstone & Hadwen*. 1 M. & S. 517

21 The assignees of a bankrupt cannot recover the amount of a check paid

by the bankrupt's bankers after the bankruptcy, in trover for the check against the creditor, to whom the check was delivered and the money paid. *Mathew v. Sherwell*. 2 Taunt. 439

22 Where a ship was mortgaged at sea, with a proviso that the mortgagor should continue in possession till failure of payment of the mortgage money on demand; but the grand bill of sale was delivered, and the mortgagor became bankrupt before the arrival of the ship, and the mortgagee took possession on her arrival: he may maintain trover against the assignees who took the ship from him, notwithstanding he made no demand either on the bankrupt or his assignees. *Atkinson v. Maling*. 2 T. R. 462

23 Trespass will not lie by the assignees of a bankrupt against a sheriff for taking the bankrupt's goods in execution, after an act of bankruptcy, and before the issuing of the commission; notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignee not to sell: but the assignees may bring trover. *Smith v. Milles*. 1 T. R. 475

24 The bargain and sale by the commissioners to the assignees of a bankrupt of the bankrupt's freehold lands, does not relate to the act of bankruptcy, so as to vest the title in the assignees from that time, and therefore, in ejectment by the assignees upon a demise laid, after the act of bankruptcy, but before the bargain and sale adjudged ill. *Doe, d. Esdaile, v. Mitchell*. 2 M. & S. 446

25 A declaration in *scire facias* by the assignees of a bankrupt, stating, "that he became a bankrupt within the meaning of the statutes, &c. and that his goods and effects were afterwards in due manner assigned to the plaintiffs," is sufficiently certain, without alleging that the party was declared a bankrupt, or that his effects were assigned by deed. *Winter v. Kretchman*. 2 T. R. 45

26 The plaintiff after judgment and a writ of error allowed, having become a bankrupt, his assignees cannot sue out a *scire facias* in their own names to compel an assignment of errors, till some judgment be given, and then it

must be done immediately after such judgment; but they should have gone on with the writ of error in the bankrupt's name till judgment. *Kretzman v. Beyer (in error)*. 1 T. R. 463
N. B. For the evidence required to support a commission, see *tit.* EVIDENCE and WITNESS.

VII. RELATION TO ACT OF BANKRUPTCY.

(a) *Payments made by, or on Account of Bankrupt.*

- 1 If the payee of a bill of exchange, received from a third person, as the price of an estate, give time to the drawee, on condition that he shall allow interest, and afterwards the drawee discharge the bill, having in the mean time committed an act of bankruptcy; this is not such a payment in the ordinary course of trade, as is protected by stat. 19th G. 2. c. 32.; and the assignees may recover the money from the payee. *Vernon v. Hall*. 2 T. R. 648
- 2 Money paid by a trader, after a secret act of bankruptcy, to a carrier, for the carriage of goods, is not within the statute, and may be recovered back in *assumpsit*, by the assignees of the bankrupt. *Bradley v. Clarke*. 5 T. R. 197
- 3 A. having recovered a verdict for a certain sum of money against B.; B. commits an act of bankruptcy; afterwards A., having had no notice of the bankruptcy, gives time to B., and instead of entering up judgment, and suing out execution, takes a bill drawn by B. on C., at a distant period, for the amount of the sum recovered. This is *not* a payment protected by the stat. 19 G. 2. c. 32.: A. therefore remains liable to refund the money received for the bill, to the assignees of B. *Pinkerton v. Marshall*.
 2 H. B. 334
- 4 A promissory note, reserving interest half yearly, given by the bankrupt for the balance of an account, consisting amongst other articles, of money lent by the defendant to the bankrupt; such note not being given in the usual and ordinary course of trade and dealing, is not protected by the stat. 19 G. 2. c. 32., and therefore the assignees of the bankrupt, are entitled to recover back money paid by the bankrupt to the defendant, after an act of bankruptcy, unknown to the defendant, (though before the date of the commission), which money the defendant

had before recovered by judgment against the bankrupt, in an action on the note. *Harwood v. Lomas*.

11 E. R. 127

- 5 A creditor, for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's, in the hands of a third person, and recovered judgment for his debt, and received the amount from such third person; a commission afterwards issued: Held, that this payment was not protected by stat. 19 G. 2. c. 32. as it could not be said to be in any way a payment, made by the bankrupt. *Hovil v. Browning*.

7 E. R. 154

- 6 But where a trader, indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former, and gives them, besides, a collateral security, by depositing policies with them, and after notice of a loss upon these policies, the broker gives his own acceptance to the defendants, which was paid, upon which they deliver up the policies; after which a commission is issued against the trader: Held, that the assignees of the bankrupt could not recover from the defendant, the amount of the broker's acceptance paid to them, which was the money of the broker, not of the bankrupt; though the broker, in settling with the assignees, retained the amount of the money, so paid by him to the defendants.

Hovil v. Pack. 7 E. R. 163

- 7 A banker is not justified in paying the drafts of a person, who has placed money in his hands, after he has notice of an act of bankruptcy committed by him. *Vernon v. Hankey*.

2 T. R. 113

- 8 A trader, having securities in the banker's hands, to a certain amount, after a secret act of bankruptcy, drew on them a bill for a larger amount, on the score of his accommodation, payable to his own order, which after acceptance, he indorsed to the plaintiff; the Court held, that though the plaintiff was entitled to sue on the bill, yet he could only recover against the acceptors, the amount of the sum accepted for the accommodation of the bankrupt, beyond the amount of the securities in their hands: for which latter, they were liable in another

form of action to the assignees.

Willis v. Freeman. 12 E. R. 656

- 9 If a debtor, after a secret act of bankruptcy, be arrested on a bill of exchange, and immediately pay the debt, such payment is protected by 19 G. 2. c. 32. *Cox v. Morgan*

2 B. & P. 398

- 10 So where the payment was made a few days after the arrest. *Holmes v. Wennington.* 2 B. & P. 399, n.

- 11 A trader, subsequent to an act of bankruptcy, being arrested and detained in prison, at the suit of several creditors, sent for all his creditors but one, and paid their debts in full; but no other circumstance occurred from which it could be presumed, that they knew of his bankruptcy or insolvency: Held, that such payments were not protected by the stat. 19 Geo. 2. c. 32. *Southey v. Butler.* 3 B. & P. 237

- 12 A. sold goods to B., for which the latter was to pay by a bill at three months; B. gave A., a check on his bankers, (who were also the bankers of A.) requiring them to pay A. on demand, in a bill at three months; A. paid the check into the bankers, and took no bill from them; but the amount was transferred in the bankers' books, from B.'s account to A.'s, with the knowledge of both; the bankers failed before the check became due; and it was held, that A. could not recover the value of the goods against B. *Bolton v. Richard.* 6 T. R. 139

- 13 It is no defence to an action for a debt due, that the plaintiff is a trader, and has committed an act of bankruptcy, of which the defendant had notice, no commission having issued nor proceedings had for that purpose: for though voluntary payments, under such circumstances are not protected, yet payments enforced by coercion of law, are valid against the assignees, in case any commission should afterwards be taken out. *Foster v. Allanson.*

2 T. R. 479

And see *King v. Leith.* 2 T. R. 141

- 14 Where a creditor of a bankrupt, who had sued out a writ against him, and without proceeding upon it, afterwards received from him a bill of exchange, in part-payment of his debt, after being apprised, that there had been a meeting of his creditors, and that the bankrupt's affairs, at that time, were only capable of paying the demands of

his creditors by instalments, although he was assured by the bankrupt's agent, that they would come round, was liable to refund the proceeds of such bill, to the assignees of the bankrupt, as a payment not in the usual course of trade, and before notice of his insolvency. *Bayly v. Scofield.*

1 M. & S. 338

- 15 A. accepts a bill payable at his banker's, to a larger amount than his effects in their hands, which is there paid. Afterwards, having committed an act of bankruptcy, he repays them the balance: Held, that this was a payment in fraud of the bankrupt laws, and not protected by stat. 19 Geo. 2. c. 32. s. 1. *Holroyd v. Whitehead.* 1 Marsh. 128

And see tit. SET-OFF.

VII. PROOF OF DEBTS.

(a) *When and how made.*

- 1 Under the general bankrupt laws, debts proveable under the commission, and debts to be discharged by the certificate, are convertible terms. And debts not due at the time of the act of bankruptcy, except in the cases specially provided for by particular statutes, are not affected by the commission. *Per Cur. Bamford v. Burrell.*

2 B. & P. 11

- 2 By stats. 1 Jac. 1. c. 15. s. 11. & 12. and 5 G. 2. c. 30. s. 29. after any person has been convicted on an indictment for falsely swearing to a debt under a commission of bankrupt, (on which indictment he is to suffer the punishment inflicted by the several statutes against perjury), the assignees of the bankrupt may recover from him double the sum so sworn to in an action; in which it is sufficient to state the conviction of the defendant on the indictment, without also alleging that the defendant did take such false oath. *Holmes v. Walsh.* 7 T. R. 458

- 3 The stat. 46 Geo. 3. c. 135. s. 2. does not restrain a creditor from proving under a commission of bankrupt, a debt contracted before the act of bankruptcy, on which the commission issued, but after notice of a prior act of bankruptcy. *Ex-parte Bowness in re Phillips.* 2 M. & S. 479

- 4 A specific sum of money received by an overseer of the poor, is not such a debt as can be proved under a commission of bankrupt against him be-

fore his accounts are delivered in.
Rex v. Egginton. 1 T. R. 369

- 5 A declaration by a bankrupt of his motives for absenting himself from his home, made at the time, is evidence in an action by the assignees against a creditor of the bankrupt, in order to prove the act of bankruptcy. *Bateman v. Bailey.* 5 T. R. 512

(b) *Creditor's Election.*

- 1 The stat. 49 G. 3. c. 121. s. 14., which enacts that creditors proceeding under the commission shall be deemed to have made their election not to sue, does not extend to prevent a creditor who proves a joint debt under a commission against one partner, from suing the others. *Heath v. Hall.*

4 Taunt. 326

- 2 If a creditor has both proved his debt under a commission of bankrupt, and commenced an action against the bankrupt before the passing of the stat. 49 G. 3. c. 121. s. 14., that act does not compel him to relinquish his action. *Atherstone v. Huddleston.*

2 Taunt. 181

And see *Linging v. Comyn.*

2 Taunt. 246

(c) *Bills and Notes.*

- 1 *A.* draws a bill of exchange on *B.*, payable to the order of *A.*, which *B.* accepts, and *B.* draws a bill on *A.* payable to the order of *B.*, which *A.* accepts, for their mutual accommodation; both bills are payable at the same time, have the same dates, and contain the same sums: one is a good consideration for the other, and neither is an indemnity; so, that if either party becomes a bankrupt, the bill accepted by him may be proved under his commission, and consequently to an action brought on it, his bankruptcy may be pleaded. *Rolfe v. Caslon.*

2 H. B. 570

- 2 The defendants gave to the plaintiff their own bills accepted by third persons in exchange for his acceptances of other bills drawn by them upon him, the different sets of which tallied, except as to some trifling difference, on which no stress was laid at the time: Held, that the transaction being that of an *absolute exchange of securities*, each party was confined to his remedy on those securities, and the

law would not raise an implied promise in the defendants, who had become bankrupts, to repay to the plaintiff a part of the amount of his acceptances which was paid by him after the bankruptcy. *Buckler v. Butivant.* 3 E. R. 72

- 3 Where the plaintiff lent his indorsement upon a bill at the desire of the drawer, but without any privity with the defendant (the acceptor), who had himself no consideration at the time for such acceptance; and the day before the bill became due the defendant became bankrupt, and it was immediately after taken up by the plaintiff (the indorser) out of the hands of the indorsee: Held, that the bill being *proveable as a debt under the defendant's commission*, and there being no privity of contract between these parties collateral to the bill, like the case of principal and surety, nor any promise of indemnity, the plaintiff could not recover the amount of the bill paid after the bankruptcy against the defendant who had obtained his certificate. *Houle v. Baxter.*

3 E. R. 177

- 4 If two persons exchange acceptances, and before the bills are mature, one of the acceptors commits an act of bankruptcy, there is not such a debt due from him to the other as will sustain a commission, before the other has paid his own acceptance. *Sarratt v. Austin.* 4 Taunt. 200
But see *post*, Page 129, *tit. Certificate, effect of, in discharge of debts.*

(d) *Costs.*

- 1 Where a debt arises before a bankruptcy, but a verdict is obtained and costs taxed after the bankruptcy, the costs are considered as part of the original debt, and may be proved as such under the bankruptcy: The Court of C. P. therefore discharged the bankrupt out of custody who had been taken in execution for such costs. *Lewis v. Piercy.* 1 H. B. 29

- 2 So where a defendant became bankrupt between the verdict and judgment. *Longford v. Ellis.*

1 H. B. 29, n.

And see *Willett v. Pringle.*

2 N. R. 190

- 3 But where a verdict is recovered against a bankrupt after the bankruptcy, in an action brought before,

the costs are not proveable under the commission. *Ex-parte Hill*.

2 N. R. 191, *noted*

- 4 The Court held that if a plaintiff become a bankrupt after he is nonsuited, and before the taxation of costs, the costs of the nonsuit are a debt proveable under the commission. *Hurst v. Mead*. 5 T. R. 365

- 5 After some hesitation, the Court of C. P. on the authority of the preceding cases, determined that if a plaintiff become bankrupt after a nonsuit at *nisi prius*, and before the judgment of nonsuit, the costs of the nonsuit are a debt proveable under the commission. *Watts v. Hart*. 1 B. & P. 134

- 6 But the Court held that the costs of a suit in chancery, directed to be paid by an award made before the bankruptcy of the defendant, but which costs were not taxed till after he became bankrupt, could not be proved under the commission; but that the bankrupt remained liable to be attached for the amount under the award made a rule of Court. *Rex v. Davis*.

9 E. R. 318

- 7 If *A.* recover a judgment against *B.* before the bankruptcy of *B.*, and revive it by *scire facias* after the bankruptcy, the costs of the *scire facias* relate back to the judgment, and may be proved under the commission. *Phillips v. Brown*. 6 T. R. 282

- 8 So if a writ of error be brought after the bankruptcy, to reverse a judgment against the bankrupt before, and the judgment be affirmed, the costs of the writ of error refer to the judgment.

6 T. R. 282

- 9 And in either case the bankrupt's certificate discharges him as to the costs, as well as with regard to the judgment. 6 T. R. 282

- 10 Where after a recovery in ejectment, and before an action of trespass for *mesne* profits, the defendant became a bankrupt, and the jury did not include the costs of the ejectment in their verdict in executing a writ of inquiry in the action for *mesne* profits, the Court refused to set aside the inquiry, because the plaintiff might have proved the costs as a debt under the defendant's commission of bankruptcy. *Gulliver v. Drinkwater*.

2 T. R. 261

- 11 If a plaintiff after a verdict found for the defendant, but before judgment

signed, become bankrupt, the costs are not a debt proveable under the commission; and execution for them may issue against him, notwithstanding his certificate. *Walker v. Barnes*.

1 Marsh. 346

(e) *Contingent Debts.*

- 1 If *A.* give a warrant of attorney to *B.* to confess a judgment immediately, with a defeazance that judgment shall not be entered up until a subsequent day on a contingency, and *A.* become bankrupt before that day, though *B.* afterwards enter up judgment on the happening of the contingency, he cannot prove this debt under *B.*'s commission. *Staines, Knt. v. Planck*.

8 T. R. 386

And see *Uttersen v. Vernon*. 4 T. R. 570

(f) *Debts payable at a future day.*

- 1 Goods sold and delivered upon an agreement to be paid for by a present bill payable at a future day, does not create a present debt, on which to found a commission of bankrupt: nor can an action for goods sold and delivered be maintained by the vendor before the time when the bill agreed to be given would have become due, and when the contract would be no longer executory: Neither can such executory contract, if no such bill payable, at a future day, be actually given to secure it, found a good petitioning creditor's debt within the statutes 7 G. 1. c. 31. s. 1. and 5 G. 2. c. 30. s. 22. which are confined to debts due on bills, bonds, promissory notes, and other personal *written securities* of the like sort, payable at a future day; which alone by the latter statute are made available to found a good petitioning creditor's debt. *Hoskins v. Duperoy*. 9 E. R. 496

N. B. In this case all the authorities are collected.

- 2 School-money for the education, &c. of the defendant's son, payable half-yearly, is not a *debt due* till the end of the half-year, so as to be proveable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half-year; though he had, just before his bankruptcy, and before the holidays began, taken his son home for the holidays. *Parstow v. Dearlove*.

4 E. R. 438

- 3 If a demand be payable *at all events*, though *at a future day*, it may be proved under a commission of bankrupt against the debtor, or set-off against an action brought by his assignees; but if it rest in *contingency* whether it will become payable or not, it cannot be so proved or set off, unless it be secured by a penalty which is forfeited at law. *Hancock v. Entwistle*. 3 T. R. 435
And see tit. SET-OFF.

(g) Damages.

- 1 If the damages be contingent and uncertain, as in cases of tort, they cannot be proved under a commission. See *Parker v. Norton*. 6 T. R. 695
Longford v. Ellis. 1 H. B. 29
- 2 A right of action on a breach of covenant, not secured by a penalty, and where the damages to be recovered are uncertain, is not barred by the certificate of the defendant who became a bankrupt after the covenant was broken. *Banister v. Scott*. 6 T. R. 489
And see CERTIFICATE, post.
- 3 When a creditor has a demand on his debtor, which is capable of being ascertained without the intervention of a jury, and the debtor becomes a bankrupt, it may be proved as a debt under the commission. *Utterson v. Vernon*. 3 T. R. 539
- 4 But this decision was reversed, and it was held, that if *A.* lend stock to *B.*, to be replaced as stock, without naming any particular day, and *B.* become a bankrupt before any request by *A.* to replace the stock, *A.* cannot come in under *B.*'s commission; *A.*'s demand in this case resting merely in damages. *Utterson v. Vernon*. 4 T. R. 570

(h) Creditors by Marriage Articles.

- 1 A trader, before marriage, agreed by *parol* to settle *all his stock* on his intended wife; which, it appeared, afterwards amounted then to 450*l.* 3 per cents., but in the marriage articles it was only stated to be 340*l.* stock; and the deed executed after marriage settled the same sum: this mistake, (proved and accounted for) was agreed by the bankrupt, after his bankruptcy, to be rectified by the alteration of the sum in the articles and deed from 340*l.* to 450*l.* stock; which

was accordingly done; and the instrument re-executed, with the consent of the bankrupt, his wife, and the trustees; and the whole stock was sold out by the bankrupt before his bankruptcy, and the amount paid into the hands of the trustees before such alteration: Held, that as one of the parties, (*the feme covert*, to whom no fraud was imputed), was incapable, by such consent, of exonerating the trustees from the performance of the trust, the trustees who had received such money under the instruments when they existed in a valid form, held it subject to the purpose of the trust, and not for the benefit of the bankrupt's estate; and that the assignees could only recover from them the surplus beyond the value of the 340*l.* stock: which surplus they were entitled to recover *at law*; the agreement for the settlement of the whole stock not being evidenced by writing before marriage, within the statute of frauds, but being the subject of equitable jurisdiction only, under the circumstances. *Shaw v. Jakeman*. 4 E. R. 201

(i) Sureties.

- 1 Where *S. L.* was arrested for the amount of goods, and *E. L.* in order to procure his discharge, became bound, as surety with him, in a bond to the plaintiffs, payable by instalments, and before the first default *E. L.* became a bankrupt, the plaintiff is bound to prove his debt under the commission, by virtue of 7 G. 1. c. 31. for the credit was given to both. *Brookes v. Lloyd*. 1 T. R. 17
- 2 If *A.* was bound with *B.* as a surety for the payment of a sum certain, and took an absolute bond from *B.* payable the day before the original bond was to become due, and *B.* became a bankrupt before the day of payment; it was held that *A.* might prove this debt under the commission, and that *B.*'s certificate was a bar to an action by *A.* on the counter bond, though *A.* did not pay the original bond till after *B.* had committed an act of bankruptcy. *Martin v. Court*. 2 T. R. 640
And see Toussaint v. Martinant. 2 T. R. 100
- 3 *X.* became bound as a surety with *Y.* to *A.* on the 10th of Aug. 1778, in a bond conditioned for payment in six

months; on the 1st *March*, 1780, he became bound with *Y.* to *B.* in a bond conditioned for payment in six months; on the 4th of *March* 1780, *Y.* became bound to *X.* in a bond conditioned for payment of two former bonds, and also to indemnify *X.* against those two bonds: the money secured by the second bond not being paid when it became due, it was holden that the last bond was thereby forfeited, though *X.* was not called on to pay the money in the second bond until afterwards, and that *X.* might prove it as a debt under the commission of bankrupt that issued against *Y.* after the forfeiture, and before payment. *Hodgson v. Bell.* 7 T. R. 97

- 4 A surety, who does not pay the debt of the principal till after his bankruptcy, though called upon and liable to pay it before, may hold the principal to bail, notwithstanding his certificate; for as the debt does not arise till the money is paid, it could not be proved under the commission. *Paul v. Jones.* 1 T. R. 599

IX. BANKRUPT.

(a) Rights and duties of.

- 1 If, upon the examination of a bankrupt touching the disposition of his property, he swear to an account of the same which appears to be incredible, the commissioners may commit him to prison. *Ex parte Nowlan.* 6 T. R. 118
- 2 In the case of a bankrupt committed by the commissioners for refusing to be examined, he must send word when he will submit and answer the questions. (*Dictum.*) *Per Buller.* 1 T. R. 654
- 3 A commitment by the commissioners is a criminal process. *In re Taylor.* 3 E. R. 232
- 4 Neither the bankrupt, nor any one claiming from him by assignment subsequent to the commission of bankruptcy, shall be permitted in an action at law to question the validity of such commission, and recover from the assignees the property of the bankrupt taken under it, by proving an act of bankruptcy committed by the bankrupt prior to the petitioning creditor's debt; though it be also shewn that there was a sufficient petitioning creditor's debt existing at the time of such prior act of bankruptcy, where-

on a better commission might have been sued out. *Donovan v. Duff.* 9 E. R. 21

- 5 If an order for the delivery of goods in the hands of a third person be given to an uncertificated bankrupt, in payment of a debt accrued subsequent to his bankruptcy, he may maintain trover for them. *Fowler v. Down.* 1 B. & P. 44

- 6 An uncertificated bankrupt has a right to goods acquired by him since his bankruptcy, against all the world but his assignees, and may maintain trover for them against a stranger. *Webb v. Fox.* 7 T. R. 391

- 7 It is a good plea to an action on a promissory note, and for money had, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff; and it is no good replication that the cause of action accrued after the plaintiff became bankrupt, and that the commissioners had not made any new assignment of the note and money: for the assignment of the creditors, passes to the bankrupt's assignees all his afterwards acquired as well as present personal property and debts. *Kitchen v. Bartsch.* 7 E. R. 53

- 8 The Court required an uncertificated bankrupt to give security for costs in an action of trover. *Webb v. Ward.* 7 T. R. 296

But see 2 Taunt. 61

- 9 A bankrupt cannot be permitted, in an action brought by him, to try the validity of the commission, to plead a prior act of bankruptcy, and a sufficient petitioning creditor's debt existing at that time, to support a commission in order to defeat the subsisting commission. *Bryant v. Withers.* 2 M. & S. 123, 131

- 10 If the assignees of a bankrupt manufacturer employ him in carrying on the manufacture for the benefit of the estate, and pay him money from time to time; this is evidence of such a contract between him and his assignees as will enable him to recover from them a reasonable compensation for his work and labour. *Coles v. Barrow.* 4 Taunt. 774

- 11 A bankrupt is not entitled to any maintenance out of his effects during his examination. *Thompson v. Council.* 1 T. R. 157

- 12 A bankrupt cannot call on his assignees for his allowance under stat. 5 G. 2. c. 30. s. 7. (his estate paying 10s. in the pound), if his certificate be not allowed before payment of the dividends. *Groome v. Potts*. 6 T. R. 548
- N. B. When a bankrupt is privileged from arrest, see *tit.* ARREST.

X. CERTIFICATE.

(a) Effect of, in discharge of debts.

- 1 The bankruptcy of a lessee is no bar to an action of covenant for rent. *Auriol v. Mills*. 1 H. B. 433
4 T. R. 94
- 2 In the case of the *South-Sea Company*, the stat. 7 G. 1. c. 28. by which all their property was taken out of their hands and vested in trustees for the satisfaction of their creditors, was held no bar to an action of covenant. *Hornby v. Houldich*. 1 T. R. 92, 93, n.
- 3 But bankruptcy is a good plea to an action of debt on the reddendum in a lease, whether the rent be due before or after the bankruptcy. *Wadham v. Marlowe*. 1 H. B. 437, n. 1 T. R. 91
And see *Gill v. Scrivens*. 7 T. R. 27
- 4 A. sold a ship to B. with a covenant that he had a good title, though in fact he had none. Afterwards B. became a bankrupt, and A. sustained damage by paying the value of a ship to the true owner: Held, in an action on the covenant by A. against B., stating the special damage, that B.'s certificate was no bar. *Hammond, Bt. v. Toulmin*. 7 T. R. 612
- 5 A debt which accrued subsequent to an act of bankruptcy, though previous to the issuing of the commission, is not barred by the certificate. *Bamford v. Burrell*. 2 B. & P. 1
- Eyre, C. J.* who died after the case was argued, but before the judgment was given, had intimated a contrary opinion.
- The same point is considered as clear in *Goddard v. Vanderheyden*. 2 B. & P. 8, n.
- 6 A. being arrested, B. became bail for him to the sheriff, and judgment was obtained against B. upon the bail-bond; A. then became bankrupt, a writ of error at that time depending on the bail-bond, which was afterwards non-prossed; upon this the debt and costs were levied on B. by *fi. fa.* after which A. obtained his certificate:

Held, that B. was not barred by the certificate from recovering from A. the amount of the debts and costs levied by the *fi. fa.* *Goddard v. Vanderheyden*. 2 B. & P. 8, n.

- 7 A person against whom a second commission of bankrupt has been issued, and who has not paid 15s. in the pound, is liable to an action by any of his creditors, notwithstanding they have signed his certificate. *Philpot v. Corden*. 5 T. R. 287
- 8 But in such case execution can only issue against his effects, his person being free from arrest: by stat. 5 G. 2. c. 30. 5 T. R. 287
- 9 An action against a bankrupt, who has obtained his certificate under a second commission, on a cause of action accruing previous to his second bankruptcy, may be maintained before a dividend has been made, or the period for making it allowed by 5 G. 2. c. 30. s. 37. is elapsed; if evidence be adduced to shew that it is not probable from the state of the effects in the hands of the assignees, that the bankrupt will be able to pay 15s. in the pound. *Jelfs v. Ballard*. 1 B. & P. 467
And see *Edmonson v. Parker*. 3 B. & P. 185
- 10 A cognovit is not discharged by bankruptcy and certificate, it being only an acknowledgment of the amount of the damages. *Wyborne v. Ross*. 2 Taunt. 68
- 11 A discharge under a commission of bankrupt in a foreign country, is no bar to an action for a debt, arising here, brought against the bankrupt by a subject of this country. *Smith v. Buchanan*. 1 E. R. 6
- 12 Bankruptcy is no bar to an action of trover, though the conversion happened before the bankruptcy, and though the cause of action were of such a nature that the plaintiff might have waived the tort, and proved his demand as a debt under the commission. *Parker v. Norton*. 6 T. R. 695
- 13 A debt due on a judgment, signed in an action for damages, after an act of bankruptcy committed by the defendant, and a commission issued thereon, is not discharged by the certificate, though the verdict was obtained before the bankruptcy. *Buss v. Gilbert*. 2 M. & S. 70
- 14 In an action against a bankrupt who has obtained his certificate under a second commission, the certificate is

no bar unless it appears affirmatively that his estate has produced 15s. in the pound; evidence that it probably will produce so much is not sufficient. *Coverley v. Morley.* 16 E. R. 225

15 If the payee of a promissory note pay the amount of it to an indorsee after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate. *Howis v. Wiggins.* 4 T. R. 714

16 Where, by agreement between plaintiffs, bankers at *Carlisle*, and defendants, bankers at *Newcastle*, plaintiffs were weekly to send to defendants all their own notes, and the notes of certain other banking-houses; and the defendants were in exchange to return to the plaintiffs their own notes, and the notes of certain other bankers, and the deficiency was to be made up by a bill drawn by defendants in favour of plaintiffs at a certain date: Held, that the notes so sent by plaintiffs constituted a debt against defendants, which defendants might pay by a return of notes according to the agreement, but if they made no such return, or a short return, and gave no bill for the balance, such balance remained as a debt against them, which was proveable by the plaintiffs, under a commission of bankrupt issued against the defendants on an act of bankruptcy committed after the time when the bill for the balance, if drawn, would have been due and payable, and that the plaintiffs could not maintain an action to recover damages as for a breach of contract against the defendants, who had obtained their certificates. *Forster v. Surtees.* 12 E. R. 605

17 A. draws a bill of exchange on B. in favour of C., who indorses it to D., who discounts it. Before the bill is due, A. becomes a bankrupt and obtains his certificate: when the bill is due, payment is refused: upon which C. refunds the money to D. which was advanced in discount, and takes back the bill. To an action brought by C. against A. on the bill, A. cannot plead his bankruptcy. *Brooks v. Rogers.*

1 H. B. 640

18 A. and B. exchanged acceptances, and each party having negotiated the respective bills, became bankrupt; and B.'s assignees were afterwards obliged to pay a dividend as drawer on the bills accepted by A., as well as

to pay B.'s own acceptances. 2*u.* If A.'s certificate is a bar to an action brought against him by B.'s assignees for money paid, &c.? *Cowley v. Dunlop.* 7 T. R. 565

19 If the acceptor of a bill of exchange not due, become bankrupt, and the indorser be afterwards obliged to take up the bill on account of non-payment by the acceptor, he may prove the amount under the commission, and if the acceptor afterwards obtain his certificate, he will be discharged from the debt, and the Court will enter an *exoneretur* on the bail-piece, in an action against him at the suit of the indorser. *Joseph v. Orme.* 2 N. R. 180

20 The drawer of a bill of exchange, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate, inasmuch as such debt is made proveable under his commission by the stat. 7 G. 1. c. 31. *Starcy v. Barnes.* 7 E. R. 435

21 Where the plaintiff gave the defendant in a foreign country, where both were resident, a bill of exchange drawn by the defendant upon a person in England, which bill was afterwards protested here for non-acceptance, and the defendant afterwards, while still resident abroad, became bankrupt there, and obtained a certificate of discharge by the law of that state: It was held, that such certificate was a bar to an action here upon an implied *assumpsit* to pay the amount of the bill in consequence of such non-acceptance in England. *Pottek v. Brown.* 5 E. R. 124

What is a discharge of a debt in the country where it was contracted, is a discharge of it every where. 5 E. R. 130

22 Where A. lent his acceptances to the defendant before his bankruptcy, but they were not paid until afterwards: Held, that A. might maintain an action against the defendant, for money paid to his use, notwithstanding his bankruptcy and certificate, and notwithstanding the defendant, before his bankruptcy, gave his receipt to A. acknowledging the receipt of so much money as the acceptances amounted to. *Snaith v. Gale.* 7 T. R. 364

23 The plaintiff having accepted a bill, payable at a future day, for the accommodation of the defendant, the latter afterwards, and before the bill became

due, committed an act of bankruptcy, followed by a commission, which was afterwards superseded; and time was given to the bankrupt by his creditor; and the plaintiff thereupon accepted another bill for the same debt, with the addition of interest and stamp: Held, that this was a continuation of the same suretyship by the plaintiff for the defendant, which existed before the act of bankruptcy and the first commission: and a second effectual commission having afterwards issued upon the same act of bankruptcy, before the plaintiff's second acceptance became due, which was paid when due: Held, that the amount was proveable as a debt under such commission by virtue of the stat. 49 Geo. 3. c. 121. s. 8., and was consequently barred as a personal demand against the bankrupt by his certificate. *Stedman v. Martinnant.* 13 E. R. 427

24 A bond and warrant of attorney to confess a judgment given by a bankrupt after his bankruptcy, in order to obtain his liberty, is not barred by his certificate, although the original debt were contracted before. *Birch v. Sharland.* 1 T. R. 715

25 The old debt was extinguished by such bond given for such purpose.

id. ibid.

(b) *How pleaded.*

1 A plea of bankruptcy need not be signed by counsel. *Leigh q. t. v. Monteiro.* 6 T. R. 496

2 But in C. P. it must. *Pitcher v. Martin.* 3 B. & P. 171

3 A plea of bankruptcy given by stat. 5 G. 2. c. 30. s. 7. must state that the cause of action accrued before the bankruptcy; stating that an indenture, on which an action of covenant is founded, was executed prior to the bankruptcy, is not sufficient. *Charlton v. King.* 4 T. R. 156

4 The general plea of bankruptcy, and the certificate given by stat. 5 G. 2. c. 30. s. 7. may be pleaded, without averring that the bankruptcy happened before the commencement of the suit. But if it appeared at *nisi prius* that it happened after the action brought, it seems that the defendant cannot avail himself of the defence under such a general plea, which is only given by the statute in case any bankrupt who has conformed to the law shall after-

wards be arrested or impleaded for any debt due before such time as he became bankrupt. *Tower v. Cameron.*

6 E. R. 413

5 The certificate of a bankrupt, allowed after the filing of the plaintiff's bill and before plea pleaded, is evidence to support the general plea in bar given by the stat. 5 G. 2. c. 30. s. 7. viz. that before the exhibiting of the plaintiff's bill the defendant became a bankrupt, and that the cause of action accrued before he became a bankrupt. *Harris v. James.* 9 E. R. 82

6 A bankrupt sued by his surety, or person who was liable for his debt, at the time of the commission issued against him (though the surety, &c. became such after the act of bankruptcy, and paid the debt after the issuing of the commission), cannot without specially pleading it, in like manner as after the stat. 5 G. 2. c. 39. s. 7. avail himself of his certificate under the stat. 49 G. 3. c. 121. s. 8. which discharges the bankrupt, having his certificate, of all such demands, at the suit of every such person, in like manner to all intents and purposes as if such person had been a creditor before the bankruptcy. *Stedman v. Martinnant.* 12 E. R. 664

7 A general plea of bankruptcy in Ireland, referring to an Irish act of parliament, and concluding to the country (in a mode similar to that given by stat. 5 G. 2. c. 30. s. 7. to bankrupts in England), is bad. *Quinn v. Keefe.* 2 H. B. 553

8 If a defendant rely on a certificate under a second commission of bankrupt against him, under which he has not paid 15s. in the pound, the plaintiff, in order to deprive him of the benefit of it, may produce the proceedings under the former commission, and prove that he submitted to it, without proving the trading, act of bankruptcy, and other facts which are necessary to support the commission as against third persons. *Haviland v. Cook.* 5 T. R. 655

9 The Court of C. P. set aside a regular judgment on an affidavit of merits, though the defendant intended to plead his bankruptcy. *Evans v. Gill.*

1 B. & P. 52

10 After a general plea of bankruptcy concluding to the country, a replication that defendant was before the

commission discharged as a bankrupt, and that his estate has not produced 15s. in the pound, which was pleaded in maintenance of the action generally, and with a verification, was held ill on special demurrer. *Wilson v. Kemp.*

2 M. & S. 549

(c) *How avoided.*

- 1 If any one of a bankrupt's creditors, though without the privity of the bankrupt, be induced by money to sign his certificate, it is void. *Holland v. Palmer.* 1 B. & P. 95
- * 2 A bond, given to a creditor of a bankrupt, in order to induce him to withdraw a petition, which he had preferred to the Chancellor, against the allowance of the certificate, is void by stat. 5 G. 2. c. 30. s. 11. *Sumner v. Brady.* 1 H. B. 647
And see *Jackson v. Lomas.* 4 T. R. 166
Feise v. Randall. 6 T. R. 146
- 3 A deed of composition, embracing all the creditors, under which, many of them came in, is, in case of a subsequent commission of bankruptcy, such a "compounding with his creditors," as will, within the stat. 5 Geo. 2 c. 30. s. 9. deprive the bankrupt of the benefit of his certificate, to protect his future effects from being liable to be taken in execution, although some of the creditors did not come in under the deed of composition. *Slaughter v. Cheyne.* 1 M. & S. 182
- 4 A deed of composition, framed only for the joint creditors of two bankrupts, under which, seven of the joint creditors, whose debts exceeded 2000*l.* accepted of the proffered composition of 3s. in the pound, but which was not signed or accepted by three other joint creditors, whose debts amounted to 92*l.*, nor by the separate creditors of one of the bankrupts, is not such a "compounding with his or their creditors," as will within the stat. 5 Geo. 2. c. 30. s. 9., avoid the effect of a subsequent certificate, under a commission of bankrupt, to protect the future estate and effects, as well as person of one of the bankrupts, who was afterwards sued to judgment, and had execution levied on his goods, by one of his separate creditors. *Norton v. Shakespeare.* 15 E. R. 619
- 5 The fourth, amongst several other signatures of creditors, to the certificate of a bankrupt, having been ob-

tained by the promise of the bankrupt, to pay that creditor his whole debt, such certificate is void, by virtue of the stat. 5 Geo. 2. c. 30. s. 7. 11. although the creditors who signed before and after the fourth, were sufficient in number and value, without reckoning that one; for his example might have induced others to sign it. *Phillips v. Dicus.* 15 E. R. 248

- 6 A certificate granted after plea pleaded, but before the trial, will not avail at law. *Per Kenyon, C. J. Langmead v. Beard.* 9 E. R. 85, n.

(d) *Certificated Bankrupt, how discharged.*

- 1 The Court of C. P. will not, on motion, discharge a bankrupt on common bail, if it appears that the certificate was obtained by fraud. *Vincent v. Brady.* 2 H. B. 1
- 2 Or if it appears that the certificate is seriously meant to be disputed. *Stacy v. Frederici.* 2 B. & P. 390
- 3 The statute 5 G. 2. c. 30. only relates to the discharge of the person of the bankrupt, who is in custody on a judgment obtained before the allowance of the certificate. Therefore an execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. *Calten v. Meyrick.* 1 T. R. 361
- 4 If a *fi. fa.* issued against a bankrupt before certificate obtained, be not executed till after, the Court of C. P. will order the goods to be restored; even though he has not pleaded his certificate according to 5 G. 2. c. 30. s. 7.; for the Court will always give that relief in a summary way, which might be obtained by *audita querela*: but if any thing be alleged to invalidate the effect of the certificate, the Court of C. P. will direct a trial on a plea of bankruptcy. *Lister v. Mundell.* 1 B. & P. 427
- 5 Where a certificated bankrupt had been holden to bail, for a debt due before his bankruptcy, the Court of C. P. refused to discharge him on entering a common appearance, it appearing that his certificate was obtained by fraud. *Vincent v. Brady.* 2 H. B. 1
- 6 The Court will not discharge a defendant on a common appearance, on the ground of his having obtained his certificate as a bankrupt, and the debt being thereby barred, if the validity

of the certificate is meant to be disputed. *Stacy v. Federici*.

2 B. & P. 390

(c) *Commission, how superseded.*

- 1 It is no objection to a commission of bankruptcy, that it was sued out with intent to defeat a previous execution, if no collusion appear on the part of the bankrupt. *Menham v. Edmonson*.

1 B. & P. 369

Aud see *Smith v. Broomhead*.

7 T. R. 300

- 2 A person attainted of felony under 5 G. 2. c. 30. s. 1. cannot be heard by petition to the Lord Chancellor to supersede a commission of bankruptcy issued against him, whether his attainer directly arose out of the commission of bankrupt, or is wholly irrelevant to it. *Rex v. Bullock*.

1 Taunt. 82

- 3 A bankrupt, who had brought an action to try the validity of his commission, and obtained a verdict; pending

a rule to set it aside, secretly confessed judgment to one of his assignees, who was the petitioning creditor, for a sum of money, in discharge of his debt, and the costs of the action, in consideration of the petitioning creditor's consenting not to oppose the bankrupt's petition for a *supersedeas*. The Court of C. P. set aside the judgment on the bankrupt's application, on 5 G. 2. c. 30. s. 24. *Thomas v. Rhodes*.

3 Taunt. 478

N. B. The statute 5 G. 2. c. 30. s. 24., was made for the protection of bankrupts as well as of creditors. *ib.*

- 4 The debt of a creditor, who has joined in a petition to supersede a prior commission, and proved his debt under a second commission, coupled with an act of bankruptcy prior to that on which the second commission is founded, may be set up to defeat such second commission, by a defendant in an action at the suit of the assignees under that commission. *Beardmore v. Shaw*.

1 N. R. 263

BARON AND FEME.

I. HUSBAND.

(a) *His Liability on Acts of Wife.*

II. WIFE.

(a) *Her Privileges after Marriage.*

(b) *Acquirements and Incapacities.*

(c) *When considered as a Feme Sole during Cohabitation.*

III. HUSBAND AND WIFE.

(a) *When they must join or be sued alone.*

IV. EFFECT OF MARRIAGE ON PRIOR RIGHTS, CONTRACTS, AND CLAIMS.

V. SEPARATION, EFFECT OF.

I. HUSBAND.

(a) *Liability of Husband on Acts of Wife.*

- 1 A husband is not bound to receive nor is he liable to pay for necessities found to his wife after she has committed adultery, though he has before

committed adultery himself, and turned her out of doors without any imputation on her conduct. *Govier v. Hancock*.

6 T. R. 603

- 2 Defendant's wife having committed adultery, he left her in his house with two children bearing his name, but without making any provision for her in consequence of the separation; she continued in a state of adultery: the Court of C. P. held that the husband should be liable for necessities furnished to her, unless it appear that the plaintiff knew or ought to have known the circumstances under which she was living. *Norton v. Fazan*.

1 B. & P. 226

- 3 Where a husband goes abroad and leaves his wife, who dies in his absence, a third person who voluntarily pays the expenses of her funeral (suitable to the rank and fortune of the husband), though without the knowledge of the husband, may recover from him the money so laid out, especially if such third person be the father of the wife. *Quære*, whether such third person can recover from the husband,

money which he has expended after the death of the wife in *discharging debts* which she had contracted in her husband's absence? *Jenkins v. Tucker.*

1 H. B. 90

- 4 It is a question of fact whether a tradesman who furnishes goods to a wife gives credit to her, or her husband; if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees her in possession of some of the goods. *Bentley v. Griffin.* 5 Taunt. 356
- 5 No ill treatment by the husband of the wife, short of personal violence, or such as to induce a reasonable fear of it, will enable a stranger to maintain *assumpsit* against her husband for necessities furnished to her subsequently to her leaving his house. *Horwood v. Heffer.* 3 Taunt. 421
- 6 If a *feme covert*, without any authority from her husband, contract with a servant by *deed*, the servant having performed the service stipulated, may maintain *assumpsit* against the husband. *White v. Cuyler.* 6 T. R. 176
- 7 A. a *feme sole*, entitled to the profits of an estate vested in trustees for her separate use, conveys them for her separate use to B., a married woman, without the intervention of trustees; A. marries, and the trustees, without notice of the conveyance to B., pay the profits to A.; B.'s husband cannot maintain an action against A.'s husband for the money, as money received to his use. *Davison v. Atkinson.* 5 T. R. 434
- 8 A husband is not bound to maintain his wife's child by a former husband. *Tubb v. Harrison.* 4 T. R. 118
- 9 One who marries a widow having children by her former husband, is not bound to maintain such children, though they were maintained by the widow before her second marriage, at which time her second husband acquired her former means. Therefore, if the second husband maintain such children, it is a good consideration for a promise made by them, when they come of age, to repay the expense of their maintenance respectively: especially where the second husband was a man of small substance, and the children had a competent provision to receive when they came of age, which was to accumulate for them in the mean time, and he made

no application to Chancery for an allowance out of the fund, as he might have done. *Cooper v. Martin.*

4 E. R. 76

And see *Separation, effect of, post, Page 137.*

II. WIFE.

(a) *Her Privileges after Marriage.*

- 1 A *feme covert* was discharged out of custody, because she was arrested without her husband, though the writ was sued out against both, on which *non est inventus* was returned as to the husband. *Edwards v. Rourke et Ux.* 1 T. R. 486
- 2 The wife of an attorney is not entitled to be discharged out of custody on *mesne* process, if arrested with her husband. *Roberts v. Mason et Ux.* 1 Taunt. 254
- 3 A married woman holden to bail (for the penalties incurred by insuring in the lottery) was discharged by the Court of C. P. on entering a common appearance, on her affidavit of her coverture. *Pritchett q. t. v. Cross.* 2 H. B. 17
- 4 The Court will not discharge a woman under arrest on common bail, as being married, if she obtained credit, pretending she was single. *Partridge v. Clarke.* 5 T. R. 191
- 5 But they will do so, if it appear that the plaintiff knew her to be *covert* at the time of contracting the debt. *Waters v. Smith.* 6 T. R. 451
- 6 Or if she mistakenly allege she believes her husband to be dead. *Pitt v. Thompson.* 1 E. R. 16
- 7 Or if the plaintiff knew she had a husband living abroad, though under terms of separation. *March v. Capelli.* 1 E. R. 17, n.
- 8 A *Frenchwoman* and her husband came over to *England*; the husband gives her a power of attorney to transact his business, and goes to *Hamburg*: she cohabits with another man, and trades on her own account with the plaintiff, by whom she is arrested; under these circumstances the Court of C. P. refused to *discharge her on a common appearance*, on the ground of her coverture, although the plaintiff appeared to have been acquainted with it. *De Gaillon v. L'Aigle.* 1 B. & P. 8
- 9 But that Court will now discharge a

feme covert defendant upon a common appearance, though she contracted the debt as a *feme sole*, and was trusted by the plaintiff as such, unless she represented herself to be single. *Collins v. Rowed*. 1 N. R. 54

- 10 If a plaintiff knowingly arrests a married woman, the Court will make him pay the costs of the motion for her discharge. *Wilson v. Serres*. 3 Taunt. 307

(b) *Acquirements and Incapacities.*

- 1 A *feme covert* can do no act to estop herself. *Per Lord Kenyon*. 7 T. R. 539
- 2 Prohibition lies to the Spiritual Court, if a suit be instituted to obtain a *general* probate of the will of a woman made during her coverture, though with her husband's consent, and though she survived him; for he could not, by any assent of his, enable her to dispose, by any will made during the coverture, of property which she might acquire after his death, but only of property over which he himself had a disposing power. *Scummell v. Wilkinson*. 2 E. R. 552
- 3 But a *feme covert* may make a will, disposing of property, which she only has *in autre droit*, as executrix, without her husband's consent. *ib.*
- 4 The husband having taken a bond, conditioned to pay an annuity to his wife, she cannot, without his assent, discharge the obligor from future payments of the annuity for a certain period, in consideration of his discharging certain debts of the husband; but the husband may, notwithstanding, sue for the arrears of the annuity when due. *Brown v. Benson*. 3 E. R. 331
- 5 In an action, on a bond, brought by the trustee of the defendant's wife, to enforce payment of an annuity, secured to her, the Court of C. P. refused to allow the defendant to withdraw the general issue, and plead, first, that the wife had committed adultery, and was living in that state; and secondly, that she had committed adultery at the time the bond was executed in her favour, though the defendant was ignorant thereof; being of opinion, that such pleas would not have been a good defence to the action. *Field v. Serres*. 1 N. R. 121
- 6 Though a note were given to a married woman, knowing her to be such,

with intent that she should indorse it to the plaintiff, in payment of a debt which she owed him, (in the course of carrying on a trade in her own name, by the consent of her husband), yet the property in the note, vested in the husband, by the delivery to the wife, and no interest passed by her indorsement to the plaintiff; neither can the plaintiff recover upon the money counts, under such circumstances. *Burlow v. Bishop*. 1 E. R. 432

Perhaps, if she had indorsed the note in the name of her husband, it might have availed, as the jury might have presumed what was necessary in favour of an authority from her husband for that purpose. 1 E. R. 434

- 7 *Feme covert* cannot make an attorney, *Oulds v. Sansom*. 3 Taunt. 261

8 Where a *feme covert*, sole trader, gave a bond and warrant of attorney, to enter up judgment, on which the plaintiff afterwards took out execution, the Court set the judgment aside, as entered up without authority, on the motion of the assignees of the wife, (who had become a bankrupt,) with the consent of the husband, which was also entered in the rule. *Read v. Jewson*. 4 T. R. 362, *notd.*

- 9 But the Court of C. P. refused to set aside, upon summary application, a judgment entered upon a warrant of attorney, given by a *feme covert*. *Malecan v. Douglass*. 3 B. & P. 128

10 If a *feme covert* be taken in execution under a warrant of attorney, given by her as a *feme sole*, the Court will not discharge her on a summary application. *Wilkins v. Wetherill & Coutts*. 3 B. & P. 220

(c) *When considered as a feme sole.*

- 1 A *feme covert* cannot be sued as a *feme sole*, unless she be separated from her husband, and have a fixed certain allowance, secured to her as a maintenance. *Ellah v. Leigh*. 5 T. R. 679
And see Separation, effect of, post, 137.
- 2 The husband, (a foreigner,) residing abroad, and the wife, trading and obtaining credit in this country as a *feme sole*; the Court of C. P. held that she was liable for her own debts. *De Gaillon v. L'Aigle*. 1 B. & P. 357
- 3 An Englishman employed in the service of the British government, residing in a foreign country, and having lands there, upon the cessation of his

employment, in consequence of war between the two countries, sent his wife and family to this country, but continued to reside abroad himself: Held, that the wife, not having represented herself as a *feme sole*, was not liable to be sued as such. *Marsh v. Hutchinson.* 2 B. & P. 226

4 A *feme covert* cannot sue without her husband, as a sole trader, by the custom of *London*, in the superior courts at *Westminster*. *Caudell v. Shaw.* 4 T. R. 361

5 A *feme covert* cannot, in general cases, be sued alone on promises made by her, except by the custom of *London*. *Clayton v. Adams.* 6 T. R. 605

6 Neither can the executor of a *feme covert*, though it appear on the record, that the executor possessed himself of her effects, sufficient to satisfy the plaintiff's demand. 6 T. R. 605

7 The probate of the will in such case is absolutely void. *id. ibid.*

8 It has now been solemnly determined in the Exchequer Chamber, that a *feme covert*, sole trader in the city of *London*; is not liable to be sued as such in the Courts at *Westminster*: and even in the City Courts, the husband must be joined for conformity. *Beard & Ur. v. Webb*, in error. 2 B. & P. 93
N.B. See Lord Eldon's judgment in this case.

9 A *feme covert*, though deserted by her husband, who had gone abroad, trading as a *feme sole*, cannot maintain trespass for breaking and entering her dwelling-house. *Boggett v. Frier.* 11 E. R. 301

III. HUSBAND AND WIFE.

(a) *Where they must join, or be sued alone.*

1 Husband alone, cannot be the petitioning creditor to support a commission of bankruptcy, in respect of a debt, composed partly of a sum of money due to him, in his own right, and partly of a sum due to his wife, *dum sola*. *Rumsey v. George.* 1 M. & S. 176

2 Husband and wife may sue on a promissory note, made to the wife during coverture. *Philliskirk & Ur. v. Pluckwell.* 2 M. & S. 393

3 The wife can only join with the husband, in bringing an action where she is *the meritorious cause of action*; as

where a legacy is left to her. *Rose & Ur. v. Bowler.* 1 H. B. 108

4 The husband cannot be sued alone for the debt of his wife, contracted before marriage. *Mitchinson v. Hewson.* 7 T. R. 348

5 If a bond be given to husband and wife, administratrix, the husband alone may declare on it, as a bond made to himself. *Ankerstein v. Clarke.* 4 T. R. 616

6 A declaration in replevin, by J. S. and his wife, without shewing any cause for joining the wife, is bad on demurrer. *Serres & Ur. v. Dodd.* 2 N. R. 405

7 A joint demise by husband, seised in right of his wife, and his wife, is disproved by evidence of a receipt for rent, given by the husband only. *Parry v. Hindle.* 2 Taunt. 180

8 A recovery, in ejectment against the wife, cannot be given in evidence in an action against the husband and wife, for mesne profits; for the husband was no party to the ejectment. *Dem v. White.* 7 T. R. 112

9 After interlocutory judgment against a *feme*, upon a contract, she marries; yet the plaintiff may proceed to judgment and execution against her, without joining the husband by *scire facias*: and a *capias ad satisfaciendum* against her, following the judgment, is, at all events, regular, though the plaintiff had notice of the marriage before. *Cooper v. Rachael Hunchin.* 4 E. R. 521

10 If a *feme covert*, sole trader in *London*, be sued in the city courts, the husband should be joined for conformity. *Beard v. Webb*, in *Exch. Cham.* (in error). 2 B. & P. 93

11 If a declaration against baron and *feme*, for a debt of the *feme* contracted before marriage, allege a promise of the *feme* made before the marriage to pay the debt, it is bad. *Morris & Ur. v. Norfolk.* 1 Taunt. 212

IV. EFFECT OF MARRIAGE ON PRIOR RIGHTS, CONTRACTS AND CLAIMS.

1 A woman may, before marriage, with the consent of her intended husband, convey all her stock in trade and furniture to trustees, to enable her to carry on her business separately; and if the husband do not intermeddle with them, and there be no fraud, such effects, (though fluctuating,) are

- not liable to his debts. *Jarman v. Woollaton*. 3 T. R. 618
- 2 But whether the trade be carried on solely by the wife, or jointly with the husband, is a question of fact for the jury; and if they determine the latter, the stock in trade is liable to the debts of the husband. 3 T. R. 618
- 3 But even in such a case, the furniture is not liable, though removed to the husband's house. 3 T. R. 618
- 4 It is no objection to such a settlement, that there is no inventory of the goods intended to be thus settled. 3 T. R. 618
- 5 The question in all such cases is, whether the possession is consistent with the deed. *Haselinton v. Gill*. 3 T. R. 620, n.
- 6 And where cows in a dairy were so settled, the wife was also held entitled to the increase and produce arising therefrom. *ib.*
- 7 A bond, conditioned for the payment of money, after the obligor's death, made to a woman, in contemplation of the obligor's marrying her, and intended for her benefit, if she should survive, is not released by their marriage. *Milbourn v. Ewart*. 5 T. R. 381
- 8 And if the marriage be pleaded in bar, to an action of debt on the bond against the heir of the obligor, a replication, stating the purposes for which the bond was made, will be good; for they are consistent with the bond and condition. 5 T. R. 381
- 9 If there be an agreement before marriage, that a settlement shall be made of the wife's estate, reserving to her a power of disposing of it, which agreement is signed by the intended husband and wife, but *not sealed*, and before the marriage, the wife disposes of it to the husband, who survives her, and devises the estate by will: the title of his devisee is such a doubtful equity, as cannot be set up in an ejectment against the wife's heir at law. *Doe d. Hodsdon v. Staple*. 2 T. R. 684
- cutors, &c. is valid in law. *Lord Rodney v. Chambers*. 2 E. R. 283
- 2 No action for *crim. con.* can be brought for any act of adultery after a separation between husband and wife. *Weedon v. Timbrell*. 5 T. R. 357
- 3 Where husband and wife entered into a deed with trustees, whereby the husband covenanted with the trustees to whom certain annuities were transferred, one payable to his wife absolutely, and another for so long time as she should live with her husband; that they should apply certain annuities to the *separate use* of the wife in case she should live apart from him, with the approbation of the trustees; and he also covenanted, in case of future differences, to permit the wife to live separate from him, if she should, on that account, find it necessary, and the deed also contained a clause that in case of separation with the approbation of the trustees, certain of the children should live with, and be educated by the wife for a certain period, and that she might visit the others at his house, especially when ill, so as to require the attention of a mother: Held, that such a deed did not preclude the husband from maintaining an action for adultery committed while the wife was *in fact* living apart from him, whether the separation were with or without the approbation of the trustees, the case not being within the principle of *Weedon v. Timbrell*, even allowing that to be law to the extent of the case there decided. *Chambers v. Caulfield*. 6 E. R. 244
- 4 Where a married woman lived apart from her husband, under articles of separation, by which he covenanted "that she shall enjoy to her own use all such estates, both real and personal, as shall come to her during the coverture, and that he will join them to such uses as she shall appoint;" and copyhold lands having afterwards descended to her, the husband again covenanted in the same manner as before, and "that he would join in surrendering such estates to such uses as she shall appoint;" the Court of C. P. held that the wife might surrender these copyhold lands without her husband joining; and without a special custom for that purpose. *Compton v. Collinson*. 1 H. B. 334
- 5 If husband and wife separate by deed,

V. SEPARATION, EFFECT OF.

- 1 A covenant by a husband, to pay to trustees a certain annual sum by way of separate maintenance for his wife in case of their future separation, with the consent of the trustees, their exe-

and the former covenant with *A.* the wife's sister, to pay to his wife, or such person as she should appoint, a certain weekly allowance, during their separation, and the wife afterwards live with *A.*, and is by her supplied with necessaries, and the husband fails to pay the stipulated allowance to his wife, *A.* may maintain an *indebitatus assumpsit* against the husband for such necessaries. *Nurse v. Craig.*

2 N. R. 148

- 6 Where a *feme covert* had been many years separated from her husband, and during that time, had received, for her separate use, the rents of her own property, which accrued to her by devise after the separation: evidence being given by a witness that he had received the rent of the premises for the *feme*, and paid it over to her, but never had paid it to the husband, the Court held that the *feme* should be presumed to have received the rent, and acknowledged the tenancy by her husband's authority. *Doe d. Leicester v. Biggs.*

1 Taunt. 367

- 7 A tradesman supplying a married woman, living apart from her husband, with furniture upon hire, does not thereby divest himself of the present right of property in such goods, inasmuch as the married woman was incapable of acquiring it by any contract; and therefore if the sheriff take such goods in execution at the suit of the husband's creditor, trover lies by the tradesman. But if the contract had been valid, the goods being let to hire generally, without any time limited, notice to determine the contract given to the sheriff's officer, and not to the other contracting party, would not be sufficient to determine the contract. *Smith v. Plomer, Knt. and another, Sheriffs of Middlesex.*

15 E. R. 607

- 8 Declaration on bond; plea that it was conditioned for performance of covenants which were to indemnify the obligee from alimony and debts incurred by his wife after their separation, and that defendant had performed the covenant; replication, that a judgment was recovered against the obligee by a creditor of his wife, and he paid debt and costs, of which defendant had notice: demurrer, the defendant was held liable for the costs as well as the debt; for the covenant to

indemnify is general, and it was not necessary for the plaintiff to give notice that an action was commenced; if it had been necessary, the plaintiff would have recovered on these pleadings, for the defendant has admitted notice. *Duffield v. Scott.*

3 T. R. 374

- 9 A *feme covert*, living apart from her husband, and having a separate maintenance, may contract and be sued as a *feme sole*. *Corbett v. Poelnitz & Ux.*

1 T. R. 5

- 10 And she continues liable, though she alien the whole again. 1 T. R. 10

- 11 In such case the husband is not liable even for necessaries. 1 T. R. 10

- 12 Where credit has been given to the wife of a man in exile, she alone is liable. 1 T. R. 8

- 13 So where the husband has abjured the realm; or is transported. 1 T. R. 8, 9

- 14 Where a married woman has a separate estate, and acts and receives credit as a *feme sole*, she shall be liable as such. 1 T. R. 9

And see *Barwell v. Brookes.* 1 T. R. 6, *noted*

- 15 To a plea of coverture, the plaintiff replied that the defendant was separated from her husband, that alimony was allowed her by the Ecclesiastical Court pending a suit there, which was a sufficient maintenance, and that she obtained credit, and made the promises on her own account as a *feme sole*, and not on the credit of her husband; on demurrer, this replication was held to be bad. *Ellah v. Leigh.*

5 T. R. 679

- 16 The Court held that a *feme covert* living in adultery, and separate from her husband, cannot be sued as a *feme sole*, if she have no separate maintenance. *Gilchrist v. Brown.*

4 T. R. 766

But see *Cox v. Kitchen.* 1 B. & P. 338

- 17 After two arguments before all the judges, the Court declared it to be their opinion that a *feme covert*, living apart from her husband, having a separate maintenance secured to her by deed, cannot contract and be sued as a *feme sole*; in fact, that by no agreement between a man and his wife, can she be made legally responsible for the contracts she may enter into, or be liable to the actions of those who may have trusted to her engagements as if she were sole and unmarried.

Marshall v. Rutton. 8 T. R. 545

- 18 And the Court will discharge a mar-

ried woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff; knowing at the time that she was a married woman, though living apart from her husband with a separate maintenance. *Wardell v. Gooch*. 7 E. R. 582

19 The Court of C. P. however, refused to discharge a defendant on the ground of coverture, she being a foreigner, and her husband abroad, though she was not separated from him by deed, had no separate maintenance, nor had represented herself as a single woman. *Burfield v. Duchess de Pienne*. 2 N. R. 380

20 To a plea of coverture, the plaintiff replied that the defendant's husband lived in parts beyond the seas, viz. in Ireland, and that the defendant lived in this kingdom separate from her

husband, and as a single woman promised: Held bad on general demurrer. *Farrar v. the Countess Dowager of Granard*. 1 N. R. 80

21 A *feme covert* living apart from her husband under sentence of separation, with alimony allowed *pendente lite* in the Ecclesiastical Court, having brought trespass in the name of her husband against wrong doers, for breaking and entering her house and taking her goods; The Court refused, on the application of such defendants, to stay the action, though supported by an affidavit of the husband (who had not released the action, nor applied to be indemnified against the risk of costs) that the action was brought without his authority. *Chambers v. Donaldson*. 9 E. R. 470

BASTARDS.

I. HOW PROVED TO BE SO.

II. THEIR CAPACITIES AND INCAPACITIES.

III. ORDER OF FILIATION.

IV. RIGHTS AND LIABILITIES OF PUTATIVE FATHER.

I. HOW PROVED TO BE SO.

1 The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access, as by evidence of being born during the notorious cohabitation of his mother with another man, and of his being considered by all the family as the child of those two. *Goodright d. Thompson v. Saul*. 4 T. R. 356
And see *Rex v. Lubbenham Inhab*.

4 T. R. 251

2 A woman cannot give evidence of the non-access of her husband, to bastardize her issue, though he be dead at the time of her examination as a witness: and therefore an order of sessions, stated by the Court to be founded in part upon credence given to her testimony of that fact, was quashed. *Rex v. Kea Inhab.*

11 E. R. 132

3 The reputed mother is a competent witness to prove the illegitimacy of

her children, by proving no marriage, or an illegal one. *Rex v. Bramley Inhab*.

6 T. R. 330

Standen v. Standen. 6 T. R. 331, n.

II. THEIR CAPACITIES AND INCAPACITIES.

1 Where a bastard child is born in a parish, for whose sustenance the parents do not provide necessities, the parish officers are obliged to do it without an order of justices for that purpose. *Hayes v. Bryant*. 1 H. B. 253

2 The Court granted a *habeas corpus* to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; but without prejudice to the question of guardianship. *Rex v. Hopkins & Ur*.

7 E. R. 579

3 Bastards are within the meaning of the marriage act, 26 G. 2. c. 33. which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. *Rex v. Inhab. of Hodnett*. 1 T. R. 96

4 The rule that a bastard is *nullius filius* applies only to the case of inheritances.

1 T. R. 101

III. ORDER OF FILIATION.

- 1 Under the statutes concerning bastards, no order of filiation or for payment of the expenses can be made, unless the child be born alive. *Rex v. De Brouquens.* 14 E. R. 277
- 2 An order of bastardy, stated to be made upon the oath of the wife, *as otherwise*, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife. *Rex v. Luffe.* 8 E. R. 193
- 3 Such an order, filiating the child of a married woman, is good; though it only state that such child was *likely to become chargeable*; which are the words of the stat. 6 G. 2. c. 31. s. 1. as applied to the bastards of single women; for upon that statute, as well as the stat. 18 Eliz. c. 3. which has the words *born out of lawful matrimony*, the only question is, whether the child be by law a *bastard*. *ib.*
- 4 An order of bastardy may be made after the death of the woman, upon her examination when taken pregnant, under stat. 6 G. 2. c. 31. *Rex v. Ravenstone, (Inhab.)* 5 T. R. 373
And see *Rex v. Clayton.* 3 E. R. 58
- 5 Every reasonable intendment will be made in favour of an order of justices. Therefore, where an order of bastardy, reciting that it had appeared to the justices on the oath of *R. T.* that the said *Mary Cole* (referring to the title in which she was named as *Mary Cole deceased*) was delivered of a bastard child, &c.; and *further*, that upon the examination of the said *M. C.* taken on oath, &c.; *dated* &c. in the presence of the said *R. T.*, the said *M. C.* upon her oath charged the defendant with being the father, &c. adjudged that therefore upon examination of the cause and circumstances of the premises, *as well on the oath of the said M. C.* before birth so taken, and also upon the oath of the said *R. T.*, that the defendant was the father, and that he should pay so much, &c.; the Court will intend, (especially after appeal confirming the order), that *M. C.* was dead at the time of the order made, and that her examination on oath before taken in writing under the statute 6 G. 2. c. 31. was verified on the oath of *R. T.* before the magistrates making the order; which ex-

amination is sufficient after the death of the mother to warrant a subsequent order of filiation. *Rex v. Clayton.*

3 E. R. 58

- 6 In an order of filiation and maintenance, the justices have no power by the stat. 18 Eliz. c. 3. to direct the defendant to pay the costs of the parish in obtaining the order; but having in such order separated the sum to be paid for maintenance, and the sum to be paid for costs, the order was quashed as to the latter, and confirmed as to the rest of it. *Rex v. Sweet.* 9 E. R. 25
- 7 One who is *de facto* guardian of the poor of a parish united with other parishes under the statute 22 G. 3. c. 83. for the better relief and employment of the poor, and who is received and acknowledged by the parish as guardian, though not legally appointed under the statute, is yet competent to apply in that character to a justice of the peace to take the examination of a single woman with child in order to filiate the bastard; which by the stat. 6 Geo. 2. c. 31. s. 1. is directed to be made upon application by the overseers of the poor, in whose place such guardian is appointed, and he is also competent to apply to the justice for a summons against a reputed father for not obeying an order of bastardy; which by stat. 49 Geo. 3. c. 68. s. 3. is directed to be made upon complaint by any one of the overseers of the poor. And though the latter statute direct the magistrate, upon such complaint and proof upon oath of the order for payment of maintenance, and non-payment thereof, to issue his warrant to apprehend the reputed father; yet it is proper for the justice to issue a summons in the first instance to the party charged, to attend and shew cause, &c. *Rex v. Martyr.*

13 E. R. 55

And see *Rex v. Inhabitants of St. Mary's, Nottingham.* *id.* 57, n.

IV. RIGHTS AND LIABILITIES OF PUTATIVE FATHER.

- 1 Non-access of the husband need not be proved during the whole period of the pregnancy: it is sufficient if the circumstances of the case shew a natural impossibility that the husband could be the father; as where he had

- access only a fortnight before the birth. *Rex v. Luffe*. 8 E. R. 193
- 2 If the putative father of a bastard obtain the possession of her from her mother by fraud, the Court will order her to be restored to the mother. *Rex v. Soper*. 5 T. R. 178
Rex v. Mosely. 5 E. R. 224, n.
- 3 But *per Lord Kenyon*, where the father has the custody of the child fairly, I do not know that this Court will interfere to take it away from him. 5 E. R. 224, n.
- 4 An illegitimate child, however, in the custody of a friend of the father, was ordered by the Court of C. P. to be delivered up to the mother, though it was not alleged such custody had been obtained unfairly, and though it appeared probable the child would not be brought up so advantageously under her care. *Ex-parte Ann Kneec*. 1 N. R. 148
- 5 A bond, conditioned for payment to the overseers of a parish of a certain weekly sum so long as a bastard child shall continue chargeable, is not illegal or contrary to public policy. *Strangeways v. Robinson*. 4 Taunt. 498
- 6 To debt on bond, conditioned for payment of a weekly sum for maintenance of a bastard child, so long as it should be chargeable, it is no plea, that after the child attained the age of seven years, the putative father offered thenceforth to keep and maintain the child, and requested the overseers to deliver it to him, without shewing that the child was within the power and custody of the overseers. *ib.*
- 7 *Quære*. Whether the putative father of a bastard child has a right to the custody of the child? *Strangeways v. Robinson*. 4 Taunt. 498
- 8 Where the putative father of a bastard child gave a *voluntary* bond, and not under the compulsion of stat. 6 G. 2. c. 31., to the parish officers, conditioned for the payment of a sum certain every three months until the child should be *deemed* capable of providing for herself: Held, that such bond was good, and the condition sufficiently certain. *Middleham v. Bellerby*. 1 M. & S. 310
- 9 If a person be bound by a recognizance by one magistrate under stat. 6 Geo. 2. c. 31. to appear at the next sessions and perform such order as shall there be made on him under 18 Eliz. c. 3. respecting bastards, the Sessions can only make an order of bastardy on him; but cannot order him also to give security for the performance of that order. *Rex v. Price*. 6 T. R. 147
- 10 The statute 6 G. 2. c. 31. only authorizes parish officers to take security from the putative father of a bastard child to *indemnify* the parish: therefore where they had taken a promissory note absolute for a sum certain, to which there was a plea of tender of a lesser sum as the amount of the damage actually sustained by the parish, the issue upon which was found for the defendant: Held, that the plaintiffs could not recover more. *Cole v. Gower*. 6 E. R. 110
- 11 A soldier-in actual service may be committed to prison for want of sureties, under stat. 6 G. 2. c. 31. for being the father of a bastard child. *Rex v. Archer*. 2 T. R. 270
And *Rex v. Bowen*. 5 T. R. 156

BILLS AND NOTES.

I. REQUISITES OF, AS TO VALIDITY.

- (a) *Form*.
- (b) *Parties*.
- (c) *Consideration, want of, when material*.
- (d) ————— *illegality of, when it vitiates*.
- (e) *Alteration, effect of*.

II. TRANSFER AND INDORSEMENT.

- (a) *How made*.
- (b) *By whom*.
- (c) *At what time*.

III. ACCEPTANCE.

- (a) *What amounts to*.
- (b) *How made*.
- (c) *How cancelled*.

IV. ACCEPTOR.

- (a) *How far liable*.

(b) *Where discharged.*

V. PRESENTMENT FOR PAYMENT.

(a) *At what time.*

(b) ———— *place.*

VI. PROTEST, WHERE NECESSARY.

VII. NOTICE OF DISHONOUR.

(a) *How given.*

(b) *When necessary.*

(c) *Consequences of neglect.*

(d) *When waived.*

VIII. DRAWER, LIABILITY OF.

IX. INDORSER, TO WHAT EXTENT LIABLE.

X. ACTION.

(a) *When and by whom maintainable.*

(b) *Pleadings.*

(c) *Evidence.*

I. REQUISITES OF, AS TO VALIDITY.

(a) *Form.*

1 A bill of exchange, payable on a contingency, cannot be declared on as a negotiable instrument. *Carlos v. Fancourt*, (in error.) 5 T. R. 482

2 Nor a promissory note; for the stat. 3 & 4 Ann. c. 9. puts promissory notes on the same footing with bills of exchange, in all respects. *id. ibid.*

3 A note, by which A. promises to pay to the bearer 50l., "being the portion of a value, as under, deposited in security for the payment thereof," may be declared upon, as a promissory note. *Haussoullier v. Hartsinck*. 7 T. R. 337

And see the case of *Collis v. Enmett*. 1 H. B. 313

Post, tit. Pleadings on.

4 A note, promising to pay "on the sale, or produce immediately when sold, of the *White Hart Inn*, *St. Alban's, Herts*, and the goods, &c. value received," cannot be declared upon as a promissory note, within the statute, though it be averred, that before the action commenced, the Inn and the goods were sold. *Hill v. Halford*, (in error.) In *Cam. Scac.* 2 B. & P. 413

(b) *Parties.*

1 Where a bill of exchange was drawn by the defendant and others, on the defendant alone, payable to a fictitious

person, (which was known to all the parties concerned in drawing the bill), and the defendant received the value of it, from the second indorser; it was held, that a *bona fide* holder for a valuable consideration, might recover the amount of it, in an action against the acceptor, for money paid, or money had and received. *Tatlock v. Harris*. 3 T. R. 174

2 It was considered as an agreement by all parties, to appropriate so much properly to the account of the holder. *Tatlock v. Harris*. 3 T. R. 182

3 *Quære*, Whether a bill so drawn, is, in its legal operation, payable to bearer, and may be declared on as such? *Vere v. Lewis*. 3 T. R. 182

4 If a bill of exchange be drawn in favour of a *fictitious payee or order*, with the knowledge of the acceptor, as well as the drawer, and the name of such fictitious payee be indorsed on it by the drawer, with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself, or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards, the bill is accepted, but it does not appear, that there was an intent to defraud any particular person; such innocent indorsee, for a valuable consideration, may recover against the acceptor, as on a bill payable to bearer. *Gibson and Johnson v. Minet and Fec-tor*. 3 T. R. 481

Affirmed in *Dom. Proc.*

1 H. B. 569,—625

See also, 2 H. B. 187,—211.: 288. & 298

5 Perhaps also, in such case, the innocent indorsee might recover against the acceptor, as on a bill payable to the order of the drawer. 1 H. B. 569

6 Or, on a count stating the special circumstances. 1 H. B. 569

And see *Collis v. Enmett*.

1 H. B. 313

(c) *Consideration, want of, when material.*

1 It is not, of itself, a defence to an action by an indorser of a bill of exchange, to plead that it was accepted for the accommodation of the drawer, without a consideration, and was indorsed over after it became due. *Charles v. Marsden*. 1 Taunt. 224

- 2 If a draft or bill, given in payment of a debt, be dishonoured, the party receiving it, may consider it as a nullity, and act accordingly. *Puckford v. Maxwell*. 6 T. R. 52
 - 3 If the seller of goods, take notes or bills for them, without agreeing to run the risk of the notes being paid, and the notes turn out to be worth nothing, this will not be considered as payment. *Owen v. Morse*. 7 T. R. 64
 - 4 *Assumpsit* for goods sold and delivered. Plaintiff proved, that having sold goods to the defendant, he received from him a check upon J. S., a banker, directing the latter, two months after date, to pay to the plaintiff, a bill at two months, for the amount of the goods; that the plaintiff and defendant both kept accounts with J. S., and the check was indorsed by the plaintiff, and paid by him into the banking-house of J. S., who entered it short in the plaintiff's account; that on the 18th of March, 1793, J. S. became bankrupt; that between the payment of the check into the house of J. S., and the bankruptcy of J. S., no settlement of accounts between the plaintiff and J. S. had taken place, nor was the amount of the check ever carried out as cash, though in that interval, plaintiff had overdrawn his account. The defendant offered to prove, that between the payment of the check into the house of J. S. and the bankruptcy of J. S., the account between him and J. S. was settled, at which time, he was debited for the whole amount of the check, and credited for interest thereon, from the day of settlement to the day when the bill, mentioned in the check, if drawn, would have become due: Held, 1st, that the check did not, under all the circumstances, amount to payment for the goods; 2dly, that the evidence offered by the defendant, was not admissible. *Brown v. Kewley*, (in error.)
In Cam. Scac. 2 B. & P. 518
 - 5 Where the holder of a bill of exchange desired A. to get it discounted, but positively refused to indorse it, and A. delivered it to B. for the same purpose, informing him to whom it belonged; and B. finding, that he could not dispose of it without indorsing it, was prevailed upon to do so, by A.'s telling him, that he would indemnify him; but the indorsee took it upon the credit of the names on the bill, without any knowledge of the real owner; it was held, that although such original holder afterwards promised to pay the bill, such promise could not support an action by the indorsee, being *nudum pactum*. *Fenn v. Harrison*. 3 T. R. 757
 - 6 It appearing on evidence, however, on a new trial, that the holder of the bill did not say he would not indorse it, the Court held, that A.'s employers were bound by his act, and liable to refund on the bill's being dishonoured; and that the subsequent promise to pay, was decisive against them. *Fenn v. Harrison*. 4 T. R. 177
 - 7 A warrant was directed to an officer of excise, by the commissioners, commanding him to apprehend a person convicted in several penalties, and take him to prison, and keep him there until the amount of the penalties was paid; the officer having arrested the party, discharged him on a promissory note, for the amount of the penalties, payable at a future day; and the commissioners afterwards approved of his conduct: Held, that the discharge was a good consideration for the note, and that an action might be maintained thereon. *Pilkington v. Green*.
2 B. & P. 151
 - 8 An express promise to pay the contents of a lost bill of exchange, if given without some new consideration, is void. *Davis v. Dodd*. 4 Taunt. 602
- (d) *Illegality of, when it vitiates.*
- 1 The plaintiff and defendant being taken prisoners in Portugal, jointly solicited and obtained the liberation of themselves and the ransom of the defendant's ship, contrary to 45 G. 3. c. 72.; to effect which the plaintiff lent money to the defendant, who afterwards gave him a bill for the amount: Held, that the plaintiff could not recover on the bill. *Webb v. Brooke*. 3 Taunt. 6
 - 2 A bill of exchange, part of the consideration for which is spirituous liquors sold in less quantities than of 20s. value, is totally void, though part of the consideration was money lent. *Scott v. Gillmore*. 3 Taunt. 226
 - 3 If all the creditors of an insolvent consent to accept a composition for their respective demands upon an assignment of his effects by a deed of

trust, to which they are all parties, and one of them, before he executes, obtain from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note be made, the note is *void* in law, as a fraud on the rest of the creditors; and a subsequent promise to pay it is a promise without consideration, which will not maintain an action. *Cockshott v. Bennett.* 2 T. R. 763

4 For no subsequent promise can set up a security which is void at its creation. 2 T. R. 763

5 If it be only *voidable*, like a security given by an infant, it may be revived by a subsequent promise. 2 T. R. 766

6 But if a bankrupt, or insolvent, after becoming free from his engagements, voluntarily give security for a former demand, which is only due in conscience, it may be enforced in a Court of law. 2 T. R. 765

7 A promise made, after taking benefit of an insolvent act, to pay a note by instalments, due before the insolvency, without specifying the amount or time of payment, will not raise a new *assumpsit* to pay the debt. *Mucklow v. St. George.* 4 Taunt. 613

8 A. having agreed to execute a lease of premises to B., who was to pay a certain sum for it; if B., who was let into possession, accept a bill for the consideration-money drawn on him by A., it is no defence to an action on the bill by A. against B., that the former refused to execute the lease: but his remedy is on the agreement. *Moggridge v. Jones.* 14 E. R. 486

9 A. being employed as a broker for B. in stock-jobbing transactions, paid the differences for him; a dispute arising between them respecting the amount of A.'s demand, the matter was referred to C., who awarded 306*l.* to be due; on which A. drew on B. for 100*l.*, part of the above, and indorsed the bill to C. after B. had accepted it: Held, that C. could not recover on the bill, for the bill itself was given for the illegal demand, and C. was privy to it. *Steers v. Lashley.* 6 T. R. 61

And see *Brown v. Turner.*

7 T. R. 630

10 No action can be maintained by the plaintiff on a note given to him by the defendant, as an apprentice-fee with his son, who was to be bound to the

plaintiff, if it appeared that the indenture executed was void by the stat. 8 Ann. c. 9. for want of the insertion of such premium therein, and a proper stamp in respect of the same; although the plaintiff did in fact maintain the apprentice for some time, and until he absconded. *Jackson v. Warwick.*

7 T. R. 121

11 It is no objection to an action on a promissory note, that it was given as part of the consideration of an indenture of apprenticeship for less than seven years, by being antedated: such indenture being only voidable. Nor does the consideration of the note fail because the apprentice was discharged by a magistrate after two years on account of the master having enticed him to commit felony; particularly when the apprentice-fee was to be paid in the first instance, though in case of the defendant, a note was taken for part of it, payable at a distant day. *Grant v. Welchman.*

16 E. R. 207

12 A promissory note to the amount of the fair expenses of a prosecution, agreed to be given at the recommendation of the Court of Quarter-Sessions by a defendant who stood convicted before them of a *mi-demeanor*, in ill-treating his parish apprentice, for which the parish officers had been bound over by recognizance to prosecute him under the stat. 32 G. 3. c. 57.; and the giving of which security was considered by the Court, in abatement of the period of imprisonment to which he would otherwise have been sentenced; is legal, and may be enforced by action. *Beeley v. Wingfield.* 11 E. R. 46

13 A., a merchant in London, draws a bill of exchange on B. at Pisa, payable to the order of C. a French merchant resident in France; C. indorses it to D. of Nice; and D. to E. at Leghorn; the bill not being paid when due, E. draws another bill for the amount of the former on A. in favour of F. of Leghorn, which is indorsed to G. a merchant in London, in the course of trade, and accepted by A. The stat. 34 G. 3. c. 9. s. 4. prevents G. from maintaining an action on the latter bill against A.; and if such action be brought, the Court will stay the proceedings. *Bendelack v. Morier.*

2 H. B. 338

14 The defendant gave a promissory note to the plaintiff in consideration of the plaintiff's marrying his daughter, which marriage was had in fact, and believed to be valid, and intended to be so by all parties, and after the wife's death the defendant was sued on the note; the jury, presuming a subsequent legal marriage, gave a verdict for the plaintiff, which the Court refused to set aside. *Wilkinson v. Payne.* 4 T. R. 468

A marriage in fact was sufficient to entitle the plaintiff to recover. *Per Buller, J.*, and a marriage may be presumed. 4 T. R. 469, 470
And *Standen v. Standen*, there cited.

15 A broker agreed with the defendants to get certain bills discounted, and that he should retain out of the money so raised, the exorbitant brokerage of 10s. per cent.; but he was not to advance the money himself, nor was his name on the bills: the Court held that a bill negotiated by the broker upon these terms, could not be avoided in the hands of an innocent indorsee, as being a security for an usurious consideration within the stat. 12 Ann. c. 16.; the person advancing the money having received no more than legal interest, though the broker received exorbitant brokerage for his trouble in getting the bill discounted. *Dagnall v. Wigley.* 11 E. R. 43

16 A warrant of the Lord Chancellor for the commitment of a person, appointed a receiver by the Court of Chancery, for the non-payment of a balance certified against him, is only in the nature of a civil execution; therefore where *D.*, being appointed receiver in a suit in Chancery, was in custody of the officer under such warrant, and the defendant, in order to procure his discharge, joined with him as surety in two promissory notes to the plaintiff, who was a party to the suit in Chancery, and his solicitor, who sued out the warrant, for the amount of the debt and costs, and was thereupon discharged by the direction of the solicitor: Held, that the discharge was a legal consideration for the notes, and that an action might be maintained on them; and although there were other parties to the suit in chancery, who did not concur in the discharge, and therefore *D.* remained

liable to be taken again, yet the consideration had not failed; and that it was no objection to the validity of the notes, that the sum given to cover costs exceeded the costs due, no fraud being intended. *Brett v. Close.*

16 E. R. 293

17 A creditor may legally contract to sue out a commission of bankrupt against his debtor, in consideration that a friend of the debtor will give the petitioning creditor 5s. in the pound for his debt; and a bill given for the agreed sum is a valid bill. *Fry v. Malcolm.* 5 Taunt. 117

(c) *Alteration, effect of.*

1 An alteration of the date of a bill of exchange after acceptance, whereby the payment would be accelerated, avoids the instrument; and no action can be afterwards brought upon it even by an innocent indorsee for a valuable consideration. *Master v. Miller.* 4 T. R. 320. (Affirmed in *Cam. Scac.*) 5 T. R. 367: 2 H. B. 141: And see 1 Anstr. 225.

2 A bill was drawn on a proper stamp dated 2d of September, payable 21 days after date: it was afterwards altered and made payable 51 days after date; and on the 30th of September was again altered to 21 days after date, and the date brought forward to the 14th of September. This is a distinct transaction from the first, and requires a new stamp, although the alterations were made with the consent of the acceptor before the bill was negotiated. *Bowman v. Nichol.* 5 T. R. 537
And see *tit. STAMPS.*

3 Where the drawer of a bill of exchange, accepted payable at *B.* and Co's.; after keeping it three or four years indorsed it to the plaintiff, erasing the name of *B.* and Co., and substituting *E.* and Co., without the knowledge of the acceptor, *B.* and Co. having failed since the acceptance: Held, that plaintiff could not recover against the acceptor. *Tidmarsh v. Grover.* 1 M. & S. 735

4 If upon a bill being presented for acceptance, the drawee alter it as to the time of payment, and accept it so altered, he vacates the bill as against the drawer and indorsers: but if the holder acquiesces in such alteration and acceptance, it is a good bill as against

the holder and acceptor. *Paton v. Winter.* 1 Taunt. 420

And the holder cannot afterwards maintain an action on the case against the acceptor for thereby rendering the bill invalid; especially after having kept it and presented it for payment at the deferred period. *ib.*

II. TRANSFER AND INDORSEMENT.

(a) *how made.*

- 1 A bill of exchange drawn and issued in blank, or the name of the payee may be filled up by a *bonâ fide* holder, with his own name, and will bind the drawer. *Cruchley v. Clarence.* 2 M. & S. 90
- 2 If the payee of a bill annexes a condition to his indorsement before acceptance, the drawee, who afterwards accepts it, is bound by that condition; and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor. *Robertson v. Kensington.* 4 Taunt. 30

(b) *By whom.*

- 1 In an action by the indorsee against the acceptor of a bill drawn payable "to A. or order," the defendant may shew that the person who indorsed to the plaintiff, was not the real payee, though his name were the same, and though there were no addition to the name of the payee on the bill. *Mead v. Young.* 4 T. R. 28
- 2 If a bill payable to A. or order, get into the hands of another person of the same name as the payee, and such person, knowing that he is not the real person in whose favour it was drawn, indorse it, he is guilty of forgery. *id. ibid.*
- 3 One who had committed a secret act of bankruptcy, procures the defendant to lend him his acceptance, and as a security pledges the lease of his house; and having drawn the bill payable to his own order, indorses it to the plaintiff for a valuable consideration, without notice of his bankruptcy: Held that, in an action by the plaintiff, as indorsee, against the acceptor, the latter could not defend himself on the ground of the drawer's bankruptcy at the time of such in-

dorsement, or because the assignees had withdrawn from him the lease deposited as a security. *Arden v. Watkins.* 3 E. R. 317

(c) *At what Time.*

- 1 Where a promissory note, after it was due and had been noted for non-payment, was indorsed to the plaintiff who sued the maker upon it, the latter was entitled to go into evidence to shew that the note was paid as between him and the original payee, from whom the plaintiff received it. *Brown v. Davies.* 3 T. R. 80
- 2 The same rule holds in all cases where the note is indorsed to one after it is due. *ib.* and *Taylor v. Matthews.* 3 T. R. 83, n.
(And see *Brown v. Turner.* 7 T. R. 630)
- 3 Where the drawers of a banker's check or inland bill of exchange issued it nine months after it bore date, upon a consideration which afterwards failed, as between them and the persons to whom they delivered it, they cannot be permitted to object this circumstance in an action brought by a subsequent holder for a valuable consideration and without notice; though by the general rule, any person receiving a negotiable instrument after it is due is deemed to have taken it upon the credit of the person from whom he received it, and subject to the same equities as between him and the party sued on such instrument. *Boehm v. Sterling.* 7 T. R. 423
- 4 A note payable on demand, with interest, drawn by A. in favour of B. as a security for a debt, was by him indorsed to C. for the same purpose; after the indorsement it passed backwards and forwards between B. and C. several times, and previous to its being ultimately deposited with C. he received an intimation from B. not to negotiate it, as he should want it when he settled accounts with A.: Held, that C. could not, after a settlement of accounts between A. and B., without a re-delivery of the note, recover on it against A. *Roberts (Assignees) v. Eden.* 1 B. & P. 598
- 5 The holder in *America* of two bills of the same tenor, having transmitted them to his agents here to present them for acceptance, and receive the money when due, and pay over a part

of it to the plaintiff; while the bills so remained in his agents' hands, agreed with the defendant, the indorser, (who had lent his indorsement on each to the drawer, from whom the holder received them), that upon the payment of one of the bills he should be exonerated from both. In the mean time, the bills having been presented for acceptance by the agents, and dishonoured; *after the dishonour*, the agents not knowing of such agreement between their principal and the indorser, assigned one of the dishonoured bills to the plaintiff, who was informed of the dishonour, and who received it liable to all its infirmities, but without notice of such agreement: the Court held, that the bill so received by the plaintiff was bound by the agreement; and that the defendant, having afterwards taken up and discharged the other bill, which had remained in the hands of the same agents, was discharged from both. *Crossley v. Ham.*

13 E. R. 498

- 6 The indorsee of a bill of exchange, made payable 65 days after date, which was issued by the drawer, and indorsed by the payee, who died before the day when it bore date, may make title through such indorsement to recover on the bill against the drawer. *Pusmore v. North.*

13 E. R. 517

III. ACCEPTANCE.

(a) What shall amount to.

- 1 A letter from the drawees of a bill in England to the drawer in America, stating that "their prospect of security being so much improved they shall accept or certainly pay the bill," is an acceptance in law: although the drawees had before refused to accept the bill when presented for acceptance by the holder, who resided in England, and again after the writing such letter refused payment of it when presented for payment: and although such letter written before were not received by the drawer in America till after the bill became due. *Wynne v. Raikes.*

5 E. R. 514

- 2 A., in consideration of having commissioned B. to receive certain African bills payable to him, drew a bill upon B. for the amount payable to his own order: B. acknowledged by letter the

receipt of the list of the African bills, and that A. had drawn for the amount, and assured him that it would meet with due honour from him. This is an acceptance of the bill by B.; and the purport of such letter having been communicated by A. to third persons, who, on the credit of it, advanced money on the bill to A., who indorsed it to them: Held, that B. was liable as acceptor in an action by such indorsees, although after the indorsement, in consequence of the African bills having been attached in B.'s hands, who was ignorant of his letter having been shewn, A. wrote to B., advising him not to accept the bill when tendered to him; which, as between A. and B. would have been a discharge of B.'s acceptance if the bill had still remained in A.'s hands. *Clarke v. Cock.*

4 E. R. 517

- 3 Upon a request to A. to accept a bill, and to draw upon B. for the same sum, the mere act of drawing upon B. does not amount to an acceptance. *Smith v. Nissen.*

1 T. R. 269

- 4 A mere promise by a debtor to his creditor, that if he would draw a bill upon him at a certain date for the amount of his demand, he should then have the money and would pay it, does not amount in law to an acceptance of the bill when drawn; and an indorsee for a valuable consideration, between whom and the drawee no communication passed at the time of his taking the bill, can neither recover upon the count as for an acceptance, nor on the general counts as for money had and received, &c. *Johnson v. Collins.*

1 E. R. 98

(b) how made.

- 1 If a person to whom a bill is directed generally, accepts it payable at a particular place, the holder needs not receive such a qualified acceptance, but may resort to the drawer as for non-acceptance. *Gannon v. Schmoll.*

5 Taunt. 344

S. C. 1 Marsh. 80

- 2 Such an acceptance is equivalent to an acceptance payable at the particular place and no where else, and narrows the general liability of the acceptor to a liability to pay at that place only.

5 Taunt. 353, 4

- 3 But if the holder consents to receive

such an acceptance, it interposes in the contract a condition precedent, that the holder shall present the bill to the acceptor for payment at the place specified. 5 Taunt. 353, 4

(c) *how cancelled.*

- 1 A bill of exchange having been accepted payable at *Ladbroke's*, with a direction in writing on it, "*in case of need to apply at Boldero's*," and having been dishonoured when due at *Ladbroke's*, and thereupon brought to *Boldero*, who, thinking that it had been made payable at his house, under that mistake cancelled the acceptance; but presently, observing the mistake, wrote under it, "*cancelled by mistake*," and signed his initials to it, yet nevertheless paid the bill for the honour of the plaintiffs, whose indorsement was on it: Held, that the plaintiffs, on proof of such cancellation by mistake, might recover upon the bill against prior indorsers. *Raper v. Birkbeck.* 15 E. R. 17

- 2 Whether an acceptance of a bill once made by the drawee may or may not be cancelled or recalled by him before the bill be delivered back to the holder, at all events, if the acceptance be so cancelled, and the holder cause the bill to be noted for non-acceptance, he cannot afterwards sue upon it as an acceptance. *Bentinck v. Dorrien.* 6 E. R. 199

- 3 Whether an acceptance is conditional or absolute is a *question of law.* *Sprout v. Mathews.* 1 T. R. 182

- 4 Therefore, where a bill of exchange was drawn upon *A.* residing in *London*, by a consignor of goods living abroad, and on its being presented for acceptance, *A.* said, he could not then accept, because he did not know whether the ship would arrive at *London* or *Bristol*; on which *B.* the holder agreed to leave it for some time, reserving the liberty of protesting it for non-acceptance, in case *A.* did not accept: on a second application *A.* said, the bill would be paid *even if the ship were lost*; this is only a conditional acceptance, depending on two events; the ship's arriving at *London*, or being lost: and *B.* having the liberty of refusing such conditional acceptance, precludes himself from recovering against *A.* by

afterwards noting the bill for non-acceptance. 1 T. R. 182

- 5 *A.* in June, 1811, agrees to purchase a house of *B.* for 1000*l.*, paying 300*l.* down; full possession to be given by the 1st of June, 1812. *B.* is arrested in June, 1811, on which *A.* accepts a bill for *B.* in favour of *B.*'s creditors, payable if the house should be given up on the 1st of June, 1812. At *B.*'s request, *A.* puts his nephew into the house to take care of it, while *B.* remains in custody; *B.* having a bad title to the house, gives up all claim to it, and *A.* purchases it of the real owner, being allowed the 300*l.* which he paid to *B.*: Held, that the possession which *A.* had of the house from *B.* was not such a compliance with the condition of the acceptance, as to support an action by the holder of the bill against *A.* *Swan v. Cox.* 1 Marsh. 176

IV. ACCEPTOR.

(a) *How far liable.*

- 1 An acceptor is only precluded from disputing the hand-writing of the drawer; for which reason, the acceptor is liable, though the bill be forged. *Smith v. Chester.* 1 T. R. 654
- 2 The indorsee of a bill of exchange, having received part of the contents from the drawer, cannot recover more than the residue from the acceptor. *Bacon v. Searles.* 1 H. B. 88
- 3 The acceptance of the drawee is *prima facie* evidence of his having effects of the drawer in his hands, and his liability attaches thereby. *Vere v. Lewis.* 3 T. R. 182
- 4 The holder of a bill sued the acceptor, and charged him in execution: the latter having obtained his discharge, under the Lord's Act, the holder then sued the drawer, who, after paying the bill, sued the acceptor, and charged him in execution, which was held to be regular; the defendant's having been charged in execution, at the suit of the holder, not being a satisfaction, as between the drawer and acceptor. *Macdonald v. Bovington.* 4 T. R. 825
When an acceptor is discharged by a payment to partners. See *Jacaud v. French.* 12 E. R. 317, *post*, *tit. PARTNER.*

When discharged by an alteration of bill, see *Tidmarsh v. Grover, and Paton v. Winter*. *Ante*, pages 145, 6.

(b) Where discharged.

- 1 Where the drawer pays the whole, the acceptor is entirely discharged, and the bill is no longer negotiable. *Beck v. Robley*. 1 H. B. 89, n.
- 2 If the holder of a bill of exchange, accepted for the accommodation of the drawer, takes a *cognovit* from the drawer, for payment by instalments, he does not thereby discharge the acceptor, whether the holder, at the time of taking the bill, knew it was an accommodation bill, or not. *Fentum v. Pocock*. 5 Taunt. 192
S. C. 1 Marsh. 14
- 3 The acceptors of a foreign bill of exchange, who, after presentment to the drawees for acceptance, and refusal by them to accept, and protest for non-acceptance, accept the same for the honour of the first indorsers, are not liable on such acceptance, unless there has been a presentment of the bill to the drawees for payment, and a protest for non-payment. *Hoare v. Cazenove*. 16 E. R. 391
- 4 The acceptor of a bill, for the accommodation of the drawer, is not discharged by time given to the drawer. *Ruggett v. Axmore*. 4 Taunt. 730

V. PRESENTMENT FOR PAYMENT.

(a) Time when it should be made.

- 1 Three days' grace are allowed on promissory notes, as well as on bills of exchange, for stat. 3 & 4 Ann. c. 9. puts them both on the same footing, in all respects. *Brown v. Haraden*. 4 T. R. 151
- 2 Three days' grace are allowed on a promissory note payable to A., without adding, "or to his order," "or to bearer." *Smith v. Kendall*. 6 T. R. 123
- 3 *Quære*, Whether the acceptor of an inland bill, be bound to pay it on demand, at any reasonable time, on the third day of grace, or whether he be allowed the whole of that day to pay it in? For the Court will not take notice of banking hours. *Leffley v. Mills*. 4 T. R. 170
- 4 If a bill be accepted, payable at A.'s, who is the acceptor's banker, the party

taking such special acceptance, (which he is not bound to do,) thereby impliedly agrees to present it for payment within the usual banking hours, at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill, so as to charge the drawer. *Parker v. Gordon*.

7 E. R. 385

- 5 A presentment of a bill of exchange at a banking-house, after banking hours, when the house is shut, is not a sufficient presentment to charge the drawer: and no inference is to be drawn, from the circumstance of the bill being presented by a notary, that it had been before duly presented within banking hours. *Elford v. Teed*. 1 M. & S. 28
- 6 Where a bill was drawn and accepted for the accommodation of the indorser, which was not duly presented for payment when due, by reason that the bill having been accepted, payable at a banking-house, was not presented till after the banking hours, when the answer given to the holder was, "no effects;" yet if such indorser apply to the indorsee, after declaration filed, for further time to make payment of the bill; which declaration alleged the fact, that the bill was duly presented for payment; that is evidence of a waiver of the objection, with notice of the fact, of which he had the means of informing himself. *Hopley v. Dufresne*. 15 E. R. 275
- 7 Where the plaintiff in *Yorkshire*, on the 26th of December, received a bill of exchange, payable in London, which became due on the 28th, and kept it in his own hands until the 29th, when he sent it by post to his bankers at *Lincoln*, who duly forwarded it to London for presentment, and the bill was dishonoured: Held, that the plaintiff, by keeping it in his hands until the 29th, was guilty of laches. *Anderton v. Beck*. 16 E. R. 248
- 8 If the drawee of a bill goes abroad, leaving an agent in England, with power to accept bills, who accepts this for him, the bill, when due, must be presented to the agent for payment, if the drawee continues absent. *Phillips v. Astling*. 2 Taunt. 206
- 9 The purchaser of a foreign bill of exchange, payable at a certain time after sight, which is publicly offered

for negotiation, is *not* bound to send it by the *earliest* opportunity to the place of its destination. *Muilman v. D'Eguino.* 2 H. B. 565

And see Dumbysire v. Parker.

6 E. R. 3

10 There is no fixed time when a bill, drawn payable at sight, or a certain time after, shall be presented to the drawee, but it must be presented within a *reasonable time.* 2 H. B. 565

11 What is a reasonable time, is a question for the jury to decide, from the circumstances of the case. 2 H. B. 565

12 But *semble*, that if the holder of a bill so payable, neither presents it nor puts it in circulation, he is guilty of *laches*, and cannot recover upon it. 2 H. B. 565

13 By the practice of the *London* bankers, if one banker, who holds a check drawn on another banker, presents it after four o'clock, it is not then paid, but a mark is put on it, to shew that the drawer has assets, and that it will be paid; and checks so marked have a priority, and are exchanged or paid next day at noon, at the clearing house: Held, that a check presented after four, and so marked, and carried to the clearing-house next day, but not paid, no clerk from the drawee's house attending, need not be presented for payment at the banking-house of the drawee. *Robson v. Bennett.* 2 Taunt. 388

14 Such a marking under this practice amounts to an acceptance, payable next day at the clearing-house. *ib.*

15 It is not necessary to present for payment a check payable on demand, till the day following the day on which it is given. 2 Taunt. 388

16 A person receiving a check on a banker is equally authorized, in lodging it with his own banker, to obtain payment, as he would be in paying it away in the course of trade. 2 Taunt. 388

(b) *At what place.*

1 A note, promising to pay on demand at a particular place, must be presented, and a demand of payment made, at that place, unless the makers discharge the holder from the presentment and demand, and the presentment and demand must be alleged,

unless a discharge is shewn. *Bowes and others v. Howe, in error.* (In *Cam. Scac.*) 5 Taunt. 80

2 An allegation that the makers of a note became insolvent, and ceased, and wholly declined and refused then and thenceforth to pay at the place specified any of their notes, does not shew a discharge of presentment and demand. Nor can it be intended from the allegation of refusal, that there was a presentment. *id.* 34

And see PLEADINGS ON BILLS, post, page 157.

3 A promissory note of the defendants, promising to pay so much *at their banking-house at W.*, requires a demand of payment *there*, in order to give the holder a cause of action, if it be not paid. *Sanderson v. Bowes.* 14 E. R. 500

4 Payment of a promissory note, made payable at a certain place named in it, must be demanded there before the makers can be sued on it. But upon such demand proved in an action by the holder against the makers, it is no objection to the plaintiff's recovery that one of the makers, whose real name was *John Key*, (who had suffered judgment by default,) was sued on the joint-promise by the name of *Thomas Kay*; it being proved that the real person had been served with the process, though under a mistaken Christian name; and the variance between *Key* and *Kay*, which were sounded alike, not being material. There had also been a part-payment on the notes duly presented. *Dickenson v. Bowes.* 16 E. R. 110

5 Though where a promissory note is made payable at a particular place, a demand of payment must be made there, in order to give the holder a cause of action; yet if the makers, (who had become insolvent) shut up and abandon their shop, that is evidence of a declaration to all the world of their refusal to pay their notes there. *Howe v. Bowes.* 16 E. R. 112

6 If a bill be accepted, payable at a banker's, it must be presented there for payment, and the neglect so to present it is equally a discharge to the acceptor, as to the drawer. *Callaghan v. Aylett.* 3 Taunt. 397

7 An averment that a bill accepted payable at a banker's, was, when due, presented to the banker's for payment,

according to the tenor and effect of the bill, and of the acceptor's acceptance thereof, and that as well the bankers as the acceptor refused payment, shall be supported after judgment on a sham plea. *Huffam v. Ellis, in error. In Dom. Proc.* 3 Taunt. 415

- 8 And it shall be intended that the bill was presented for payment to the acceptor himself at the house of those persons. *Semble.* *ib.*

For evidence of those facts would be admissible under such an allegation, and not repugnant to it. *ib.*

- 9 If a note be made payable at a particular house, a demand of payment at that house is a demand on the maker. *Saunderson v. Judge.* 2 H. B. 509

VI. PROTEST.

Where necessary.

- 1 The provisions of stat. 9 & 10 W. 3. c. 17. respecting protests of inland bills, do not apply to such bills as are made payable *after sight*. *Leftley v. Mills.* 4 T. R. 170

- 2 Therefore an acceptor of such a bill, who refuses payment on the third day of grace, is not liable to any charge for the noting of the bill. 4 T. R. 170

- 3 Noting is unknown to the law as distinguished from the protest, of which it is merely a preliminary step. 4 T. R. 170

- 4 In an action against the drawer of a foreign bill of exchange, a protest for non-acceptance must be proved. *Gale v. Walsh.* 5 T. R. 239
But see *Legge v. Thorpe.* 12 E. R. 171. *post*, 159

- 5 Where it appeared that at the time of drawing a foreign bill of exchange the drawer had effects in the hands of the drawee, but which were taken out of his hands by the drawer before the bill became due: Held, that a protest for non-acceptance and notice thereof to the drawer by the drawee, is necessary to enable the payee to recover against the drawer, and it is no excuse for not giving such notice, that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance, or afterwards, if he had some effects to whatever amount, in the drawee's hands when the bill was drawn. *Orr v. Maginnis.* 7 E. R. 359

- 6 A bill of exchange payable 60 days *after sight* becomes due 60 days after acceptance, or after protest for non-acceptance, and may, when due, be protested for non-payment. *Campbell v. French, in error.* 6 T. R. 200

- 7 Bills of exchange were drawn by A. in England on B. in the East Indies, payable 60 days *after sight*, and a bond was entered into, conditioned to be void, if the bills should be *duly paid in the East Indies*, or come back to England duly protested for non-payment, and the amount of them paid by the obligor within a certain time after the bills should be produced protested for non-payment. The bills arrived in the East Indies, the drawers had left that place, and their agents refused to accept them when they did arrive: the bills were then protested in India for non-acceptance, and sent back to England so protested: some of these being presented to the drawer for payment, were protested for non-payment here. In debt on the bonds, the Court of C. P. held, that with respect to the bills returned protested for non-acceptance, and not presented and protested for non-payment here, the obligor was not liable; but for those which were so protested for non-payment here, he was liable; this being a substantial performance by the obligee of his undertaking according to the condition of the bonds; and the Court gave judgment on the several counts accordingly; on two for the plaintiffs, and on one for the defendant. *French v. Campbell.* 2 H. B. 163

- 8 On the judgment on the two counts for the plaintiffs, the defendant brought a writ of error in K. B., and that Court, holding that the undertaking on the part of the plaintiffs ought to have been *literally* complied with, *reversed the judgment of the Court of C. P.* on those counts; and intimated their concurrence with the Court of C. P. on the other count. *Campbell v. French, in error.* 6 T. R. 200

VII. NOTICE OF DISHONOUR.

(a) *How given.*

- 1 Notice of a bill of exchange, or promissory note being dishonoured, must come from the holder. *Tindal v. Brown.* 1 T. R. 167

- 2 What is reasonable notice to the indorser of non-payment by the drawer of a promissory note, or acceptor of a bill of exchange, is a question of law arising from the particular facts.
1 T. R. 167
- 3 Where the drawer of a promissory note, or the acceptor of a bill of exchange, do not live in the same place, the holder must write by the next post after the bill is dishonoured. *Tindal v. Brown.*
1 T. R. 168
- 4 The circumstances under which a notice was given in any particular case, are to be ascertained by a jury; but whether under such circumstances notice were given in a *reasonable* time, is a question of law, on which they ought to receive the direction of the judge. *Darvishire v. Parker.*
6 E. R. 10, 11, 12
- 5 The general rule as collected from the cases seems to be, that with respect to persons living in the same town, the notice shall be given by the *next day*; and with respect to persons living at different places, by the *next post*; leaving parties in particular cases, where compliance with such latter part of the rule cannot reasonably be expected, to account for their non-compliance with it.
6 E. R. 10, 11, 12
- 6 Where a bill of exchange passed through the hands of five persons, all of whom lived in or near *London*, and the bill being dishonoured, the holder gave notice on the same day to the fifth indorser, and he on the next day to the fourth, and he on the same day to the first; the Court were of opinion, on a case finding these facts, that *due diligence* had been used: and Lord *Kenyon* thought the question of due diligence was proper to be left to the jury; on which the other judges gave no opinion. *Hilton v. Shepherd.*
6 E. R. 14, n.
- 7 *Dubiat*ur by Lord *Kenyon*, whether the question of *reasonable notice* as to the dishonour of a bill of exchange be not a question of fact to be submitted to the jury under all the circumstances of the case. But though the holder may have lost his remedy against the drawer through want of notice (and notice by the drawee to the drawer, the next day, will not suffice for notice by the holder), yet a subsequent promise by the holder to the drawer, that he will see the bill paid, will support an *assumpsit*. *Hopes v. Alder.*
6 E. R. 16, n.
- 8 In an action against the drawer of a bill of exchange in consequence of the acceptor's default, the Court left it to the jury to presume from circumstances (such as the payment of a part of a bill without any objection to want of notice) &c. that due notice was regularly given. *Horford v. Wilson.*
1 Taunt. 12
- 9 A bill indorsed in blank, and deposited by the holder with his bankers, became due on *Saturday*, and was presented for payment about two o'clock on that day; payment being refused, the bill was noted and again presented between nine and ten in the evening by a notary; on *Monday* the bankers informed the holder that the bill was dishonoured, who on that day about noon gave notice to the indorser; the holder lived at *Knightsbridge*, and the indorser in *Tottenham-Court-Road*: Held, that this notice was sufficient to entitle the holder to recover against the indorser. *Haynes v. Birks.*
3 B. & P. 599
- 10 Where the indorsee of a bill of exchange lodged it with his bankers, in the city of *London*, who presented it for payment on the 4th, when it was dishonoured: and on the 5th they returned it to the indorsee, who gave notice to the drawer, who resided at *Shadwell*, of the dishonour on the 6th by the two-penny post: the Court held such notice to be reasonable. *Scott v. Lifford.*
9 E. R. 347
- 11 Notice of non-payment given by an indorser living in *Holborn*, to an indorser living at *Islington*, by nine at night of the day following that on which the first indorser knew, was held reasonable notice. *Jameson v. Swinton.*
2 Taunt. 224
- 12 It is sufficient, if notice of a bill drawn in *England* on a person in the *East Indies*, being dishonoured, is sent to *England* by the first direct and regular mode of conveyance, whether it be by an *English* or a foreign ship; the holder is not bound to send such notice by the accidental, though earlier conveyance of a foreign ship, not destined to this country. *Muiltman v. D'Eguino.*
2 H. B. 565
- 13 The putting a letter into the post-office to the indorser in proper time,

informing him that the maker has not paid a note when due, is sufficient evidence of notice to such indorser. *Saunderson v. Judge.* 2 H. B. 509

- 14 The indorsee of a bill having lodged it with his banker in *London*, who presented it for payment at another banking-house in *London*, where it was made payable, on the 25th of *February*, when it was dishonoured; but under a doubt whether the presentment was not made too early on that day, the banker again presented it shortly before 5 o'clock on the 26th, when it was again dishonoured; on which he immediately returned it to the indorser in *London*, on that day, and sent notice of the dishonour by the post of the 27th, into the country where the indorser lived: Held, that this was due diligence and due notice of the dishonour. *Langdale v. Trimmer.* 15 E. R. 291

- 15 Notice to the drawers, of non-payment of a bill of exchange by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, is sufficient, without leaving a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place. *Crosse and others, Assignees, &c. v. Smith.* 1 M. & S. 545

(b) When necessary.

- 1 Notice of non-payment by the acceptor need not be given to the drawer, if the latter have no effects in the hands of the former, though the indorser have. *Walwyn v. St. Quintin.* 1 B. & P. 652
- 2 Notice of a bill's being dishonoured by the drawee by non-payment, is not necessary to be given to the drawer, if he has no effects in the hands of the drawee either at the time of drawing or when the bill becomes due. *Bickerdike v. Bollman.* 1 T. R. 405
- N. B. This rule proceeds upon the ground of a supposed fraud in the drawer. *Clegg v. Cotton.*

3 B. & P. 242

- 3 Though the indorsers of a bill of exchange had full knowledge of the bankruptcy of the drawer, and of the insolvency of the acceptor, before and

at the time when the bill became due; and, within a day after, notice might (but for a mistake of the holders) in due course have reached them from the holders, communicating such their knowledge to the bankers in *Liverpool*, with whom they had before discounted the bill, and who had transmitted it to the holders in *London*; yet that did not dispense with such holders giving notice of the dishonour in due time to the indorsers. *Esdaile v. Sowerby.*

11 E. R. 114

- 4 Upon a guarantee of the price of goods, to be paid by a bill, due notice of the non-payment of the bill must be given both to the drawer and guarantee, unless both drawer and acceptor are bankrupts when the bill becomes due. *Philips v. Asling.*

2 Taunt. 206

- 5 The vendee having accepted a bill of exchange for the price of goods, and becoming bankrupt before the bill became due, a guarantee who paid the vendor after the bankruptcy of the vendee, may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill. *Warrington v. Furber.* 8 E. R. 242

- 6 A., the agent in *America* of B. in *England*, drew a bill upon him, and indorsed it to C., also residing in *America*, who indorsed it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned; C. undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A.: Held, that A. was discharged. *Clegg v. Cotton.*

3 B. & P. 239

- 7 Where defendant lent to the drawer of a promissory note payable on demand, his indorsement, to enable the drawer to raise money from plaintiffs who were bankers, and agreed to advance money thereon for six months: Held, that

the bankers, who had renewed their advances at the end of the six months, without the defendant's knowledge, could not recover on his indorsement, without proof of a demand on the drawer, and regular notice of the dishonour to the defendant. *Smith v. Becket.* 13 E. R. 187

8 Where a bill was drawn, accepted, and indorsed by several indorsers, for the accommodation of the last indorser, and the acceptor had no effects of the drawer in his hands, but that fact was not known to the defendant, one of the prior indorsers: Held, that the defendant was entitled to notice of the dishonour, before the holder could maintain an action against him, in order to enable him (even if he had no remedy upon the bill) to call immediately upon the last indorser, to whom, in fact, he had lent the security of his indorsement, without value received, and who had, in fact, received the money upon that security. *Brown v. Massey.* 15 E. R. 216

9 Where one draws a bill of exchange with a *bonâ fide* reasonable expectation of having assets in the hands of the drawee; as by having shipped goods on his own account which were on their way to the drawee, but without the bill of lading or invoice; the drawer is entitled to notice of the dishonour, though in fact the goods had not come to the hands of the drawee at the time when the bill was presented for acceptance, (or he had rejected them), and he returned it marked "no effects." *Rucker v. Hiller.* 16 E. R. 43

10 Persons who are bankers both for the drawers and acceptor of a bill, and have received it from the drawers, and given credit for it in an account current between them, if before it becomes due they receive directions from the acceptor to stop the payment of it at the place of payment, and do so accordingly, are not bound to give notice of this circumstance to the drawers, but upon non-payment of the bill may look to the drawers, notwithstanding they have not given such notice: and they are not bound to apply the money of the acceptor in their hands in discharge of the bill; but if the drawers become bankrupt, it will constitute an item in the account between

them and the bankers. *Crosse v. Smith.* 1 M. & S. 545

11 One, who without consideration but without fraud, indorses a bill in which both the holder and acceptor are fictitious persons, is entitled to notice of the dishonour of the bill. *Leach v. Hewitt.* 4 Taunt. 731

(c) *Consequences of Neglect.*

1 Where the note became due on the 5th October, and the indorsee's clerk called on the drawer *Donaldson*, at 10 o'clock in the morning, and not finding him at home, left word that the drawer would send for it to his master's and take it up: and on the 6th called again on the drawer, who told him he would take it up that day within the banking hours, which not being done, the other called on the drawer again on the 7th, and not finding him at home, then tendered it to the indorser; and all the parties lived within 20 minutes' walk of each other; the indorser was discharged by the laches of the holder, notwithstanding he had notice from the drawer on the 6th that he could not pay it. *Tindal v. Brown.* 1 T. R. 167

2 In this case, even if the notice had been given on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. 1 T. R. 171

3 If the indorsee of an inland bill, not due, present it for acceptance, which is refused, and delay giving notice to his indorser, the indorser will be discharged. *Goodall v. Dolley.* 1 T. R. 712

4 And a subsequent proposal by the indorser to pay the bill by instalments, made without the knowledge of the indorsee's laches, is not a waiver of the want of notice. 1 T. R. 712

5 *A.* being in insolvent circumstances, *B.* undertakes to be a security for a debt owing from *A.* to *C.*, by indorsing a promissory note made by *A.* payable to *B.*, at the house of *D.*; the note is accordingly so made and indorsed with the knowledge of all parties; just before it becomes due, *B.* being informed that *D.* has no effects of *A.* in his hands, desires *D.* to send the note to him *B.*, and says he will pay it, having then a fund in his hands

for that purpose; the note is not presented at *B.*'s house till three days after it is due; *C.* cannot maintain an action against *B.* on the note, not having used due diligence in presenting the note as soon as it was due to *D.* for payment, and in giving immediate notice to *B.* of the non-payment by *D.*; for *B.* has a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case.

Nicholson v. Gouthit. 2 H. B. 609

- 6 Notice of the dishonour of a bill in London was sent by the post to the holder in Manchester, where the letter was delivered out between eight and nine in the morning; the post from thence for Liverpool, where the drawer lived, went out at noon, between twelve and one; the holder did not send notice to the drawer the same day, nor by the post of the succeeding day, but by a private hand on the latter day, who did not deliver it till two hours after the post delivery, and about one hour before the post left Liverpool for London: Held, that the holder had made the bill his own by his laches. For whether *reasonable notice* be a question of law or of fact, and whether or not the law require notice to a party living at another place by the *next* post, (by which must be understood the next post by which it is practicable to give notice: and whether or not four hours be a sufficient interval for that purpose); at all events the holder ought to have written at farthest by the *post* of the succeeding day. *Darbishire v. Parker.*

6 E. R. 3

The holders of a bill of exchange having presented it for payment to the acceptor without effect, gave regular notice of the dishonour to the drawers, who lived at a distance, but informed them at the same time, that having reason to believe that a friend of the acceptor's would take it up in a few days, they would, in order to save expense, hold the bill till the latter end of the week, unless they heard from the drawers to the contrary: Held, that such notice gave the holders a remedy upon the bill against the drawers, though no further notice of non-payment was given to them at the end of the week: but if the construction of the letter bound the plaintiffs to give

such further notice at the end of the week, they were only answerable for the neglect in their implied character of agents for the drawers, which they had taken upon themselves, without disturbing their remedy upon the bill itself. *Forster v. Jurdison.*

16 E. R. 105

- 8 The defendant being unable to pay a bill when due, which he had accepted, obtained time, and indorsed to the plaintiff, as a security, a bill drawn by himself to his own order, which, when due, was dishonoured by the drawee, but the holder omitted to give the defendant notice: Held, that by this laches the defendant was not only discharged as indorser of the one bill, but also as acceptor of the other. *Bridges v. Berry.*

3 Taunt. 130

(d) When waved.

- 1 The objection arising from want of notice of non-acceptance of a bill of exchange from the holder to the drawer, is done away by shewing that the latter had no effects in the hands of the drawee at the time. *Rogers v. Stephens.*
- 2 *Quere*, How far this rule holds, if the drawer shew from other circumstances that in fact he sustained an injury for want of such notice.
- 3 But at any rate a subsequent promise by the drawer to pay the bill is a waiver of the want of notice.
- 4 And if, on demand made, he answer that "the bill must be paid," it is equivalent to a promise to pay. *Rogers v. Stephens.*
- 5 The want of due notice of the dishonour of a bill is answered by shewing the holder's ignorance of the place of residence of the prior indorser when he sues; and whether he used due diligence to find out the place of residence is a question of fact to be left to the jury. *Bateman v. Joseph.*

12 E. R. 433

And see *Goodall v. Dolley.*

1 T. R. 712, ante, 154

VIII. LIABILITY OF DRAWER.

- 1 *A.* in England draws a bill of exchange on *B.* in a foreign country, which after having been negotiated through

another foreign country, is presented to *B.* who refuses to pay it, on account of the law of the country in which he resides having prohibited such payment; the *drawer* is liable for the whole amount of the *rechange* between the different countries. *Mellish v. Simeon.* 2 H. B. 378

2 If the holder, after protest for non-payment, and notice to the drawer, (or after protest only, if the drawer be not entitled to notice), forbear to sue the acceptor, the drawer is not thereby discharged. *Secds* before protest, or if the holder take security from the acceptor after protest. *Walwyn v. St. Quintin.* 1 B. & P. 652

3 If the holder receive part-payment of the indorser, he may still recover the residue against the drawer, if not the whole. *Walwyn v. St. Quintin.* 1 B. & P. 652

4 If the holder of a bill of exchange, of which payment has been refused, inform the drawer of his intention to take security from the acceptor, and the drawer answer, that he may do as he likes, for that he (the drawer) is discharged for want of notice, and it appear that due notice has been given; the holder may sue the drawer, notwithstanding that he has taken security from the acceptor; for the drawer under such circumstances must be considered as having assented to the security being taken. *Clarke v. Detlin.* 3 B. & P. 363

5 The drawer of a bill is only bound to pay within reasonable time after receiving notice of its being dishonoured: therefore, where he received notice the day after the bill became due, a tender on the following day was held to be in time. *Walker v. Barnes.* 1 Marsh. 36 S. C. not S. P. 5 Taunt. 240

6 The drawer of a bill of exchange, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable upon the bill in default of the acceptor, three months after it was due, said that he knew he was liable, and if the acceptor did not pay it, he would: Held that he was bound by such promise. *Stevens v. Lynch.* 12 E. R. 38

promissory note, after it has been dishonoured, the indorser is discharged. *Tindal v. Brown.* 1 T. R. 167 (Affirmed in *Cam. Scac.* 2 T. R. 186)

2 If the holder of a bill when due, after taking part-payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to the agreement; though the drawer might have had no effects in the hands of the acceptor. *Gould v. Robson.* 8 E. R. 576

3 So if he take a new security from him for the amount, with the exception of a nominal sum only. *English v. Darley.* 2 B. & P. 61

4 The holder of a bill before it was due, having tendered it for acceptance, which was refused, kept it till due, when it was tendered for payment and refused, and then immediately returned it on the second indorser, who, not knowing of the laches, took up the bill: The Court held that his ignorance when he paid the bill, of the laches of the former holder, did not entitle him to recover against the first indorser who set up such defence. *Roscow v. Hardy.* 12 E. R. 434

5 A letter written by the indorser of a bill, who had been applied to for payment, after several days' laches, telling the plaintiff that he would not remit till he received the bill, and desiring the plaintiff, if he considered the defendant as unsafe, to return the bill to *Trevor & Co.* (who were prior indorsers on the bill, and also bankers at the defendant's place of residence,) was held not to be such a waiver of laches and promise to pay, but that the defendant, on discovering that in law he was discharged, might refuse payment. *Borradaile v. Lowe.* 4 Taunt. 93

X. ACTION.

(a) *When and by whom maintainable.*

1 Debt lies by the payee against the maker of a promissory note expressed to be for value received. *Bishop v. Young.* 2 B. & P. 78

2 *Quare*, Whether it would, if any of

IX. INDORSER, TO WHAT EXTENT LIABLE.

1 If the holder give time to the acceptor of a bill of exchange, or drawer of a

- these three circumstances were varied? *id.* 2 B. & P. 84
- 3 An action of debt will not lie on a promissory note payable by instalments, till the last day of payment be passed. *Rudder v. Price.* 1 H. B. 547
- 4 A. deposited a sum of money at the banking-house of B. in Paris, for which B. gave him his note, "payable in Paris; or at the choice of the bearer at the Union Bank in Dover, or at my usual residence in London, according to the course of exchange upon Paris;" after this notice was given, the direct course of exchange between London and Paris ceased altogether, having been, previous to its total cessation, extremely low; the note was at a subsequent period presented for acceptance and payment at the residence of B. in London, at which time there was a circuitous course of exchange upon Paris by way of *Hamburg*: Held, that A. was entitled to recover upon the note according to such circuitous course of exchange upon Paris at the time when the note was presented. *Pollard v. Herries.* 3 B. & P. 335
(See 2 H. B. 378.)
- 5 A. having declared against B. on a promissory note made by C. to A., by him indorsed to B., and by him again indorsed to A., judgment was arrested after verdict, on the ground of circuity of action. *Bishop v. Hayward.* 4 T. R. 470
And see tit. NEW-TRIAL.
- 6 An action lies by the indorsee against the indorser upon a bill of exchange immediately on the non-acceptance by the drawee, though the time for which the bill was drawn be not elapsed. *Ballingalls v. Gloster.* 3 E. R. 481
When interest is recoverable.—See tit. INTEREST.

(b) Pleadings.

- 1 In an action on a promissory note by the indorsee against the maker, notice of the indorsement need not be averred. *Reynolds v. Davies* (in error). 1 B. & P. 625
- 2 It is not necessary in a declaration on a bill of exchange to aver that the maker delivered it; it is sufficient to state that he made it. *Churchill v. Gardner.* 7 T. R. 596
- 3 An averment that the defendant was indebted on a bill of exchange, and that the plaintiff having lost the bill had at his request given him a bond acknowledging payment, and conditioned to indemnify him against the bill, states a good consideration for a promise by the defendant to pay the contents of the bill. *Williamson v. Clements.* 1 Taunt. 523
- 4 A bill of exchange payable to the order of A., is payable to A. without alleging any order made; and it is sufficient to declare that A. delivered the bill to the defendant, which he accepted, and by reason of the premises, and according to the custom of merchants became liable to pay the contents to A., without alleging a re-delivery of the bill by the defendant: for if a re-delivery, or something tantamount, to shew the assent of the drawee to charge himself, be necessary to an acceptance, the demurrer, by admitting the acceptance, impliedly admits the re-delivery, &c. *Smith v. M'Clure.* 5 E. R. 476
- 5 A. having signed his name to a blank paper duly stamped, and delivered it to B. for the purpose of drawing a bill of exchange in such manner as B. shall think fit, B. draws a bill payable to a fictitious payee or order, and indorses it over for a valuable consideration to C., who is ignorant of the transaction between A. and B: C. may maintain an action against A. as the drawer of a bill payable to bearer, on a count to that effect. *Collis v. Emmett.* 1 H. B. 313
- 6 Or, C. may recover on a count stating the special circumstances. 1 H. B. 313
- 7 The first count of a declaration stated that the defendant heretofore, to wit, on such a day, drew a bill of exchange bearing date the day and year aforesaid, payable two months after date. The second count stated that afterwards, to wit, on the day and year aforesaid, the defendant drew a certain other bill of exchange, payable two months after date; without mentioning any express date in either count. Held, that both counts were good. *Hague v. French.* 3 B. & P. 173
- 8 In a count against the acceptor of a bill of exchange, stated to be accepted payable at S. and Co.'s. it is sufficient to allege generally a request by the plaintiff

to the defendant to pay the bill, without alleging that it was presented for payment at the particular place. *Fenton v. Goundry*. 13 E. R. 459

- 9 But in C. P. if a declaration alleges a bill to be accepted payable at the house of certain persons at a particular place, it must also aver that the bill was presented for payment at that place, and not to those persons generally. *Ambrose v. Hopwood*. 2 Taunt. 61

- 10 If a bill be accepted payable at a particular place, the plaintiff must aver performance of this, like other conditions precedent, by shewing a presentment to the acceptor at the place specified. And that, whether the action be against the drawer, or against the acceptor. *Gannon v. Schmoll*. 5 Taunt. 344
S. C. 1 Marsh. 80

- 11 The Court of C. P. will not allow a defendant to plead the general issue, and that a bill was given on a stock-jobbing transaction contrary to 7 G. 2. c. 8. *Shaw v. Everett*. 1 B. & P. 222

- 12 A. made a promissory note payable to himself and B. and C. his partners; it was by them indorsed to C. (one of the payees) and D. and E., also partners; in assumpsit upon the note by C. D., and E. against B., he pleaded in bar that the promises were made by him jointly with C., one of the plaintiffs; and held good on special demurrer. *Mainwaring v. Newman*. 2 B. & P. 120

- 13 It is a good plea to an action on a promissory note that the plaintiff is an uncertificated bankrupt, and a replication thereto that the causes of action accrued after the bankruptcy is bad. *Kitchen v. Bartsch*. 7 E. R. 53

- 14 To an action by the indorsees of a promissory note against the drawer, the defendant pleaded that he drew the note as surety only for the payee, and that the plaintiff had released the payee from all claim in respect of the said note; without alleging that the plaintiff had notice of the want of consideration between the defendant and payee: Held, that the release did not operate as an extinguishment of the consideration which the plaintiff had given to the payee for the note, so as to make it a note without consideration between himself and the defendant, and therefore that the plea was

bad on general demurrer. *Carstairs v. Rolleston*. 1 Marsh. 207
And see LIMITATION OF ACTIONS, post.

(c) Evidence, Facts necessary to be proved.

N. B. For the incompetency of witnesses on bills and notes, as being interested in the suit.—See tit. WITNESS.

- 1 Where a bill has been lost, or fraudulently or feloniously obtained from the defendant, the holder who sues must prove that he came to the bill upon good consideration. *Paterson v. Hardacre*. 4 Taunt. 114
2 But the defendant will not be permitted to object to the want of such proof, unless he has given the plaintiff reasonable previous notice, that the plaintiff may come to trial prepared to prove his consideration.

id. ibid.

- 3 Proof of the delivery and payment of a check to the plaintiff, is not sufficient evidence of a debt, in order to support a set-off, unless it be shewn upon what consideration, and under what circumstances it was given. *Aubert v. Walsh*. 4 Taunt. 293
4 Payment of a bill of exchange cannot be enforced without producing the bill. *Davis v. Dodd*. 4 Taunt. 602
5 Where there is a promise to pay a bill of exchange, unless within a fixed time, proof be produced of its being already paid, though the promise be broken (no proof being brought within the time), and the plaintiff in an action on the bill give evidence (under a count on *insimul computassent*) of the special promise; yet the defendant may also prove under that count, that the debt for which the bill was originally given was paid; and thereby avoid the promise by shewing that it was without consideration. *Elmes v. Wills*. 1 H.B. 64
6 A. draws a bill of exchange on B., payable to a fictitious payee or order, and indorsed in the name of such payee, which B. accepts. In an action by an innocent indorsee for a valuable consideration against B., on the bill, in order to draw an inference, either that B., at the time of his acceptance, knew the name of the payee to be fictitious, or that B. had given an authority to A. to draw the bill on B., payable to fictitious persons, evidence is admissible of irregu-

lar and suspicious transactions and circumstances relating to other bills drawn by *A.* on *B.*, payable to fictitious payees, and accepted by *B.*; though none of those transactions or circumstances have any apparent relation to the bill in question; and though none of them prove that *B.* accepted any of those other bills, with a knowledge that the payees mentioned in them were fictitious. *Gibson v. Hunter*, in *Dom. Proc.*

2 H. B. 288

- 7 In an action on a bill given for the price of goods sold under a warranty, the breach of the warranty is an answer to the plaintiff's demand on the bill if the defendant has tendered back the goods, although the plaintiff did not accept them. *Lewis v. Cosgrave*.

2 Taunt. 2

- 8 Where a foreign bill of exchange payable 40 days after sight is refused acceptance, and an action is brought in order to charge the drawer, proof of the *noting* of the bill for non-acceptance is not sufficient, without proving that it was also protested for non-acceptance, though there be a subsequent protest for non-payment. *Rogers v. Stephens*.

2 T. R. 713

- 9 A protest for non-acceptance of a foreign bill of exchange is not necessary to be proved in an action by the indorsee against the drawer, if it appear that the drawer had no effects, in the hands of the drawee, at the time; and it do not appear that there was any fluctuating balance of assets between them unascertained at the time which might then have afforded probable ground of belief to the drawer that his bill would be honoured. *Legge v. Thorpe*.

12 E. R. 171

- 10 Want of notice to a bankrupt drawer, of the dishonour of a bill, may be supplied by evidence of his acknowledgment to the holder, when asked if the bill would be paid, that it would not; though such acknowledgment were made after the act of bankruptcy committed. *Brett v. Levett*.

13 E. R. 213

- 11 An indorsee, three months after a bill became due, demanded payment of the indorser, who first *promised to pay it if he would call again with the account*, and in a day or two being called upon again for payment, said,

that he had not had regular notice, *but as the debt was justly due he would pay it*: Held, that the first conversation being an absolute promise to pay the bill, was, *prima facie*, an admission that the bill had been *presented in due time*, and *dishonoured*, and that due notice had been given of it to the indorsee, and superseded the necessity of any further proof. *Lundie v. Robertson*.

7 E. R. 231

- 12 The indorsee of a promissory note may recover upon it against the payee and indorser, on evidence of a promise to pay it, made some time after the dishonour of the note, by him to a subsequent indorsee, who then held it; without direct proof by the plaintiff, that due notice of the dishonour was given to such payee and indorser. *Potter v. Rayworth*.

13 E. R. 417

- 13 In an action against the acceptor of a bill of exchange, it is necessary to prove the hand-writing of the first indorser, notwithstanding such indorsement was on the bill at the time it was accepted. *Smith v. Chester*.

1 T. R. 654

- 14 *A.* draws a promissory note payable to *B.* or order, which *B.* indorses, having given no value for it, and knowing that *A.* is insolvent; in an action by the indorsee against *B.*, it is not necessary to prove that the note was presented for payment to *A.* immediately when it became due, or that notice was given to *B.* of *A.*'s refusal to pay it. *De Berdt v. Atkinson*.

2 H. B. 356

- 15 A bill being presented by the indorsee to the drawee for acceptance, the latter on accepting it said, that he expected a remittance from the drawer in a few days, and that as he had a bill of the drawer in his hands which would be paid, he would take all risks: Held, that this conversation, together with the bill accepted by the drawee, did not amount to sufficient evidence to entitle the indorsee to recover against the drawee the amount of the bill accepted on a count for money had and received. *Whitwell v. Bennett*.

3 B. & P. 559

- 16 *A.* makes a promissory note payable to *B.*, or order, with a memorandum upon it that it will be paid at the house of *C.*, who is *A.*'s banker; in the course of business the note is indorsed to *C.* In an action by *C.*

against the indorser, it is not necessary to prove an actual demand on *A.*

- Saunderson v. Judge.* 2 H. B. 509
- 17 *A.* in Jamaica, draws a bill on *B.* in London, on a Jamaica stamp, leaving the payee's name in blank. *C.* gets possession of the bill, and inserts his own name as payee, without any other authority than a letter from *B.* promising to accept it; but having the address torn off and containing nothing to shew to whom it was ad-

dressed: Held; that this was not evidence to shew that *C.* was the payee of the bill. *Crutchley v. Mann.*

1 Marsh. 29

For judgment by default, and reference to the master to ascertain the sum due on bills and notes, see *tit. INQUIRY*, WRIT OF.

When the Court will stay proceedings on payment of costs, see *Smith v. Woodcock.*

4 T. R. 691

Post, *tit. PRACTICE.*

BILLS OF LADING.

N. B. *How far the negotiation of a bill of lading may tend to defeat the right of stopping in transitu, See tit. STOPPAGE IN TRANSITU, post.*

- 1 A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. *Mason v. Lickbarrow (in error).* 1 H. B. 359
- 2 Bills of lading are transferrable and negotiable by the custom of merchants. *Lickbarrow v. Mason.* 5 T. R. 683
- 3 The indorsement and delivery of a bill of lading is *primâ facie* an immediate transfer of the legal interest in the cargo. 1 T. R. 215, 216
And *Hibbert v. Carter.* 1 T. R. 745
- 4 Bills of lading are negotiated and transferred by the shipper's indorsement; and when such bills of lading are transmitted from abroad, it is usual for merchants to accept bills in consequence of them before the arrival of the goods. *Haille v. Smith.* 1 B. & P. 564
- 5 A bill of lading is not a necessary instrument of the transfer of property in goods consigned to the owner. *Meyer v. Sharpe.* 5 Taunt. 80
- 6 A bill of lading may operate as a contract between the master and consignee for payment of demurrage as well as of freight. *Leer v. Yates.* 3 Taunt. 387
- 7 There is no distinction between a bill of lading indorsed in blank, and an indorsement to a particular person. *Lickbarrow v. Mason.* 2 T. R. 63
- 8 Where several bills of lading of different imports have been signed, no reference is to be had to the time when

they were signed, by the captain; but the person who first gets legal possession of one of them, by delivery from the owner or shipper, has a right to the consignment. *Caldwell v. Ball.*

1 T. R. 205

- 9 And where such bills of lading, though different upon the face of them, are constructively the same, and the captain has acted *bonâ fide*, a delivery according to such legal title will discharge him from them all.

1 T. R. 205

- 10 An assignment of goods at sea as a collateral security for a debt, and a subsequent indorsement of a bill of lading, are good as against the assignees of the assignor, who committed an act of bankruptcy between the assignment of the goods and the indorsement of the bill of lading. *Lempriere v. Pasley.*

2 T. R. 485

- 11 *A.* consigns goods to *B.* abroad and orders a cargo in return, for which he sends his own ship. The return cargo is delivered to *A.*'s captain, *B.* stating it to be *on A.'s account, as A.'s own goods, and to be delivered to A.* The return cargo consisting of more goods than the proceeds of those consigned to *B.*, *B.* draws bills on *A.* for the difference, which he sends to his agents with a bill of lading drawn in blank, and desiring the agent, in case of *A.*'s refusal to accept the bills, to indorse the bill of lading to *C.* *A.* refuses to accept the bills, and the bill of lading is accordingly indorsed to *C.* The ship arrives, and *C.* demands the cargo, as indorsee of the bill of lading; captain, however, refuses, and delivers

them to *A.*, who deposits them with *D.* as his warehouseman: *D.* then receives notice from *B.* to hold the goods for *B.* as his property, in consequence of which, *D.* refuses to re-deliver them to *A.* In an action of trover by *A.* against *D.*: Held, 1st, that *D.* was not estopped, by having received the goods as warehouseman of *A.* from setting up the claim of a third person as a defence, supposing that claim to be a good one: 2dly, that *A.*, having rested his claim on the supposition that the property had vested in him, could not, if he failed in that defence, set up his lien on the goods for freight: but, 3dly, that though the goods might have been delivered to the captain, on condition of *A.*'s accepting the bills, yet that, as no such condition was imposed at the time of the delivery, that delivery was complete, and vested the property absolutely in *A.* *Ogle v. Atkinson.* 1 Marsh. 323

And see *tit.* STAMPS.

- 12 A freighter of a ship to *Spain* and *Portugal*, or either, as the master should be directed by the freighter or his assigns,

having first ordered the master to proceed to *Lisbon*, in consequence of which the master had taken in goods, and signed bills of lading to that port, cannot afterwards countermand that order, and order him to proceed to *Gibraltar*, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon. *Davidson v. Gwynne.*

12 E. R. 381

- 13 The usual clause in a bill of lading, engaging the master of the ship to deliver the goods to the consignee or his assigns, *he or they paying freight for the said goods*, is introduced for the benefit of the master only, and not for the benefit of the consignee; and therefore the master is not bound to the consignor to withhold the delivery of the goods unless the consignee or his assigns pay the freight. Nor does it vary the case that the consignor was also the charterer of the ship. *Shepherd v. De Bernales.* 13 E. R. 565

N. B. For cases relative to freight, see *tit.* FREIGHT, *post.*

BILLS OF SALE.

N. B. For the requisites of a bill of sale in transferring property in ships, see *tit.* SHIPS AND SHIPPING, *post.*

- 1 It is a general rule in the transfer on chattels, that the possession must accompany and follow the deed. *Edwards v. Harben.* 2 T. R. 587

- 2 Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.

2 T. R. 587

- 3 An absolute conveyance of personalty, without possession, is, in point of law, fraudulent; and not merely evidence of fraud. 2 T. R. 587

- 4 The goods of *A.* being taken in execution, and put up to sale, *B.* became the purchaser, and took a bill of sale of the sheriff, but permitted *A.* to continue in possession; *A.* then executed another bill of sale of the same goods to *C.* a creditor; under which the latter took possession; whereupon *A.* brought an action against *C.* for the

produce: Held, that the first bill of sale was valid, and that *B.* was therefore entitled to recover. *Kidd v. Rawlinson.* 2 B. & P. 59

- 5 A creditor having taken in execution the goods of a defendant who had confessed judgment, and having herself bought them by public auction, and taken a bill of sale for a valuable consideration from the sheriff, and let the goods to the former owner for a rent, which was actually paid, has a title which cannot be impugned as fraudulent by other creditors having executions against the same defendant. *Watkins v. Birch.* 4 Taunt. 823

- 6 A bill of sale of goods made for a valuable consideration, unaccompanied with the possession, is valid as against the vendor: And as against a creditor, with whose knowledge and assent it was given. *Steel v. Brown & Parry.*

1 Taunt. 381

- 7 A bill of sale does not amount to an act of bankruptcy. *Manton v. Moor.*

7 T. R. 67. *ante*, page 116

BOND.

I. LIABILITY OF OBLIGOR.

(a) *On joint and several Bonds.*(b) — *Bonds of Surety and Indemnity.*

II. CONSIDERATION.

III. CONDITION, HOW CONSTRUED.

IV. PLEADING.

(a) *On Bonds conditioned for Payment.*(b) — *Performance of Covenants.*

V. BREACHES, WHEN AND HOW ASSIGNED.

VI. DAMAGES, HOW ASSESSED.

VII. SATISFACTION, WHERE PRESUMED.

I. LIABILITY OF OBLIGOR.

(a) *On joint and several Bonds, and Contribution thereon.*

1 If the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. *Cheatham v. Ward.* 1 B. & P. 630

2 But where *A.* as surety, and *B.* as principal, are jointly and severally bound to *C.*, *B.* becomes insolvent, and *C.* the obligee, receives a dividend from his effects, and covenants not to sue *A.*, and that if he do, the deed of covenant may be pleaded in bar, *C.* may nevertheless sue *A.*, for this is only a release to *B.* by construction. *Dean v. Newhall.* 8 T. R. 168

3 Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunction is granted *pro tempore* on condition of paying the debt into Court, which is done accordingly; and afterwards the money is paid over: Held, that the bail were damaged by payment of money into Court, after notice to the debtor, and no fund provided by him. For one who agrees to indemnify and save others harmless against a certain engagement, is bound to secure them from incurring any expense, as it runs on at the time, which falls upon them by virtue of that engagement. *Spurkes v. Martindale.* 8 E. R. 593
And see BAIL ante.

4 *A.* executed a bond as the joint and several bond of himself and *B.*, and signed it "*A. and B.*," having no authority from *B.* so to do: Held that the bond was good, as the several bond of *A.* *Elliot v. Davis.* 2 B. & P. 338

5 It seems that one of several co-sureties in a bond may recover against any one of the others his aliquot proportion of the money paid by him under the bond; regard being had to the number of sureties. *Cowell v. Edwards.* 2 B. & P. 268

6 Even though the insolvency of the principal and of the other sureties be not proved. *ib.*

7 If *A.*, *B.*, and *C.* become bound as sureties for *D.* in three separate bonds, and any one of them be compelled to pay the whole debt of the principal, the two others are compellable to contribute in proportion to the penalties of their respective bonds. *Deering v. Winchelsea (Earl of) in Cam. Seac.* 2 B. & P. 270

(b) *Bonds of Surety and Indemnity.*

1 A bond with a condition that a clerk shall faithfully serve and account for all money, &c. to the obligee and his executors, does not make the obligor liable for money received by the clerk in the service of the executors of the obligee, who continue the business and retain the clerk in the same employment, with the addition of other business, and an increase of salary. *Barber v. Parker.* 1 T. R. 287

2 But a bond for the fidelity of a clerk, who was taken into the service of the obligees as a clerk in their shop and counting-house, is not discharged by the obligees taking another partner into their house; and the obligees may recover money received by the clerk after such change of partners. *Barclay v. Lucas.* 1 T. R. 291, n.

Such a bond is only as a security to the house of the obligees. 1 T. R. 287

3 Under a bond of indemnity given by *A.* that *B.* who was appointed the general agent of *C.* the receiver of his rents, and the manager of his estates, should pay over to *C.* all rents which he should receive, *as also the in-*

crease and improvements thereof upon any new contracts or renewals of leases; *A.* is answerable for all fines received by *B.*, on renewing the leases, which were not paid over by him. *Irish Society v. Needham.* 1 T. R. 482

- 4 Where a bond by *A.*, reciting that *B.* intended to open a banking account with *C.*, *D.*, and *E.*, as his bankers, was conditioned for payment to them of all sums from time to time advanced to *B.* at the banking-house of *C.*, *D.*, and *E.*: Held, that on *C.*'s death such obligation ceased, and did not cover future advances made after another partner was taken in; and that *B.*, who was indebted to the house at *C.*'s death, having afterwards paid off the balance, which was applied at the time to the old debt incurred in *C.*'s lifetime, *A.* was wholly discharged from his obligation. *Strange v. Lee.* 3 E. R. 484
- 5 A bond was given to *A.*, *B.*, *C.*, &c. payable to them and their successors, as the governors of the society of musicians, conditioned to secure *J. H.*'s faithfully accounting with them and their successors, governors, &c. as their collector; afterwards the society was incorporated by letters patent, at which time *J. H.* had duly accounted for all monies collected by him; but after the incorporation he received money for which he did not account: Held, that the obligor of the bond was not liable for such default. *Dance v. Girdler.* 1 N. R. 34

A bond given to Trustees to secure the faithful services of a clerk to the *Globe Insurance Company* who were no corporation, may be put in suit by the trustees for a breach of faithful service committed by the clerk at any time during his continuance in the service of the actual existing body of persons carrying on the same business under the same name, notwithstanding any intermediate change of the original holders of the shares by death or transfer: the intention of the parties to the instrument, being apparent to contract for such service to be performed to the company as a fluctuating body: and the intervention of the trustees removing all legal and technical difficulties to such a contract made with, or suit instituted by, the company themselves as a natural body. *Metcalf, Bart. v. Bruin.* 12 E. R. 400

And see *CONDITION, post, page 164.*

II. CONSIDERATION.

- 1 Where a woman, on her marriage with a copyholder of a manor, where the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband by a former wife should have possession of part of the copyhold estate after the death of the husband on condition of his repairing the part of the house reserved for her, &c.: this was held to be a good consideration. *Rex v. Inhabitants of Lopen.* 2 T. R. 580
- 2 A bond given by an incumbent to the patron, on presentation, to reside on the living, or to resign if he did not return to it, after notice, and also not to commit waste, &c. on the parsonage house, is good. *Bagshaw v. Bossley.* 4 T. R. 78
- 3 In such case, a license to the incumbent to absent himself from the living may be revoked. 4 T. R. 78
- 4 A bond given by a schoolmaster of an ancient public school, who had a freehold in his office, to resign at the request of his patron, is good at law; but equity will restrain any improper use of it by the patron. *Legh v. Lewis.* 1 E. R. 391
- 5 On error brought in this case in the Exchequer Chamber, that Court thought it did not appear upon the pleadings that it was a freehold office, and therefore affirmed the judgment without giving any opinion upon the principal point. *Lewis v. Legh (in error).* 3 B. & P. 231
- 6 In consideration that *A.* would take *B.* as an assistant in his business as a surgeon, for so long time as it should please *A.*, *B.* agreed not to practise on his own account for 14 years within ten miles of the place where *A.* lived, and gave a bond for this purpose: this bond was held good in law. *Davis v. Mason.* 5 T. R. 118
- 7 A bond given by a servant of the *African Company*, conditioned to take possession of the effects of persons dying intestate in one of their settlements on the coast of *Africa*, and sell the same, and remit the produce to the Company in *Europe*, to be by them delivered to the lawful administrator, is a legal bond. *African Company v. Torrance.* 6 T. R. 588

8 A bond given to an individual, conditioned to be void if the obligor (on the obligee's agreeing not to prosecute him), should remove certain public nuisances and not erect any others of the same kind, is good in law. *Fallowes v. Taylor*. 7 T. R. 475

9 A bond taken by commissioners appointed under an Inclosure Act, to indemnify themselves against the expenses of a suit brought to try the right to an allotment made by them, and in which they are, according to the directions of the Act, made defendants, is not void; though there be a fund provided out of which such expenses may in some cases be satisfied; at least if the commissioners doubt whether the case in question be one of those cases. *Iles v. Boxall*. 2 B. & P. 89

10 A *post-obit* bond is a security of a doubtful nature. *Lushington v. Waller*. 1 H. B. 95

III. CONDITION, HOW CONSTRUED.

1 A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay or be liable to pay on the obligor's account: and, before the execution of the bond, a memorandum was thereon indorsed that the obligee "hath given an undertaking not to sue upon the bond till after the obligor's death:" Held, that this memorandum was to be taken as part of the condition; and made the bond in effect payable only by the representatives of the obligor after his death. *Burgh v. Preston*. 8 T. R. 483

2 If the condition of a bond be to render a person in execution who has once been discharged, the latter condition is void. Condition to do one of two things, one becomes impossible, no reason for not performing the other. *Da Costa v. Davis*. 1 B. & P. 242

3 A bond conditioned for the payment of a sum of money to such person as A. B. shall by will appoint, is not forfeited by non-payment to the *residuary legatee* of A. B., no specific appointment having been made in the will of A. B. *Buckland v. Barton*. 2 H. B. 136

4 A bond, dated on a day certain, in a penal sum, conditioned for payment of a less sum generally, without naming any day of payment, is payable on the

day of the date; and on an action brought upon it, the Court will refer it to the Master to compute principal, interest, and costs thereon, and on payment of the same stay the proceedings, under stat. 4 Anne, c. 16. s. 13. *Farquhar, Bart. v. Morris*. 7 T. R. 124

Interest is due on such a bond, though not expressly reserved. 7 T. R. 124

5 In a bond conditioned "for the payment of one hundred pounds by instalments, till the full sum of one Pounds be paid; the word *hundred* having been omitted in the second place where it occurred in the condition: Held, that the insertion of it by a stranger was an immaterial alteration, and did not avoid the instrument. *Waugh v. Bussell*. 1 Marsh. 311

And see post, tit. VARIANCE.

6 A bond conditioned to pay costs on 29th November, in *Cumberland*, when taxed by the Master of K. B. is forfeited by non-payment, though in fact the costs were only taxed on the 25th of November, of which the defendant had no notice on or before the 29th, for the defendant might have had them taxed before, and thus have known their amount in time. *Bigland v. Skelton*. 12 E. R. 436

7 A bond, conditioned to repay to five persons all sums advanced by them or any of them, in their capacity of bankers, will not extend to sums advanced after the decease of one of the five by the four survivors; the four then acting as bankers. *Weston v. Barton*. 4 Taunt. 673

8 A bond for the collection and payment over of public duties may be put in force against one of the sureties, though he were not apprised of the default of the principal collector in not paying over the duties collected by him, nor called upon for an indemnity by the commissioners, till after the dismissal from office of such collector. *Nares v. Rowles*. 14 E. R. 510

9 The laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees) in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment, so soon as they might have done, for sums in arrear or

unaccounted for, is not an estoppel at law in an action against the sureties. *The Trent Navigation Company v. Harley.* 10 E. R. 34

- 10 The condition of a bond, reciting that the defendant had agreed to collect their revenues from "*time to time for twelve months*;" and afterwards stipulating that, "*at all times thereafter during the continuance of such his employment; and for so long as he should continue to be employed*," he would justly account and obey orders, &c. confines the obligation to the period of 12 months mentioned in the recital. *Liverpool Water Works Company v. Atkinson.* 6 E. R. 507

The Same v. Harpley. *ibid.*

- 11 *A*, *B*, and *C*. entered into a bond as sureties for *D*. and *E*., the condition of which bond recited that *D*. was on such a day appointed collector of the church rate of the parish of *S. S.* by virtue of which office he was empowered to collect and receive all such monies as were rated and assessed on the inhabitants by virtue of the said rate, and for which he was accountable to the wardens of the grand account, and bound the sureties for *D*.'s duly accounting for all monies collected or received by him on account of the above rate, as also on all and every other rate or rates thereafter to be made and collected by him the said *D*.: Held, that the sureties were only answerable for *D*. in that single appointment, and not on his appointment in the ensuing year. *The Wardens of St. Saviour's, Southwark, v. Bostock.* 2 N. R. 175

- 12 A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under the stat. 43 G. 3. c. 122, to the commissioners acting for the district under that statute, for the due collection and payment of those duties to the receiver-general, could not, it seems, be enforced if the statute referred to, did not authorize the collection of those duties, though in fact the collector had received sums from the subjects as and for such duties. But that statute authorizing the duties to be assessed and collected "*under the regulations of any Act to be passed in the same session of parliament for consolidating certain of the provisions con-*

tained in any Act or Acts relating to the duties under the management of the commissioners for the affairs of taxes, &c." was held to speak the language of the legislature as from the commencement of, and with reference to, the whole session, and to relate to a prior Act, with the title referred to, passed in the same sessions (c. 99), and indorsed accordingly with a prior date, by virtue of the stat. 33 G. 2. c. 13. *Nares v. Rowles* 14 E. R. 510

- 13 A bond made by defendant's testator as surety for *E*., with a condition reciting, that *E*. had been and still was collector of the land-tax, and all other taxes and duties imposed by several Acts of Parliament on the inhabitants of the parish of *C*., by means whereof he received from the inhabitants divers sums of money, and conditioned for the due payment by *E*. from time to time, and at all times thereafter, to the receiver general of taxes, &c. all and every sum which he (*E*.) should from time to time collect and receive from the inhabitants of the parish; for, or on account of any tax or taxes then imposed, or which should or might thereafter be imposed on them by any Act of Parliament, was held to be confined to the current year for which *E*. was at the date of the bond collector, although it did not appear on the condition that he was only appointed for a year, it being shewn by the defendant's plea that the said office of collector was an annual office, and held as such by *E*. at the date of the bond, although by the replication it appeared that *E*. held the office not only for that year, but from thence to the time of exhibiting plaintiff's bill. *Hussell v. Long.* 2 M. & S. 363

- 14 A bond given to parish officers, reciting that *B*. had taken a house in the parish for a term of seven years, and conditioned to indemnify the parish against any charges which they might sustain on account of *B*. and his family becoming inhabitants of and belonging to the parish, is not discharged by *B*.'s purchasing an estate of the value of 30*l*. in the parish, and residing on it upwards of 40 days, after the expiration of the 7 years' lease. *Edwards v. Bobbit.* 1 M. & S. 130

- 15 A bond entered into by *A*. and *B*. to the plaintiffs to enable *A*. to carry on

his trade, conditioned for the payment of all such sums not exceeding 3000*l.* which should at any time thereafter be advanced by plaintiffs to *A.*, is not a continuing guarantee to the extent of 3000*l.* for advances made at any time, but only a guarantee for advances once made to the extent of 3000*l.* Payments made generally to the plaintiffs on the account of *A.* may be applied by them in liquidation of a balance existing against *A.* before the execution of the bond, and *B.* cannot insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it, plaintiffs did not give him notice that any balance was then existing against *A.* *Kirby v. the Duke of Marlborough.*

2 M. & S. 18

16 The extent of the condition of an indemnity-bond may be restrained by the recitals, though the words of the condition import a larger liability than the recitals contemplate. *Pearsall v. Summerset.*

4 Taunt. 593

17 The obligee of a bond given by principal and surety conditioned for the payment of money by instalments, who has proved under a commission of bankruptcy against the principal the whole debt, and received a dividend thereon of two shillings and seven pence in the pound, may recover against the surety an instalment due, making a deduction of two shillings and seven pence on the amount of such instalment, and the surety is not entitled to have the whole dividend applied in discharge of that instalment, but only rateably in part payment of each instalment as it becomes due. *Martin v. Brecknell.*

2 M. & S. 39

IV. PLEADING.

(a) On Bonds, conditioned for Payment

1 To debt on bond conditioned for the payment of a certain sum at a certain day, defendant pleaded that by articles of agreement between the plaintiff, her sister, and the defendant, the interest of the money was to be paid to one of the sisters upon an event which had happened; but as the plea did not allege the payment of the interest accordingly, it was holden bad. *Baldee v. Elers.*

5 T. R. 250

2 To debt on bond conditioned for the

payment of a sum of money, which the condition stated to have been *taken up, borrowed, and received* by the defendants of the plaintiffs at *respondentia* interest, secured by a cargo of goods shipped from *Calcutta to Ostend*, it is competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the *East Indies*, and illegally prepared by the plaintiffs for shipment from thence to beyond the *Cape of Good Hope*, without the license of the *East India Company*; without proceeding to state formally, that the condition was colourable, to conceal the illegality of the transaction, and to negative that the bond was given for money *taken up, borrowed, and received*, &c. For the statement in the plea is rather explanatory of, than absolutely inconsistent with, the transaction stated in the condition of the bond: but if it were inconsistent with it, the plea would still be good in this form. *Par-ton v. Popham.*

9 E. R. 408

And see *Downing (Lady) v. Chapman.*

id. 414, *n.*

3 *A.* gave *B.* a bond to secure an annuity, and before any payment became due *A.* lent *B.* a sum of money; on which it was agreed that *B.* should retain the payments of the annuity as they became due till that sum was discharged: then *B.* became a bankrupt; and the agreement to retain was held a good plea to an action on the bond by *B.*'s assignees for the payments accruing after the bankruptcy, being equivalent to a plea of *solvit ad diem.* *Sturdy v. Arnaud.*

3 T. R. 599

4 If the obligor of a bond, after notice of its being assigned, take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the Court of C. P. will set the plea aside, nor will they, under these circumstances, allow the obligor to plead payment of the bond. *Legh v. Legh.*

1 B. & P. 447

5 *Non damnificatus* cannot be pleaded to debt on bond conditioned for the payment of a sum of money at a certain day, though it appear by the condition that the bond was given by way of indemnity. *Holmes v. Rhodes.*

1 B. & P. 638

6 An officer cannot commute for money

the services of an impressed man, nor let him go for money; and a bond given to secure the man's return on non-payment of such money is void, and may be avoided by plea disclosing the true transaction, and shewing that the man was illegally impressed.

Pole v. Harrobin. 9 E. R. 417, n.

- 7 To debt on bond the defendant pleaded that the bond was given to secure payment of the price of goods agreed to be sold and delivered in *London* by the plaintiff to the defendant, to be by the latter shipped to *Ostend*, and from thence re-shipped for the *East Indies*, and there trafficked with clandestinely: Held a sufficient bar to the action; the case being within stat. 7 G. 1. c. 21. which avoids all contracts for supplying cargoes to foreign ships in such a trade. *Lightfoot v. Tenant.*

1 R. & P. 351

- 8 To debt on bond dated 20th *July*, conditioned for repayment of the principal sum, with interest at 5*l.* per cent. from 24th *June* preceding, defendant pleaded that there was a corrupt agreement between plaintiff and defendant that the former should lend the principal sum on 20th *July*, to be repaid with interest from 24th *June* preceding, which exceeds legal interest, and that the bond was given in pursuance thereof; the plaintiff, in his replication, traversed the corrupt agreement, and defendant demurred; judgment was given for the plaintiff, because the demurrer admitted the non-existence of any corrupt agreement. *Grimwood v. Barril.* 6 T. R. 460

- 9 Debt on bond conditioned for payment of an annuity of 175*l.* quarterly, during the life of *G.*; pleas, payment of the annuity at the days, and payment of the arrears after the days in the condition. Replication, that the defendant did not pay the annuity or the arrears in manner and form as defendant alleged, but on the contrary, plaintiff suggested that during the life of *G.* 87*l.* 10*s.* for two quarterly payments became due and was still in arrear, and concluded to the country. On demurrer the Court seemed to think the replication bad, and gave the defendant leave to amend on payment of costs. *De la Rue v. Stewart.*

2 N. R. 362

- 10 If defendant plead to debt on bond that plaintiff won money of him at

cards, and that the bond was given for securing payment of it; to which the plaintiff replies that it was given to secure the payment of money justly due, and not for securing the payment of money won; the replication may either conclude to the country, or with an averment. *Hedges v. Sandon.*

2 T. R. 439

N. B. Rule for duplicity in pleading on a bond, refused. *Rama Chitty v. Hume.*

13 E. R. 255

See also *Jenkins v. Edwards.* 5 T. R. 97

(b) Performance of Covenants.

- 1 To debt on bond conditioned for performance of articles in an agreement referred to, a plea of performance generally was held bad on special demurrer, because it did not appear but that some of the articles might be negative or disjunctive. *Earl of Kerry v. Baxter.* 4 E. R. 340

- 2 *Quere.* If such plea would have been helped by an allegation, that none of the articles were negative or disjunctive? *ib.*

- 3 So where general performance was pleaded to debt on bond conditioned to perform covenants, and the plaintiff in his replication set out the indenture *verbatim* and then demurred, shewing for cause that the defendant had not shewn how he had performed the negative covenants: demurrer held good. *Secus.* If the indenture set out in the replication had contained no negative or disjunctive covenants, in which case the defect of the plea in not setting out the indenture would have been cured. *Plomer v. Rain.* 4 E. R. 344, n.

- 4 Debt on bond, conditioned for the performance by *R. G.* of all the covenants on his part mentioned in a certain indenture, bearing even date with the bond, made or expressed to be made between the plaintiff and the said *R. G.*: plea, that before the execution of the bond it was agreed that the plaintiff should grant to *R. G.* a lease under certain covenants, and that the defendant should enter into a bond as surety for the performance of those covenants: that the defendant did accordingly enter into the bond on which the action was brought, but that the indenture mentioned in the condition thereof is the lease so agreed upon, and no other, but that the said

- lease never was executed: Held on demurrer, that the defendant was estopped by the condition of the bond from pleading this matter. *Hosier v. Searle.* 2 B. & P. 299
- 5 Debt on bond conditioned for J. S. rendering account to the plaintiffs of all monies which he shall receive as their agent. Defendant pleads performance in the words of the condition. Plaintiffs reply, that J. S. received divers sums of money amounting to 2000*l.* belonging and relating to the plaintiffs' business as their agent, and hath not rendered to the plaintiffs an account of the said 2000*l.* or any part thereof. This replication being specially demurred to for generality, was held sufficient. *Shum v. Farrington.* 1 B. & P. 640
- 6 To debt on bond, conditioned that one B. R. should account for and pay over to the plaintiffs as treasurers of a charity, such voluntary contributions as he should collect for the use of the charity, the defendants pleaded general performance: the plaintiffs replied, that B. R. had received *divers sums* amounting to a large sum, *viz.* 100*l.* from *divers persons* for *divers voluntary contributions* for the use of the said charity, which he had not accounted for or paid over, &c. It was held by the Court on special demurrer, that the replication was sufficiently certain. *Barton v. Webb.* 8 T. R. 459
- 7 Covenants to sink coal mines by a certain day, as far as could be accomplished, or in default, to pay so much to the lessor as should be awarded: on default a sum was awarded to the lessor for the time past, and an annual rent for the time to come, until such coal mines should be sunk; to an action on the bond, it is a sufficient plea that the defendant paid the sum awarded, and that on trial there were no coal mines found fit to be worked. *Hanson v. Boothman.* 13 E. R. 22
- V. BREACHES, WHEN AND HOW ASSIGNED.
- 1 In debt on bond conditioned to perform an award, the plaintiff must assign a breach under the stat. 8. & 9. W. 3. c. 11. and cannot have judgment for the penalty, and take out execution for the single sum awarded, though the measure of damages be ascertained by the award. *Welch v. Ireland.* 6 E. R. 613
- 2 After judgment for the plaintiff on demurrer, in debt on bond conditioned to pay an annuity, the defendant cannot take out execution for the arrears due, but must assign breaches on the record under stat. 8 & 9 W. 3. c. 11. s. 3. *Walcot v. Goulding.* 8 T. R. 126
- 3 After oyer of the condition and *non est factum* pleaded to debt on bond, on which issue is joined and notice of trial given, the plaintiff may enter a suggestion on the roll, and assign breaches, pursuant to the 8 & 9 W. 3. c. 11. *Ethersey v. Jackson.* 8 T. R. 255
- 4 In debt on bond, conditioned not to assault, molest, or injure the person of the plaintiff, the replication alleging that defendant assaulted, &c. by beating and ill-treating plaintiff, was held a sufficient assignment of the breach of the condition for which the jury were to assess damages on stat. 8 & 9 W. 3. c. 11. s. 8. though such breach were not alleged in formal terms, according to the statute. *Tombs v. Painter.* 13 E. R. 1
- 5 In debt on bond, conditioned for the performance of covenants, if the defendant craves oyer, and pleads performance of each covenant specially, and also general performance, the plaintiff must assign specific breaches in his replication, if he has not done it in his declaration; and if he merely takes issue on the general performance, and enters a separate assignment of breaches on the record, no damages can be assessed on them, and the Court will award a replender. *Plomer v. Ross.* 5 Taunt. 386
S. C. 1 Marsh. 95
- 6 To debt on bond, the condition of which was that A. B. should deliver a true account of all monies received by him in pursuance of his office, the defendant pleaded performance generally. The plaintiff, in his replication, assigned for breach, that A. B. was requested to deliver a true account of all monies received by him in pursuance of his office, but refused so to do. Held on special demurrer, that this assignment of the breach was bad, in not alleging, "that A. B. had received any monies by virtue of his office." *Sena v. Fyffe.* 1 Marsh. 441
- VI. DAMAGES, HOW ASSESSED.
- 1 In an action on a bond, damages may

be recovered for more than the penalty. *The Earl of Lonsdale v. Church.*

2 T. R. 388

- 2 Therefore in debt on bond with condition to account for money to be received, the Court will not stay proceedings upon paying the penalty into Court. 2 T. R. 388

- 3 But in a subsequent case the Court ordered satisfaction to be entered on the record in an action on a bond of indemnity, on the defendant's paying the penalty of the bond and the costs of the action. *Wilde v. Clarkson.*

6 T. R. 303

- 4 If an instalment of an annuity secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law. *Judd v. Evans.*

6 T. R. 399

- 5 And therefore the defendant having been charged in execution for such a penalty of 10.0*l.* under such circumstances, previous to the last Insolvent Act, the Court refused to order that sum to be reduced in the Marshal's book to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that Act.

6 T. R. 399

- 6 The stat. 8 & 9 W. 3. c. 11. s. 8. which enacts, "that in actions on any penal sum for non-performance of covenants, &c. the plaintiff may assign as many breaches, &c.; and if judgment shall be given for the plaintiff on *nil dicit*, the plaintiff may suggest on the roll as many breaches, &c. as he shall think fit, upon which shall issue a writ to summon a jury, before the justices of assize, &c. to inquire, &c. and to assess the damages, &c." is compulsory on the plaintiff, and he cannot enter up judgment for the whole penalty on a judgment by default, as he might have done at common law. *Roles v. Rosewell.*

5 T. R. 538

And see *Hardy v. Bern.* 5 T. R. 540

- 7 A bond given to the Lord Chancellor by the petitioning creditor of a bankrupt, under 5 G. 2. c. 30. s. 23. is not within the 8 & 9 W. 3. because the Chancellor is to assess the damages; though he may assist his conscience by directing an inquiry before a master, or an issue at law. *Smithy v. Edmonson.*

3 E. R. 22

- 8 On a bond conditioned for replacing stock, the obligee is not entitled to

special damages for a profit which he might have made, if it had been sooner replaced, unless he shews that he actually would have made it. The measure of damages on such a bond is the price, at the day when it ought to have been replaced, or the price at the day of trial, at the option of the plaintiff. *McArthur v. Lord Seaforth.*

2 Taunt. 257

- 9 In an action upon a judgment recovered upon a bond, interest may be recovered in damages beyond the penalty of the bond; though it were a judgment recovered abroad, viz. in Ireland. *McClure v. Dunkin, Knt.*

1 E. R. 436

And see *tit.* INTEREST, *post.*

- 10 Final judgment may be entered upon a bail-bond, without executing a writ of inquiry. *Moody v. Pheasant.*

2 B. & P. 446

- 11 It was referred to the prothonotary, in debt on bond after judgment by default, to tax interest by way of damages, it being at the plaintiff's option to have interest so taxed, or to have a writ of inquiry. *Holdipp v. Otway*, cited. 7 T. R. 447, *n.*

- 12 Judgment by default having been suffered in an action on a bond, the plaintiff entered up judgment for the penalty, together with 9*l.* 10*s.* for damages and costs. A writ of inquiry having been executed, damages were assessed at 111*l.* 13*s.* 4*d.* and costs 40*s.*; and the plaintiff entered up another judgment for those damages, together with 31*l.* 6*s.* 8*d.* for costs; but afterwards entered a *remittitur* on the roll for the costs: Held, that the second judgment was erroneous. *Hankin v. Broomhead*, (*in error.*) *Cam. Scac.*

3 B. & P. 607

- 13 A bond conditioned for the payment of a certain sum by instalments, is within the stat. 8 & 9 W. 3. c. 11. s. 8. and after judgment obtained upon default of payment of one of the instalments, if a subsequent instalment be in arrear, the plaintiff cannot sue out execution for it, though within a year after such judgment, without first suing out a *scire facias* to revive it. *Willoughby v. Swinton.* 6 E. R. 550

VII. SATISFACTION, WHERE PRESUMED.

- 1 The circumstance of 20 years having elapsed without any demand made, is

of itself a presumption that a bond has been satisfied. *Oswald v. Leigh.*

1 T. R. 270

- 2 Satisfaction of a bond may be presumed within a less period, if any evidence be given in aid of the presumption; as if an account between the parties has been settled in the inter-

mediate time, without any notice having been taken of such a demand.

1 T. R. 270

- 3 But in either case it is only a ground on which the jury may presume satisfaction, and is in itself no legal bar.

1 T. R. 270

BLACK ACT.

- 1 In an action against the hundred on the stat. 9 G. 1. c. 22. for damage sustained by the wilful burning of the party's barn, it is a precedent condition that the party grieved should within the time limited, give in his examination upon oath before a magistrate, whether or not he knew the offender or offenders, or any of them: and an examination on oath, in which the party only swore that he suspected that the fact was done by some person or persons to him unknown, is not sufficient within the statute; still less in support of an averment in the declaration, that he gave in such examination, &c. in and by which it appeared that the plaintiff did not know the person or persons who committed the fact. For non constat by the terms of such examination that the plaintiff did not know some of the offenders if there were several. *Thurtell v. Hundred of Mutford and Lothingland.*

3 E. R. 400

- 2 The burning of a mill-house, not parcel of any dwelling-house, is not felony within the stat. 9 G. 1. c. 22. which gives a remedy to the party grieved against the hundred, though within the stat. 9 G. 3. which omits the remedial clause. *Hiles v. Hundred of Shrewsbury.*

3 E. R. 457

- 3 The declaration in an action on the statute 9 G. 1. c. 22. s. 8., to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the parish (instead of the "town, village, or hamlet," which are the words of the Act), near the place, &c.; yet as the law *prima facie* intends every parish to be a vill, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook v. The Hundredors of Pimhill.*

8 E. R. 173

- 4 Setting fire to a parcel of unthreshed wheat is not felony within stat. 9 G. 1. c. 22. *Rex v. Judd.*

2 T. R. 255

- 5 A party grieved by having his house set on fire, is entitled to costs in an action on stat. 9 G. 1. c. 22., against the hundred, although the costs, together with the damages, may exceed 200*l.* *Jackson v. Calesworth Inhabitants.*

1 T. R. 71

BRIDGES.

I. BY WHOM AND IN WHAT MANNER REPAIRED.

II. INDICTMENT FOR NOT REPAIRING.

I. BY WHOM AND IN WHAT MANNER REPAIRED.

- 1 The county or riding is liable to the

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repair of a bridge built by trustees under a Turnpike Act; there being no special provision for exonerating them from the common law liability, or transferring it to others; though the trustees were enabled to raise tolls for the support of the roads. *Rex v. Inhabitants of the West Riding of Yorkshire.*

2 E. R. 342

2 The county is liable to repair a bridge built in the highway, and used by the public above forty years, though originally erected for the convenience of an individual. *Rex v. Glamorgan Inhab.* 2 E. R. 356, n.

3 If a bridge be of public utility, and used by the public, the public must repair it, though built by an individual: *aliter*, if built by him for his own benefit, and so continued, without public utility, though used by the public. *id.*

4 Where an individual builds a bridge which he dedicates to the public, by whom it is used, the county are bound to repair it. 2 E. R. 342

5 Where a person, about forty-five years back, erected a mill and dam thereto for his own profit, *per quod*, he deepened the water of a ford through which there was a public highway, but the passage through which was before the deepening very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used: Held, that the county and not the miller were chargeable with the reparation. *Rex v. The Inhabitants of the County of Kent.* 2 M. & S. 513

6 The *Medway Navigation Company* being empowered under a local act to make the river navigable, and to take tolls, and to amend or alter such bridges or highways as might hinder the passage or navigation, *leaving* them or others convenient in their room; having destroyed a ford across the river in the common highway by deepening its bed, and having built a bridge there, are bound to keep such bridge in repair. *Rex v. Kent (Co. Inhab.)* 13 E. R. 220

7 A Canal Company, authorized by an Act of Parliament to make the river *Bain* navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which crossed the highway, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance, are bound to maintain the same; and the burthen of repair cannot be thrown upon the

inhabitants of the (county) parts of *Lindsey*, in the county of *Lincoln*.

Note.—The company were found to have profitable funds for the purpose. *Rex v. The Inhabitants of the parts of Lindsey, in the County of Lincoln.* 14 E. R. 317

8 The justices of *Dorset* having under the stat. 43 G. 3. c. 59., contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and having directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials to be used by the contractor in finishing the new bridge; the Court refused a writ of prohibition to them to restrain them from pulling down the old before the new bridge was passable; though there were strong affidavits of the inconvenience and loss to be sustained by the neighbourhood, in being obliged to use a round-about way in the interval: referring the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and seeing no occasion to interfere by applying a prompt remedy of a novel kind in modern practice. *Rex v. The Justices of Dorset.* 15 E. R. 594

9 The 49 G. 3. c. 84. appoints trustees for taking down the old and building a new bridge over the river *Tone*, and empowers them to take tolls, and that it shall be lawful for them, out of the monies received, to build a new bridge, &c., and vests the property in the old and new bridge during the continuance of the Act, in the trustees; and that as soon as the purposes of the Act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c. shall be repaired by such persons as are by law liable to repair the old bridge: Held, that during the time the trustees were engaged in executing the powers of the Act, and before they had completed them, the county was not liable to repair the bridge. *Rex v. The Inhabitants of Somerset.* 16 E. R. 305

10 By the common law, declared and defined by the stat. 22 H. 8. c. 5. and subsequent Acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the

highway at each end of the bridge; and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. *Rex v. The Inhabitants of York W. R. 7 E. R. 588*

N. B. *The judgment in this case was affirmed in Dom. Proc. 5 Taunt. 244*

- 11 A new and substantive bridge of public utility, built within the limit of one county and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound in course under the stat. 22 H. 8. c. 5. to maintain such 300 feet of road, though lying in the other county. *The King v. The Inhabitants of Devon. 14 E. R. 477*
- 12 Those who are bound to repair a carriage bridge, are bound to widen it, if the exigencies of the public require it. *Rex v. Cumberland Inhab. 6 T. R. 194*

- 13 On error brought in this case in the House of Lords, the Lord Chancellor intimated doubts upon the point; but the judgment was affirmed on the ground that after verdict it must be presumed the over narrowness of the bridge arose from its having been contracted from its ancient width. *Cumberland Inhabitants v. Rex, in error. 3 B. & P. 354*
- 14 Where townships have so enlarged a bridge which they were before bound to repair as a foot-bridge, they shall still be liable *pro ratâ*. *Rex v. Yorkshire, W. R. 2 E. R. 353*
- 15 A. grants liberty, license, power and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it and not to demand toll: the property in the materials of the bridge when built and dedicated to the public still continues in B., subject to the right of passage by the public; and when severed and taken away by a wrong doer, he may maintain trespass for the abatement. *Harrison v. Parker. 6 E. R. 154*

- 16 An action will not lie by an individual against the inhabitants of a county, for an injury sustained from a county bridge being out of repair. *Russel v. Men of Devon. 2 T. R. 667*

II. INDICTMENT FOR NOT REPAIRING.

- 1 A bridge built in a public way without public utility is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. *Rex v. Inhabitants of Yorkshire, W. R. 2 E. R. 342*

- 2 Where to an indictment against a riding for not repairing a public carriage bridge, the plea alleged that certain townships had immemorially used to repair the said bridge, evidence that the townships had enlarged the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, will not support the plea. *Rex v. The Inhabitants of Glamorgan. 2 E. R. 356, n.*

- 3 Indictment charging an individual with the repair of a bridge by reason of his being owner and proprietor of a certain navigation, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought, it will be reversed. It seems that a count charging him by reason of being owner of a navigation under a private Act of Parliament, must set forth the Act. *Rex v. Kerrison. 1 M. & S. 435*

- 4 The inhabitants of a county are bound to repair every public bridge within it; unless, when indicted for the non-repair of it, they can shew by their plea that some other person is liable; and every bridge in a highway is by the stat. 22 H. 8. c. 5. deemed a public bridge for this purpose. Therefore where Queen Anne, in 1708, for her greater convenience, built a bridge on the Thames at Datchet, in the common highway leading from London to Windsor, in lieu of an ancient ferry which belonged to the crown, and she and her successors maintained and repaired the bridge till 1796, when being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before: the Court held that the inhabitants of the county of Bucks, who in answer to an indictment for the non-repair of that part of the bridge lying in the county of Bucks, pleaded these matters, and shewed that the bridge was a common public bridge, were never-

theless bound to rebuild and repair it.
Rex v. Inhabitants of Buckinghamshire.

12 E. R. 192

Though a charter of *Ed. 6.* granted upon the recited prayer of the inhabitants of the borough of *Stratford-upon-Avon*, that the king would esteem them, the inhabitants, worthy to be made, reduced, and erected into a body "corporate and politic," and thereupon proceeding to "grant (without any word of confirmation) unto the inhabitants of the borough, that the same borough should be a free borough for ever thereafter;" and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c. would, without more, imply a new incorporation: yet, where the same charter recited that it was an ancient borough, in which a guild was theretofore founded and endowed with lands, out of the rents, revenues, and profits of which a school and an almshouse were maintained, and a bridge was from time to time kept up and repaired; which guild was then dissolved, and its lands lately come into the king's hands: and further reciting, that the inhabitants of the borough, from time immemorial, had enjoyed franchises, liberties, free customs, jurisdictions, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, and otherwise, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the borough and its government would fall into a worse state without speedy remedy: and thereupon the inhabitants of the borough had prayed the king's favour for bettering the borough and government thereof, and for supporting the great charges which from time to time they were bound to sustain, to be deemed worthy to be made, &c. a body corporate, &c.: and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same bounds and limits as the borough and the jurisdiction thereof from time immemorial had extended to:

And then the king, "willing that the almshouse and school should be kept up and maintained as theretofore,

(without naming the bridge), and that the great charges to the borough and its inhabitants from time to time incident might be thereafter the better sustained and supported, granted to the corporation the lands of the late guild:

And it further appearing by parol testimony, as far back as living memory went, that the corporation had always repaired the bridge:

Held, that taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, 1st. That this was a corporation by prescription, though words of creation only were used in the incorporating part of the charter of *Ed. 6th.* 2dly. That the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge; which was only in case of the corporation, and not *ratione tenuræ*; and that the corporation were still bound by prescription, and not merely by tenure; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as immemorially bound to the repair of it, was sustainable. *Rex v. The Mayor, Aldermen, and Burgesses of the borough of Stratford-upon-Avon.* 14 E. R. 318

6 Indictment against a county for not repairing a bridge. Plea, that *J. S.* is liable *ratione tenuræ*. The plea not sustained by evidence that the estate of *J. S.* was part of a larger estate, which part *J. S.* purchased of the former owner, who retained the rest in his own hands, and as well before the purchase as since has repaired the bridge. But where in such case the county was found guilty, the Court gave leave to stay the judgment upon payment of costs until another indictment was preferred in order to try the liability. *Rex v. Inhabitants of Oxfordshire.* 16 E. R. 223

7 Upon not guilty to an indictment against the inhabitants of a county, for not repairing a public bridge, it is competent to the defendants to give evidence of the bridge having been repaired by private individuals. *Rex v. The Inhabitants of Northampton.* 2 M. & S. 262

- 8 A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through the river. *Rex v. The Inhabitants of Northampton.* 2 M. & S. 262

CANALS.

- 1 A Canal Act provided that the canal commissioners should not be entitled on purchasing lands for making a canal to any coal mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled to them if the Act had not been made: but the owners were to give notice to the commissioners of their intention to work the mines within a certain distance of the canal, and that the commissioners might inspect the mines and stop the working of them, paying compensation therefore: Held, that if after notice given by the owners to the company, the latter did not purchase out the owners' rights, and the canal being damaged by the mine after such notice and non-purchase, an action could not lie against the coal owners for such injury, as it happened by the default of the commissioners in not purchasing. *Wyrley and Essington Canal Navigation v. Bradley.* 7 E. R. 368
- 2 By the *Huddersfield Canal Act* the shares were declared to be vested in the subscribers, their executors, and assigns, with power to the subscribers to assign their shares; and a committee to be appointed under the Act were authorized to make calls on the proprietors of shares at such time as they should think fit: Held, that an original subscriber is not liable for any call made by the committee after assigning his share. *The Huddersfield Canal Company v. Buckley.* 7 T. R. 36
- 3 Where by statute a canal company were empowered to take such rates as should be fixed at a general assembly of the proprietors, not exceeding 1*d.* &c. per ton per mile, upon coal; and they were also empowered to reduce the rates at a general assembly held on certain notice; but no reduction was to be made without the consent of the major part in value of the proprietors; a contract made by individuals with the company, but not at such general meeting, whereby, in consideration that those individuals would make a navigable cut to convey water from their collieries, through land not within the statutable line of the canal, into the canal, and convey the same to the company, the latter should permit them to carry their coals through the cut and along the canal for 1*s.* per ton, the company paying back 6*d.* per ton, is illegal and void; 1*st.* As a speculation by which the company might gain more or less than the legislature intended they should take under similar circumstances from the public in general. 2*dlly.* As extending in effect the power of the company to purchase lands beyond the limits assigned by the Act. 3*dlly.* as enabling them to raise more capital than they were entitled by the Act to do, by means of paying for land or works by a total or partial sale of their tolls; which tolls are made a security for the money subscribed or taken upon mortgage. 4*thly.* Because the tolls could, in no instance, be reduced but at a general assembly, &c. and this in fact operates as a reduction of the tolls *pro tanto*. 5*thly.* Whether such a contract be not void, as diminishing the inducement (by favouring individuals) to a general reduction of the tolls, when proper for the benefit of the public? *Lees v. Manchester Canal Navigation.* 11 E. R. 645
- 4 By an Act for making and maintaining the *Glamorganshire Canal*, power is given to the canal company to make all such works as they shall think necessary and proper for "effecting, completing, maintaining, improving, and using the canal, and other works; and the company are required to lay before the sessions an account of the sums expended in making and completing the canal, up to the time of its completion; and after that, an *annual account* of the rates collected, and of the charges and expenses of supporting, maintaining, and using the navigation and its works: and the Sessions are authorized, in case it appears to them that the clear profits exceed the per

centage, limited by the Act on the sums mentioned in the first account to have been expended by the company (*i. e.* in making and completing the canal and its works), to reduce the canal rates: Held, that the Sessions, even after the period fixed for the completion of the canal, and after the first account delivered of the capital expended in the undertaking, and on which the dividends were to be calculated, were not authorized to reject charges and expenses, stated in the annual account of disbursements, for new works, such as a reservoir and

steam-engine, which the company deemed necessary, and proved by evidence to have been erected for the support and improvement of the original line of canal, and for the better supplying it with water in dry seasons. Though it seems that if the new works had been shewn to be merely colourable, and erected for purposes collateral to the navigation authorized by the Act of Parliament, such charges would have been rightly rejected by the Sessions. *Rex v. Glamorganshire Canal Company.* 12 E. R. 157

CARRIERS.

I. TO WHOM AND TO WHAT EXTENT RESPONSIBLE.

II. CONSTRUCTION OF NOTICES TO LIMIT RESPONSIBILITY.

III. PLEADINGS.

I. TO WHOM AND TO WHAT EXTENT RESPONSIBLE.

1 The consignor of goods delivered them to a particular carrier by order of the consignee, and they were afterwards lost; it was held that the consignor could not maintain an action against the carrier for the loss, although he paid for booking the goods; and that the action could only be brought by the consignee. *Dawes v. Peck.*

8 T. R. 330

2 Delivery of goods by the vendor on behalf of the vendee, to a carrier not named by the vendee, is a delivery to the vendee. *Dutton v. Solomonson.*

3 B. & P. 582

3 Carriers are answerable for the loss of goods while in their custody as common carriers, in all cases, unless the loss happen by the act of God, or of the king's enemies. *Hyde v. Trent Company.*

5 T. R. 389

4 A carrier is in the nature of an insurer. *Forward v. Pittard.* 1 T. R. 27

5 A carrier who undertakes for hire to carry goods is bound to deliver them at all events, except damaged or de-

stroyed by the act of God or the king's enemies; even though the jury expressly find that the goods were destroyed without any actual negligence in the carrier. *Forward v. Pittard.*

1 T. R. 27

6 A carrier is liable for inevitable accident, happening through the intervention of any human means, as by fire which began at another booth in a fair than that wherein the goods were placed, and afterwards spread thither.

1 T. R. 27

7 If A. send goods by B., who says, "I will warrant they shall go safe;" he is liable for any damage sustained by them, notwithstanding A. send one of his own servants in B.'s cart to look after them. *Robinson v. Dammore.*

2 B. & P. 416

8 A common carrier between A. and B. (employed to carry goods from A. to B. to be forwarded to C.) carried them to B., then put them in his warehouse, in which they were destroyed by an accidental fire, before he had an opportunity of forwarding them; and held not answerable for the loss. *Garside v. The Proprietors of the Trent navigation.*

4 T. R. 581

9 Common carriers from A. to B. charge and receive for cartage of goods to the consignee's house at B. from a warehouse there, where they usually unload, but which does not belong to them; they must answer for the goods if destroyed in the warehouse by an accidental fire, though they allow all the profits of the carriage to another person, and that circumstance be

known to the consignee. *Hyde v. The Trent Company.* 5 T. R. 389

Quare, Whether the carriers would be liable in the above case, if they do not charge for cartage and wharfage?

5 T. R. 389

10 The defendant, a common carrier, to and from *B.* through *W.* to *R.* employs distinct boats to carry to and from *B.* to *R.* and from *R.* to *B.* which pass on different days; the plaintiff knowing this, and having corn at *W.*, which is threatened to be seized by a mob, writes to defendant at *B.* to send a private boat quickly, on account of the state of the country, to take the corn to *B.* to which the defendant not returning any answer, and plaintiff fearing to wait till the defendant's boat would, in the usual course of employment, go from *W.* to *B.*, stops the boat passing from *R.* to *B.*, and without disclosing the circumstances to the boatman, prevails on him to take the corn on board, and then dispatches him forward in the night, having privately sent orders to open the lock at any time when he should pass; the corn being seized by the mob, and an action brought for the loss; after a verdict for the defendant, negating that the corn was delivered in the usual course of dealing as a common carrier: Held, that the verdict might be sustained, either on the ground of fraud in the plaintiff; or on that of a *tacit* stipulation on the part of defendant to do the best he could, but not to be answerable as a common carrier for the violence of the mob; or on the ground that the boatman had not authority to accept the goods at *W.*; much less to accept them in that manner. *Edwards v. Sherratt.* 1 E. R. 604

11 The owner of a ship who takes goods for hire is not liable beyond the value of the ship and freight under 7 G. 2. c. 15. s. 1. in the case of a robbery, in which one of the mariners is concerned, by giving intelligence and afterwards sharing the spoil. *Sutton v. Mitchell.* 1 T. R. 18, 75. (And see stat. 26 G. 3. c. 86.)

II. CONSTRUCTION OF NOTICES TO LIMIT RESPONSIBILITY.

1 Where a carrier gives notice by printed proposals, that he will not be answerable for certain valuable goods, if lost, "of more than the value of a sum

specified, unless entered and paid for as such; and valuable goods of that description are delivered to him by *A.* who knows the conditions, but concealing the value, pays no more than the ordinary price of carriage and booking; on a loss happening, the carrier is neither liable to the extent of the sum specified, nor to repay the sum paid for carriage and booking. *Clay v. Willan.*

1 H. B. 298

S. P. Izett v. Mountain. 4 E. R. 370

2 Where one delivered goods of above 5*l.* value to common carriers to carry by the mail, paying no extra price; and by a public notice which had before reached the owner, the carriers had declared they would not be accountable for any package above the value of 5*l.*, unless insured and paid for accordingly: Held, that the goods having been sent by a different carriage and lost, the owner could not recover the value against the carriers; for the loss happened by no tortious conversion, nor by a renunciation of their character as common carriers, but only by a negligent discharge of their duty as such; also, that he could not recover even the 5*l.* *Nicholson v. Willan.*

5 E. R. 507

3 Where it was agreed between the plaintiff and one of the defendants, proprietors of a stage coach, to carry certain parcels for the plaintiff free of expense, which were accordingly carried for two years, but there was no evidence of any knowledge of this agreement by the other defendants; and the defendants had given notice that they would not be accountable for parcels above the value of 5*l.*, unless entered and paid for, &c.: Held, that the defendants were not liable for the loss of a parcel of above the value of 5*l.*, sent by the plaintiff under this agreement, of which no notice of its value had been given to the defendants. *Bignold v. Waterhouse.*

1 M. & S. 255

4 A carrier who had given notice that he would not be liable for loss or damage unless occasioned by the actual negligence of the master or mariners, was held not to have waved that notice, by having on former occasions made allowances to plaintiffs for damage, without inquiring into the cause of such damage. *Evans v. Soule.*

2 M. & S. 1

- 5 A public notice given by carriers that they will not be answerable for certain specified articles or any other goods of what nature or kind soever above the value of 5*l.*, if lost, stolen, or damaged, unless a special agreement is made, and a premium paid, such value to be entered at the time of delivery, seems not to extend to goods which do not fall within any of the specified articles, and which from their bulk and quality, communicated to the carriers at the time of delivery, must be known to them to exceed the value of 5*l.* and therefore it seems they will be liable for any damage to the goods arising from the carriage, although no special agreement be made, nor any premium paid; but at all events they will be liable for damage arising from gross negligence notwithstanding such notice. *Beck v. Evans.* 16 E. R. 244
- 6 If a carrier gives notice that he will not be accountable for goods above the value of 20*l.*, unless entered and an insurance paid, over and above the price charged for carriage, according to their value, a person who enters silk exceeding the value of 20*l.*, and does not pay the insurance, cannot recover any part of the value of the goods, if lost. *Harris v. Packwood.* 3 Taunt. 264
- 7 Although the price he agrees to pay for the carriage of the silk, is, on account of its superior value, higher than the ordinary price charged for the carriage even of bulky articles. *ibid.*
- 8 And although the carrier does not prove that the loss happened by any of those accidents against which the law makes him an insurer. *ibid.*
- 9 The carrier is not bound to prove that he used reasonable care. *ibid.*
- 10 *Semb.* A carrier is entitled to make a higher charge for the superior risk attending the carriage of valuable goods, but the charge must be reasonable. 3 Taunt. 264
- 11 The owners of vessels on the navigation between *A.* and *C.* having given public notice that they would not be answerable for losses in any case, except the loss were occasioned by the want of care in the master, nor even in such case beyond 10*l.* per cent., unless extra freight were paid; the master of one of the ships took on board the plaintiff's goods to be carried from *A.* to *B.* (an intermediate

place between *A.* and *C.*) and to be delivered at *B.*: the vessel passed by *B.* without delivering the plaintiff's goods there, and sunk before her arrival at *C.*, without any want of care in the master: Held, that the owner of the vessel was responsible for the whole loss in an action on the contract. *Ellis v. Turner.* 8 T. R. 531

- 12 A carrier by water contracting to carry goods for hire, *impliedly* promises that the vessel should be tight and fit for the purpose, and is answerable for damage arising from leakage; and this though he had given notice "that he would not be answerable for any damage unless occasioned by want of ordinary care in the master or crew of the vessel, in which case he would pay 10 per cent. upon such damage, so as the whole did not exceed the value of the vessel and freight:" for a loss happening by the *personal* default of the carrier himself (such as the not providing a sufficient vessel), is not within the scope of such notice, which was meant to exempt the carrier from losses by accident or chance, &c.; even if it were competent to a common carrier to exempt himself by a special acceptance from the responsibility cast upon him by the common law. *Lyon v. Melis.* 5 E. R. 428
For the *lien* of Carriers, see *tit. LIEN.*

III. PLEADINGS.

- 1 A count in an action on the case stating that the defendants being owners of a ship at *Liverpool*, bound on a voyage from thence to *Waterford*, the plaintiff shipped goods on board to be carried upon the said voyage by the defendants, and to be delivered at *W.* to the plaintiff's assigns, and thereupon the plaintiff insured the goods at and from *L.* to *W.*; and then averring that it was the duty of the defendants as such owners, to cause the ship to proceed on the voyage from *L.* to *W.* without deviation: and alleging a breach of such duty by their causing the ship to deviate from the course of that voyage; after which she was lost with the goods; and the plaintiff by reason of such deviation lost his goods and the benefit of his policy, &c.: cannot be maintained, for want of alleging that the goods were delivered to, or received by the defendants for the purpose of carriage, or that they had

notice of the shipment, from whence a promise or duty founded upon an agreement to carry the goods might be inferred; and also for want of an allegation that the defendants undertook to carry the goods directly to *W.* from *L.*; for though the ship's ultimate destination might be *W.* yet she might have been first destined to other places on a coasting voyage. *Max v. Roberts.* 12 E. R. 89

- 2 In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, &c. in consideration of the hire to be paid by the plaintiff; proof that the hire was to be paid by the consignee was held to be no variance, the consignor being by law liable. *Moore v. Wilson.* 1 T. R. 659

- 3 Assumpsit may be maintained in the common form of declaring against a carrier for the loss of goods which were of above 5*l.* value, and were not in fact paid for accordingly, although it were part of the contract proved by general notice, fixed up in the carrier's office, and presumed to be known and assented to by the plaintiff that the carrier would not be accountable for more than 5*l.* for goods, unless entered as such and paid for accordingly. *Clarke v. Gray.* 6 E. R. 564
- 4 An averment of an undertaking to carry goods to *R.* to be delivered to *C. B.* to be paid for on delivery, shews with sufficient certainty that the price of the goods was to be paid by *C. B.*, the consignee, to the carrier. *Jacobs v. Nelson.* 3 Taunt. 423

CERTIORARI.

I. IN WHAT CASES, AND ON WHOSE APPLICATION GRANTABLE.

II. HOW AND AT WHAT TIME OBTAINED.

III. COSTS ON.

IV. RESTRAINTS ON, BY STATUTE.

V. WHEN QUASHED.

VI. RETURNS—HOW MADE.

I. IN WHAT CASES, AND ON WHOSE APPLICATION GRANTABLE.

- 1 It is discretionary in the Court to grant or refuse a *certiorari* to remove a conviction before justices of the peace: and if the Court see that the justices have drawn the proper conclusion from presumptive evidence, they will not grant a *certiorari*. *Rex v. Bass.* 5 T. R. 251
- 2 The Court will grant a *certiorari* to remove an indictment for a misdemeanor from the Great Sessions in *Wales* into this Court. *Rex v. Griffith.* 3 T. R. 658
- 3 *Qu.* Whether the Court will grant a *certiorari* to remove an order of sessions by which a soldier is continued in custody on a charge of being the father of a bastard child, under stat. 6 G. 2. c. 31. *Rex v. Bowen.* 5 T. R. 156
- 4 The Court will not grant a *certiorari* to remove the record and proceedings out of a court leet, in order to inquire into the propriety of an amercement, where the fine has been estreated into

the Duchy Chamber of *Lancaster*, and paid. *Rex v. Heaton.* 2 T. R. 184

- 5 The Court will not grant a *certiorari* to remove the assessments of the land-tax. But if an information be moved for against the commissioners of the land-tax, the Court will admit an attested copy of the assessment as evidence, instead of the original. *Rex v. King.* 2 T. R. 234
- 6 Neither will a *certiorari* be granted to remove a poor-rate, on account of the public inconvenience. 2 T. R. 235
- 7 The Court will not grant a *certiorari* to a defendant after he has appealed to the sessions, pending such appeal. *Rex v. Sparrow.* 2 T. R. 196, n.
- 8 If a defendant who has been convicted on an indictment in an inferior jurisdiction remove the record here by *certiorari* between verdict and judgment, with a view of making objections to the indictment in arrest of judgment, the Court will send the record back by *procedendo*, without going into the objections to the indictment. *Rex v. Jackson.* 6 T. R. 145
- 9 If the defendant wish to take the opinion of the Court on the sufficiency of such an indictment, he must remove the record here by writ of error after judgment below. 6 T. R. 145
- 10 The Court refused a *certiorari* to remove an indictment for a misdemeanor, and proceedings thereon at the

assizes, after conviction and before judgment, which was prayed for the purpose of applying for a new trial, on the judge's report of the evidence, upon the ground of the verdict being against evidence and the judge's direction. *Rex v. Oxford Inhabitants.*

13 E. R. 411

11 A *certiorari* will not lie to the sessions to remove a conviction for a misdemeanor before judgment for the fine being uncertain: the Court above cannot tell how to assess it, otherwise, where the punishment is certain. *Rex v. Nicholls.*

13 E. R. 414, n.

12 A *certiorari* is granted of course on the application of the crown. *Rex v. Eaton.*

2 T. R. 89

13 *Secus*, on the application of a defendant; he must lay some ground for it before the Court. 2 T. R. 89

14 A *certiorari* to remove an indictment against an excise-officer from the sessions was granted on the motion of the Attorney general, without any affidavit. *Rex v. Stannard.*

4 T. R. 161

15 It is no objection to a *certiorari* to remove a presentment of a road made by a justice of peace under the 24th section of 13 G. 3. c. 78. that it is prosecuted by another than the justice presenting; if it be by his consent. *Rex v. Inhabitants of Penderryn.*

2 T. R. 260

16 Where judgment is signed against a defendant, in an inferior Court of record, and he surrenders in discharge of his bail, but before he is charged in execution is removed to the Fleet by *habeas corpus*; the Court of C. P. will grant a *certiorari* to remove the record in order to charge him in execution in the Fleet, by virtue of the stat. 19 G. 3. c. 70. s. 4. *Jordan v. Cole.*

1 H. B. 532

II. HOW, AND AT WHAT TIME OBTAINED.

1 The party prosecuting a *certiorari* to remove a conviction, &c. must himself enter into a recognizance, with two other persons, in 50*l*. to prosecute it with effect, &c. by 5 G. 2. c. 19. s. 2. *Rex v. Boughey.*

4 T. R. 281

2 The statute is not complied with by the party and his two sureties entering into a recognizance in 25*l*. each, but it must be in the entire sum of 50*l*. *Rex v. Dunn.*

8 T. R. 217

3 *Quare*, How far the statute 5 G. 2. c. 19. applies to the removal of convictions under the Game Act. 5 Ann. c. 14?

8 T. R. 218, n.

4 A *certiorari* to remove a conviction must by 13 G. 2. c. 18. s. 5. be applied for within six months after the date of such conviction. 4 T. R. 281

8 T. R. 219

5 The six days' notice required by stat. 13 G. 2. c. 18. s. 5. before any application for a *certiorari* to remove proceedings by justices of the peace, must be given before making the motion for a rule to shew cause why such *certiorari* should not be granted. *Rex v. Justices of Glamorgan.*

5 T. R. 279

6 The provisions of the 13 G. 2. c. 18. do not apply to indictments at the sessions, but only to proceedings of a lower denomination: therefore a *certiorari* to remove an indictment from the sessions may be sued out, without giving the six days' previous notice. The effect of such writ is to remove all proceedings of the nature described therein which have taken place between the *teste* and return, although the proceedings originated after the *teste*. The magistrates below are bound to obey the writ after production of it, and notice to them in fact of such production, when sitting in their judicial capacity: and after that all further proceedings before them on the matter are erroneous. *Rex v. Battams.*

1 E. R. 298

7 A *certiorari* to remove an order of sessions confirming an order of removal by two justices, must be moved for within six calendar months after such order of sessions made, and six days' notice of such motion must be given to the justices pursuant to 13 G. 2. c. 18. s. 5., notwithstanding the order of sessions was made subject to the opinion of this Court on a case to be stated, which case was afterwards stated, and settled by the justices at the sessions. *Rex v. The Justices of Sussex.*

1 M. & S. 631

8 A *certiorari* to remove an order of sessions confirming an order of removal, subject to a case to be stated, must be applied for within six calendar months after making the order of sessions, and not within six months after settling the case. *Rex v. The Justices of Sussex.*

1 M. & S. 734

III. COSTS ON.

1 Under the stat. 5 W. & M. c. 11. s. 3. for regulating the removal of indictments from the sessions by cer-

- tiorari*, the representatives of the prosecutor are entitled to the costs taxed during his life, *though no personal demand was ever made by him.* *Rex v. Chamberlayne.* 1 T. R. 103
- 2 *Quare*, Whether the party removing a conviction by *certiorari*, under stat. 5 Ann. c. 14. s. 2. should give a bond to the prosecutor for payment of costs, &c.? 8 T. R. 217, 218, n.
- 3 If a defendant remove an indictment to the Court by *certiorari*, giving the usual recognizance under stat. 5 W. & M. c. 11. and be found guilty, and die before the day in bank, his bail are liable to pay the costs. *Rex v. Finmore.* 8 T. R. 409
- 4 A justice of the peace, who has prosecuted a gaoler to conviction for suffering a prisoner to escape, committed by him on a charge of felony, is not entitled to the costs of the conviction under stat. 5 & 6 W. & M. c. 11. s. 3. *Rex v. Sharpness.* 2 T. R. 47
- 5 But if he were to present a road, and the offender were thereon afterwards indicted and convicted, it seems he would then be entitled to costs as a public prosecutor within the Act. *ibid.*
- 6 And it was determined that a justice, who *indicts* a road for being out of repair (the indictment being afterwards removed by *certiorari*) is entitled to costs, under the stat. 5 & 6 W. & M. c. 11. s. 3. if the defendant be convicted. *Rex v. Kettleworth.* 5 T. R. 33
- 7 So if he were to indict an inferior officer for disobeying an order made by him and convict him. *Rex v. Sharpness.* 2 T. R. 47
- 8 The clerk of the peace, whose duty it is to draw up all presentments in the form of indictments, is a public prosecutor within the Act. *ib.*
- 9 The prosecutor in a trial at bar is not within the Act. *ib.*
- 10 *Qu.* Whether the person really injured, who is the real prosecutor, be entitled to costs, if his name do not appear on the back of the indictment? *ibid.*
- 11 No costs are due on a *certiorari* removing summary proceedings, unless a recognizance be entered into at the time of removing the proceedings: But it is discretionary in the Court whether they will grant a *certiorari*; and in future they will compel the party to enter into a recognizance. *This was in the case of a conviction on the Lottery Act.* *Rex v. Jenkinson.* 1 T. R. 82
- 12 The stat. 5 W. & M. c. 11. directing by s. 2 that no *certiorari* shall be granted on the part of a defendant to remove an indictment for a misdemeanor from the sessions before he shall enter into a recognizance, &c. in 20l. to try at the next assizes, &c.; and by s. 3. that "if the defendant prosecuting such *certiorari* be convicted, the Court shall give reasonable costs to the prosecutor, and that the recognizance shall not be discharged till the costs taxed shall be paid;" attaches only upon a defendant convicted by judgment; and therefore if, after a verdict of guilty, the judgment be arrested, no costs can be taxed for the prosecutor. *Rex v. Turner.* 15 E. R. 570
- 13 Upon an indictment for perjury removed by *certiorari*, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *Rex v. Bartrum.* 8 E. R. 269
- 14 The prosecutor of an indictment for stopping a common footway, who had used it for some years before it was stopped up, is a party grieved within the meaning of 5 W. & M. c. 11. s. 3. *Rex v. Williamson.* 7 T. R. 32
- 15 Where on removing an indictment from the sessions, by *certiorari*, a recognizance is given by two in 20l. each, under stat. 5 W. & M. c. 11. s. 2, 3. to secure the costs, such recognizance shall not be discharged till all costs are paid, though they exceed 40l. *Rex v. Teal.* 13 E. R. 4
- 16 The prosecutor of an indictment for obstructing a highway, must shew himself to be the party grieved, in order to obtain costs under the 5 & 6 W. & M. c. 11. s. 3.: therefore, where the prosecutor did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and whilst it was stopped declared he did not care about it: Held, that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expense. *Rex v. Incedon.* 1 M. & S. 268
- 17 Persons dwelling near a steam-engine, which emitted volumes of smoke, affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for it, are

parties grieved, entitled to have their costs taxed under the stat. 5 *W. & M. c. 11. s. 3.*, upon removal of the indictment by *certiorari* from the sessions into the Court by the defendants, and their subsequent conviction. *Rex v. Dewnap.* 16 E. R. 194

IV. RESTRAINTS ON, BY STATUTE.

- 1 If a statute, creating an offence, give cognizance of it to one justice, with an appeal to the sessions, and take away the *certiorari*, as to all the proceedings, and afterwards further powers for the punishment of the offender are given to the sessions, by another statute, which does not take away the *certiorari*; the clause for taking away the *certiorari* in the former Act cannot be extended to the proceedings under the latter. *Rex v. Terret.* 2 T. R. 735
- 2 Therefore where there have been proceedings under both statutes, those under the former Act cannot be removed, but those under the latter may. *ibid.*
- 3 A *certiorari* can only be taken away by express words; and where a statute authorizing a summary conviction before a magistrate gives an appeal to the sessions, who are directed to hear and finally determine the matter; this does not take away the *certiorari* even after such an appeal made and determined. *Rex v. Jukes.* 8 T. R. 542
- 4 An indictment for not repairing a county bridge may be removed by *certiorari* at the instance of the prosecutor, notwithstanding the general words of stat. 1 *Ann. c. 18. s. 5.* that no such indictment shall be removed by *certiorari*. *Rex v. Inhab. of Cumberland.* 6 T. R. 194
Affirmed in error in *Dom. Proc.* 3 B. & P. 354
- 5 An indictment found at the Quarter-sessions on stat. 1 *W. & M. c. 18.* for disturbing a dissenting congregation, may be removed into this Court by *certiorari* before verdict. *Rex v. Hube.* 5 T. R. 542
- 6 The general words of the stat. 25 *G. 2. c. 36. s. 10.* that no indictment for keeping a disorderly house shall be removed by *certiorari*, do not restrain the Crown from removing the indictment, by *certiorari*; there being nothing in the Act to shew that the legislature intended that the Crown should be bound by it. *Rex v. Davies.* 5 T. R. 626

- 7 No *certiorari* lies to remove an indictment on stat. 30 *G. 2. c. 24. s. 1.* for obtaining money by false pretences. *Rex v. Young.* 2 T. R. 472
(And see *Rex v. Smith, Cowp. 24.*)
- 8 A *certiorari* lies to remove a conviction on stat. 16 *G. 3. c. 30.* (to prevent the stealing of deer) if the defendant has not appealed to the quarter-sessions. *Rex v. Eaton.* 2 T. R. 89
- 9 The stat. 48 *G. 3. c. 74. s. 15.*, giving to the party grieved an appeal to the sessions against a conviction by justices of the peace for penalties incurred in respect of the duties on malt, and empowering the sessions "to hear and finally determine of and concerning the truth of the facts and merits of the case in question between the parties to such conviction respectively;" and after enabling the sessions to amend defects of form, enacting, in the same clause, that no *certiorari* shall be allowed to set aside the determination of the sessions; and providing that upon such appeal the sessions shall re-hear, re-examine, and re-consider the truth of the facts and merits of the case, &c. and re-examine the same witnesses as before, and no other; does not preclude the Crown from removing, by *certiorari*, the conviction, and the order of the sessions quashing the same. *Rex v. Allen.* 15 E. R. 333
- 10 And the Court will take cognizance of a case reserved by the sessions, accompanying the conviction and the proceedings so removed. *ibid.*
- 11 The *certiorari* to remove a conviction of a glassmaker on the stat. 13 *G. 2. c. 18. s. 5.* is not taken from the Crown, though it be from the defendant, the Act being levelled against vexatious delays. *Rex v. Tindal.* 15 E. R. 339, n.

V. WHEN QUASHED.

- 1 The Court quashed a *certiorari*, which was issued before, but not served until after judgment on an indictment for a misdemeanor. *Rex v. The Inhabitants of Seton.* 7 T. R. 373
- 2 After judgment the record can only be removed by a writ of error. 7 T. R. 373
- 3 The Court will not quash a writ of *certiorari*, because the damages laid in the record below, which was an action of assault against excise-officers,

were under 40s. ; there being reason to believe that they could not have an impartial trial below. *Daniel v. Phillips.* 4 T. R. 499

- 4 The Court, on deciding on the legality of a conviction, cannot take cognizance of any fact contained in the *certiorari* by which the conviction is removed. *Rex v. Liston.* 5 T. R. 338

- 5 And therefore they refused to quash a conviction on stat. 12 G. 2. c. 28. directing the penalty to be distributed according to that Act, though it appeared in the *certiorari* that the conviction was made at one of the seven public offices established by stat. 32 G. 3. c. 53. which directs that all penalties levied by the justices under that Act shall be paid to the receivers appointed by that Act. 5 T. R. 338

- 6 *Quare*, Even if that fact had appeared on the conviction, whether it would have been a legal objection to it? 5 T. R. 341

VI. RETURNS, HOW MADE.

- 1 Upon a *certiorari* to remove a conviction by a justice of peace on the Deer Act, 16 G. 3. c. 30. a return that the record is returned to the sessions, and that a copy is annexed to the writ, is sufficient ; for justices ought in all cases to return convictions to the sessions, whether an appeal lies or not. *Rex v. Eaton.* 2 T. R. 285

- 2 Third persons cannot object to the misdirection of a *certiorari* to remove a cause from an inferior Court, if the proper officers in whose keeping the record was, waive the objection, and return the record upon such writ. *Daniel v. Phillips.* 4 T. R. 499

- 3 The Court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in *another and more formal shape* than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk ; the conviction returned being warranted by the facts. *Rex v. Barker.* 1 E. R. 186

CHARTER-PARTY OF AFFREIGHTMENT.

I. WHAT ACTION MAINTAINABLE ON, AND BY WHOM BROUGHT.

II. CONSTRUCTION OF COVENANTS IN.

III. PLEADINGS ON.

I. WHAT ACTION MAINTAINABLE ON, AND BY WHOM BROUGHT.

- 1 Where a ship was let to freight by charter-party from the plaintiff to the defendant, a clause in the deed—“and it is hereby *covenanted and agreed by and between* the said parties *that 40 days shall be allowed* for unloading and loading again, &c.” was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c. beyond the 40 days : and if he detain her for any longer time, the owner's remedy is upon that covenant, and not in *assumpsit*, as upon an implied new contract. *Randall v. Lynch.* 12 E. R. 179

- 2 Where the master covenanted in a charter-party to proceed with certain

goods from *London to Tangiers* ; there to apply “to the correspondents, factors, or agents of the charterer for orders, whether he was to proceed to *St. Lucar* or *Cadiz* ; and that pursuant to the orders he would make *a right and true delivery to the correspondents, factors, or agents* of the charterer agreeably to bills of lading ; and the charterer covenanted that he would pay to the master *immediately* on the right and true delivery of the cargo in full for the freight of the ship at a certain rate in sterling money : and afterwards bills of lading were signed and delivered, making the cargo deliverable at *Tangiers and St. Lucar, to J. P.* (the charterer's agent at *Tangiers*) or his assigns, *he or they paying freight for the said goods*, so much in sterling money, *at the current exchange at Cadiz on London* ; and the master was ordered by J. P. at *Tangiers* to deliver the cargo at *Cadiz* (by which it was averred that the master was prevented from

delivering the same to any of the correspondents, factors, or agents of the charterer at *Tangiers* or *St. Lucar* agreeably to the bills of lading;) and did deliver it at *Cadiz* to *B. P.* the agent of the defendant in that behalf, according to the charter-party; the master, who had not received the freight from *B. P.* on delivery of the cargo to him, was held entitled to recover it from the charterer, in an action of covenant upon the charter-party. For neither the fixing of the rate of exchange in the bills of lading varies this from the common rule abovementioned; nor the omission in the bill of lading of going to *Cadiz*, which was named in the charter-party, together with *Tangiers* and *St. Lucar*: for such omission only relieved the master, (who was to deliver agreeably to the bills of lading,) from going to *Cadiz*, but did not take from him the power of going there under the charter-party. And again *B. P.*, who was only averred to be the agent of the charterer, is either to be considered as virtually the assign of *J. P.*, to whom or to whose assigns the bill required the delivery to be made: or *J. P.* must be taken, in default of making any appointment, as having refused to accept the cargo; and then the master properly delivered it to the agent of the charterer and consignor himself, so as to found the action of covenant on the charter-party. *Shepard v. De Bernales.* 13 E. R. 565

- 3 The plaintiffs having contracted by charter-party sealed to let a ship, then in the *Thames*, to freight to the defendants for eight months, to commence from the day of her sailing from *Gravesend* on the voyage there stated, and covenanted that she should sail from the *Thames* to any British port in the English Channel, there to load such goods as the freighters should tender, and sail to the *West Indies*, and bring back a return cargo to *London*; afterwards agreed by parol with the defendants that the ship, instead of loading at some port in the channel, should load in the *Thames*, and that the freight should commence from her entry outwards at the Custom-house: Held, that this subsequent parol contract was distinct from, and not inconsistent with the contract by deed, being anterior to it in point of time

and execution, and might therefore be enforced by action of *assumpsit*. *White v. Parkin.* 12 E. R. 578

- 4 The owners of a vessel, who, by performing the legal stipulations of a charter-party, provoke confiscation by the illegal and piratical act of a foreign state, do not thereby avoid their assurance. *Sewell v. Royal Exchange Assurance Company.* 4 Taunt. 856
- 5 *A.* as captain, by charter-party between himself and *B.*, agreed to receive a cargo of the agents and assigns of *B.*, and *B.* agreed to procure the same.—*A.* having received a cargo abroad, signed a bill of lading stating the goods to have been shipped by order of *C.*, and to be delivered to his order, and freight to be paid according to the charter-party. In an action for negligence in stowing the goods, brought by *C.* against *A.*, held that *C.* was only an agent and that the action should have been brought in the name of *B.* *Moores v. Hopper.*

2 N. R. 411

- 6 *A.* commissions *B.* to get a charter-party effected on his ship, *Russian* built and *British* owned. She is accordingly chartered to go to *America*, and take in there a cargo of permitted goods, rice and cotton being specified, and to sail therewith to *Cadiz*, *Lisbon*, or *Gottenburgh*, as directed by a previous agreement; it appeared to have been in the contemplation of the parties to carry the goods to some port in the United Kingdom, and that the ship should carry no license: Held, that this was not an illegal contract, so as to deprive *A.* of his right to his commission for procuring the charter-party to be effected. *Haines v. Busk.*

1 Marsh. 191

II. CONSTRUCTION OF COVENANTS.

N. B. For the cases relative to the payment of freight, see tit. FREIGHT, post.

- 1 A covenant in a charter-party "that no claim should be admitted or allowance made for short tonnage, unless such short tonnage be found and made to appear on arrival of the ship, on a survey by four ship-wrights to be indifferently chosen by both parties," is not a condition precedent to the plaintiff's right of recovering for short tonnage; but is a matter of defence to be taken advantage of by the defendants.

and the not averring performance is no ground for arresting the judgment. *Hotham, Knt. v. The East India Company.* 1 T. R. 638

- 2 A covenant in a charter-party of affreightment that the owner shall at his expense *forthwith* make the ship tight and strong, &c. for a voyage for twelve months, &c. and *keep* her so, is not a condition precedent to the recovery of freight, after the freighter had taken the ship into his service, and used her for a certain period: but if the freighter be afterwards delayed or injured by the necessity of repairing her, he has his remedy in damages. But if the owner's neglect to repair in the first instance had precluded the freighter from making any use of the vessel, that would have gone to the whole consideration, and might have been insisted on as a bar to the action. *Havelock v. Geddes.*

10 E. R. 555

- 3 Where the master of a vessel covenanted with the freighter (*inter alia*) that the vessel should proceed with the first convoy from England for Spain and Portugal, or either, as he should be directed by the freighter or his agents; and there make a right and true delivery of the cargo, agreeably to the bills of lading signed for the same; and so take in a home cargo, and return and make a right and true delivery thereof at London, &c. In consideration whereof, and of every thing abovementioned, the freighter covenanted (*inter alia*) to load the vessel out and home, and pay certain freight per ton per month, part before, and the remainder on the right and true delivery of the homeward cargo to London: Held, -

1st. That the freighter having first ordered the master to proceed to Lisbon, in consequence of which the master had taken in goods, and signed bills of lading for that port, could not afterwards countermand that order, and order him to proceed to Gibraltar, without first recalling the bills of lading, or at least tendering sufficient indemnity to the master against the consequence of his liability thereon.

2d. But supposing the freighter had such a power, yet his supercargo and agent, who, was on board the vessel, had the like authority in the absence

of his principal, even before the vessel sailed from this country, to alter again the destination to Lisbon.

3d. That the master having proceeded with the outward cargo to Lisbon under the first order, and brought home a return cargo, and delivered the same to the freighter at London, was entitled to his freight for that voyage; though he had not sailed with the first convoy: the sailing with the first convoy not being a condition precedent to his recovering freight for the voyage actually performed under the first order, but a distinct covenant, for the breach of which he was liable in damages.

4th. And he was entitled to recover such freight as upon a right and true delivery of the cargo agreeably to the bills of lading, upon proof of having delivered the entire number of chests, &c. for which bills of lading had been signed; though it appeared that the contents of the chests of fruit were damaged by the negligence of the master and crew on board, in not ventilating them sufficiently: the party injured having his counter-remedy by action for such negligence. *Davidson v. Gwynne.* 12 E. R. 381

- 4 Where a charter-party, dated 6th February, but averred not to be executed till the 15th of March, contained a covenant by the owner that the ship should and would proceed from D., where she then lay, on or before the 12th February, on her outward bound voyage, and return, &c. and a covenant by the freighter that in consideration of every thing abovementioned, &c. he would pay certain freight for the voyage; the voyage being averred to be performed, and the freight earned, the owner may recover in an action of covenant, without averring that the ship sailed on or before the 12th of February, such covenant that the ship should sail on or before the 12th of February being either no condition precedent but only an independent covenant, for breach of which the party had his remedy in damages; or not in the substance of the contract, which was for the performing of the voyage for which the ship was chartered, and earning the freight; or being rendered impossible to be performed by the parties them-

selves not having executed the deed till after the time appointed for doing the act, and thereby dispensing with the performance of it. *Hall v. Cazeneuve*. 4 E. R. 477

- 5 Where a charter-party of affreightment, provided that in case of the "inability of the ship to execute or proceed on the service," certain persons should be at liberty to make such *abatement* out of the freight as they should think reasonable: Held, that an inability of the ship to proceed to sea for want of men to navigate her was within the proviso, although such want of men proceeded from the ravages of the small-pox amongst the original crew, the death of some, and the desertion of others from fear of the distemper, and an impossibility of procuring others on the spot in their room. *Beatson v. Schank*. 3 E. R. 233

- 6 By charter-party, the freighter covenants with the owner to ship a cargo at *Oporto*, and to dispatch the ship with the first convoy for *England*, within fourteen working days after she is ready to receive her cargo. It is also agreed, that the freighter may detain the ship for loading, for fifteen running days after the fourteen, paying for the fifteen at a certain rate. The first convoy sails after the expiration of the fourteen days, and before the end of the fifteen: Held, that the covenant to sail with the first convoy is restricted by the agreement for the fifteen days; and therefore that the defendant is not liable to pay for the detention after the fifteen days. *Connor v. Smith*. 1 Marsh. 276

- 7 A covenant in a charter-party of affreightment, to pay freight and demurrage to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splitt v. Bowles*. 10 E. R. 279

- 8 If a vessel be chartered to any ports of an island, part of which is hostile, and part neutral, and the freighter covenants to procure a license: if the

ship trades to a neutral port of the island, it is no breach of the covenant, that the freighter has procured a license which would not authorize the like trade to an hostile port. *Johnson v. Greaves*. 2 Taunt. 344

- 9 The clauses in the *East India Company's* charter-parties, whereby the Company agree to allow 200*l.* per month for provisions while the ship remained in *India* or *China*, to be computed from her delivery of the Company's dispatches (if any) at the ship's "*first consigned port*, until she should be dispatched from her *last port* in *India* or *China* to return to *Europe*," is to be understood of her *last consigned port*; and will not include the time which elapsed after her departure from *Canton* (which was her last consigned port according to her sailing instructions), on her return to *Europe*, from which course she was driven by stress of weather, and forced to put into *Bombay* for repairs, before she was again dispatched for *Europe*. But after the ship was ready to sail again from *Bombay*, the Company having detained her two months longer for convoy before they again dispatched her for *Europe*, they paid the 200*l.* a-month for that period. The 14*l.* covenanted to be paid by the Company to the ship-owner in *England*, for each passenger ordered on board the ship in *India* by the Company's agents, is payable, notwithstanding the loss of the ship before her arrival in the *Thames*. *Moffat v. The East India Company*. 10 E. R. 468

- 10 Under the common printed form of the *East India Company's* charter-parties, the Company are warranted in sending any chartered ship on a warlike expedition, in aid of government, under command of the king's officer placed on board; and such ship remains under the charter-party, though alterations are made to increase her number of guns, &c. and though a king's officer assumed the command of her, and hoisted the king's broad pendant on board. *Dobree v. The East India Company*. 13 E. R. 290

III. PLEADINGS.

- 1 In covenant on a charter-party, by which it was agreed to employ a ship

of which the plaintiff was the captor, *as soon as condemnation should have passed*, the sentence must be taken to mean a *legal sentence*; and the party who sues for the freight must aver that the ship was condemned by a Court having competent jurisdiction. *Unwin v. Wolseley.* 1 T. R. 674

- 2 By a charter-party of affreightment the owner of the ship covenanted to take on board at London the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo, and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage: In consideration whereof the freighter covenanted to pay 670*l.* per month, for freight, during the said intended voyage to *Monte Video*, and back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when she should have finally discharged the whole; and also to pay two-thirds of all pilotage and port-charges during the said voyage; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *G. B.*—

In covenant by the owner for an alleged breach in non-payment of freight, pilotage, and port-charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.*, and proceeded part way on the voyage, but before her arrival at *Monte Video*, was, without the default of the owner or crew, wrongfully seized and brought back to London, and there detained for some time, till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch, and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for the purpose, and requested him to give the necessary instructions in that

behalf, and offered to observe the same, &c. but that the freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (*qua freight*), pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in *G. B.*, and therefore such arrival and discharge, which must be understood after the stipulated voyage performed, are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage: and the performance of the condition which was to entitle the owner to freight, &c. would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken, and which he has the immediate power of doing at the time, in order to entitle himself to a concurrent duty from another, is, (by a refusal of that other to accept such tender,) dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty. *Smith v. Wilson.*

8 E. R. 437

- 3 The charterer of a ship from *L.* to *B.* and back, cannot plead to an action brought against him by the owner on the charter-party for not providing a sufficient cargo at *B.*, that the ship sailed on the voyage from *L.* without

convoy, contrary to the 43 G. 3. c. 57. and that the plaintiff was privy to and knew the same: it not being in the contemplation of the parties at the time of entering into the contract to violate the regulations of that Act. *Wilson v. Foderingham*. 1 M. & S. 468

- 4 Where the master of a ship covenanted in a charter-party to go to a certain port of *America*, and receive a loading from the freighter, alongside the ship, and bring home the same; with an exception of the restraints of rulers, &c. : but the freighter covenanted absolutely to provide the loading without any such exception; it seems that an embargo in the *American* port, which prevented the freighter from

loading the ship, did not discharge him from his covenant: but the plea alleging that the defendant did provide a cargo, and was ready and willing, and offered to send it alongside the ship, but that the plaintiff refused to receive it there, and discharged the defendant from sending it alongside, on which issue was taken by the replication, was held not to be sustained by evidence of the master's written acknowledgment of the defendant having offered to load the cargo on board, on his (the master's) being ready to take it, for the purpose of raising the question of law on the embargo. *Sjoerds v. Luscombe*.

16 E. R. 201

CHOSE IN ACTION.

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| <p>1 Though a <i>chose in action</i> cannot strictly in law be assigned, yet in equity it may: and in the case of a policy of Insurance the Court will so far take notice of an assignment as to permit an action to be brought in the name of the assignor. <i>Delaney v. Stoddart</i>. 1 T. R. 26</p> <p>2 The assignor of a <i>chose in action</i> who is become a bankrupt, may sue the debtor for the benefit of the assignee. <i>Winch v. Keeley</i>. 1 T. R. 619</p> | <p>3 An assignment of a <i>chose in action</i> need not be by deed. <i>Howell v. Mabb Ivers</i>. 4 T. R. 690</p> <p>4 Comments on assignments of <i>choses in action per Buller, J.</i> 4 T. R. 340</p> <p>5 The assignee of a <i>Scotch</i> bond may maintain an action of <i>assumpsit</i> against the obligor, in his own name. <i>Innes v. Dunlop, Bart.</i> 8 T. R. 595</p> <p>6 An equitable assignment of a debt may be by parol as well as by deed. <i>Heath v. Hall</i>. 4 Taunt. 326</p> |
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COMMON.

- I. APPENDANT OR APPURTENANT.
- II. APPROVEMENT AND INCLOSURE.
- III. RIGHTS OF COMMONER.
- IV. PLEADINGS.
- V. EVIDENCE.

I. APPENDANT OR APPURTENANT.

- 1 Common appurtenant may be claimed, as well by grant within time of memory, as by prescription; and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, proof that the lord's tenant of the land had for 50 years past enjoyed the right of common on the waste is evidence for

the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common, declaring upon his possession of the messuage and land, with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to common of pasture, &c. *Cowlam v. Slack*. 15 E. R. 108

- 2 Where one of two adjoining commons, with common of vicinage, was enclosed and fenced off by the owner of the

soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet, as the separation was not complete, so as to prevent the cattle straying from one to the other by means of the highway, the common by vicinage still continued. *Gullett v. Lopes, Burt.* 13 E. R. 348

- 3 A claim of a right of common without stint as annexed to an ancient messuage, without land, cannot exist in law. *Benson v. Chester.* 8 T. R. 396
- 4 An ancient deed of feoffment granting the wastes and commons of a manor to feoffees in trust to permit the tenants and inhabitants, &c. to use and enjoy the same as they had formerly done, or been accustomed to do, must be taken to mean such a right of common as may by law exist, namely, a right of common restricted by levancy and couchancy. 8 T. R. 396
- 5 Common for cattle levant and couchant cannot be claimed by prescription, as appurtenant to a house without any curtilage or land. *Scholes v. Hargreave.* 5 T. R. 46
- 6 Levancy and couchancy means the possession of such land as will keep the cattle claimed to be commoned during the winter. 5 T. R. 46
- 7 Common appurtenant without levancy and couchancy, convertible for a time to common in gross. *Burn v. Channen.* 5 Taunt. 246
- 8 After an easement has been extinguished by unity of possession, a new easement is not created by a grant of messuage and land with common appurtenant; though those who have occupied the tenement since the extinguishment have always used common therewith; otherwise, if it had been a grant of all common used therewith. *Clements v. Lambert.* 1 Taunt. 205
- 9 A copyholder who has common in a waste, without the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate, and must prescribe in a *que estate*, through his lord for him and all his customary tenants thereof. And such common without the manor is not extinct by enfranchisement of the copyhold, though there be no words of re-grant. And after enfranchisement, the feoffee must prescribe in a *que estate* of his lord for himself and his customary tenants, till the

time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement. *Barwick v. Matthews.*

5 Taunt. 365

II. APPROVEMENT AND INCLOSURE.

- 1 Any person who is *seised in fee* of part of a waste within a manor may approve, leaving a sufficiency of common, though he be not the lord of the manor. *Glover v. Lane, (Clerk).* 3 T. R. 445
- 2 There can be no approvement by the lord of the manor in derogation of a right of common of turbary. *Grant v. Gunner.* 1 Taunt. 435
- 3 The lord has no right, under the statute of *Merton*, to inclose and approve the wastes of a manor, where the tenants of a manor have a right to dig gravel, or take estovers on the wastes. *Duberley v. Page.* 2 T. R. 391
- 4 A custom in a manor, that any person being desirous of inclosing may apply to the Court, &c. first obtaining the consent of the lord, does not abridge the lord's common-law right of inclosing without any such application, provided he leave a common sufficient for the tenants. 2 T. R. 392, *n.*
And see tit. MANOR, post.
- 5 By a grant of a manor with an exception of the wastes, they are thereby severed from the manor, though the copyholders continue to have a right of common thereon by immemorial custom; and after a grant of the soil of those wastes to trustees for the use of the copyholders in free socage, the lands when inclosed will be freehold and not copyhold. *Revell v. Jodrell.* 2 T. R. 415
- 6 A custom that the owners of ancient messuages, &c. within a manor have had assigned to them by the Moss-Reeve certain portions of the common, to be held by them in severalty, for digging turves, &c. called *Moss-Dales*, and having inclosed and improved such *Moss-Dales* (after clearing them of turves), and held them so inclosed in severalty, discharged from all right of common, is good in law. *Clarkson v. Woodhouse.* 5 T. R. 412, *n.*
- 7 The lord of a manor, or his grantee, may inclose and improve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the

common, as a right to dig for sand, &c. if he leave sufficient common of pasture. *Shakespeare v. Peppin*.

6 T. R. 741

8 The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement upon different wastes in different manors under several lords: and therefore an allotment under one Inclosure Act in lieu of his right of common upon one of such wastes will not do away or lessen his claim for an equal allotment with other commoners under a subsequent Act for inclosing the other waste. *Hollingshead v. Walton*.

7 E. R. 485

9 An inclosure made from the waste 12 or 13 years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by license of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. *Doe d. Foley v. Wilson*.

11 E. R. 56

10 Where by the terms of an inclosure act for inclosing the wastes of a manor, a certain portion was to be made to the lord in lieu of his right and interest in the soil, and the residue was to be allotted to the several tenants in fee, discharged from all customary tenures, &c. a saving clause, reserving to the lord of the manor, all seignories incident to the manor, and all rents, fines, services, &c. and all other royalties and manorial jurisdictions whatever, will not reserve mines under those allotments to the tenants; though it appear that there was a subsisting lease of such mines at the time the act passed, granted by the lord of the manor. *Townley v. Gibson*.

2 T. R. 701

11 If a person who has common in the manor of *A.* and common in the manor of *B.* for all his cattle levant and couchant, on his tenement in *A.* receives under an Act for inclosing the wastes in *A.* an allotment in satisfaction of his common in *A.*, he is nevertheless entitled under an Act for inclosing the wastes in *B.* to an allotment thereof in respect of his common in *B.*, and that to the same extent as if he had never had any common or al-

lotment in *A.* *Barwick v. Matthews*.

5 Taunt. 365

S. C. 1 Marsh. 50

12 Where allotments were made and awarded to *W. L.*, in respect of several customary estates, of which he was seised in fee according to the custom of the manor, under an agreement between the lord of the manor and the commoners, and an award made thereon, which were confirmed by an Inclosure Act, and which agreement contained a clause, saving to the lord all mines and all royalties and privileges in *tam amplo modo*, as he had enjoyed the same within the ancient customary tenements, and the award contained also a clause, saving to the lord all seignories and royalties incident to the manor. And the Act saved to him the seignories, and all rents, services, courts, &c. and all other royalties, jurisdictions, and pre-eminences incident to the manor, in *tam amplo modo* as he might have enjoyed the same in case the Act had not been made, and also contained a clause that nothing should alter or annul any settlements, &c. affecting the lands to be inclosed, but that the several allotments should be held by the several persons to whom allotted, to the same uses, and for the same estates, and subject to such limitations, &c. as the lands in respect of which such allotments were made, were limited to: Held, that the allotments so made were freehold, and not customary estate; and therefore were not within the custom of the manor; that customary estates are not devisable by will. *Doe d. Lowes v. Davidson*.

2 M. & S. 175

13 A lord of the manor was held entitled to an allotment under an Inclosure Act, in respect of his demesnes of the manor, over and above the allotment awarded to him by the Act in respect of his right as lord of the manor. *Arundell v. Viscount Falmouth*.

2 M. & S. 440

14 An Inclosure Act gave power to the commissioners to award in what townships the allotments should be assessed to the rates and taxes. They awarded that certain allotments which before were within the district of *H.* were within the township of *C.* Held, that they did not thereby become rateable in *C.* *Fenton v. Boyle*. 1 Taunt. 344

III. RIGHTS OF COMMONER.

- 1 One commoner, who has surcharged, may nevertheless maintain an action against another for sureharging the common. *Hobson v. Todd.* 4 T. R. 71
- 2 A commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle; though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a non-suit. *Pindar v. Wadsworth.* 2 E. R. 154
- 3 The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have been always exercised by the lord. *Bateson v. Green.* 5 T. R. 411
- 4 So the lord may, with the consent of the homage, grant part of the soil of the common for building, if he has immemorially exercised such a right. *Folkard v. Hemmett.* 5 T. R. 417, n.
- 5 A commoner cannot justify cutting down trees planted by the lord on the waste, though there be not a sufficiency of common left; but his remedy is by action on the case, or by assize. *Sadgrove v. Kirby.* 6 T. R. 483
Affirmed in *Cam. Scac.* *Kirby v. Sadgrove*; (in error). 1 B. & P. 13
- 6 But if the lord totally exclude a commoner from the common, the commoner may do whatever is necessary to let himself into the common. 6 T. R. 485
- 7 *A.* being possessed of a quantity of land in a common field, and having a right of common over the whole field, and *B.* having also a right of common over the whole field, they enter into an agreement for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenants to that effect. If, during the term, the cattle of *B.* come upon the land of *A.*, he may distrain them damage feasant; for the general rule that one commoner cannot distrain the cattle of another is superseded by the special agreement, by which, (with regard to *A.*), *B.* became a stranger.

And *A.* may in his replication (in answer to a plea pleaded by *B.* of his right of common, in bar of the cognizance of *A.*) set forth the special circumstances of the agreement and covenants, and leave the construction of them to the Court. *Whiteman v. King.*

2 H. B. 4

IV. PLEADINGS.

- 1 A plea of prescription for common in a *que* estate is good after verdict, though it be not in *express terms* alleged that the owners of the estate have used it from time immemorial. *Clark v. King.* 3 T. R. 147
- 2 If to an action of trespass in the common called *A.* the defendant plead that *A.* and *B.* commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the *whole* prescription. *Morewood v. Wood.* 4 T. R. 157
- 3 For all prescriptions are entire, and, when pleaded, the adverse party cannot deny a part only, but must deny the whole. 4 T. R. 157
- 4 In pleading a right to enter a common to dig for and carry away sand and gravel for the repairs of a house, it is necessary to allege that the house was out of repair, that the party entered for the purpose of digging for and carrying away sand and gravel for the necessary repairs of that house, and that the materials were used for that purpose. *Peppin v. Shakespeare.* 6 T. R. 748
- 5 A prescription for common of pasture, for a certain number of sheep, on *A.*, every year, at *all times of the year*, is well laid, though the evidence which proves the right of common, proves also that the tenant of a certain farm has a right to have the sheep folded at night on his farm, after they have fed on the common during the day. *Brook v. Willet.* 2 H. B. 324
And see *Howlam v. Strick.*

15 E. R. 108. *ante.* 187

V. EVIDENCE.

- 1 The immemorial exercise of a right by the lord to grant part of the soil of a common for building, is evidence that he reserved that right to himself when he granted the right of common to the commoners. *Folkard v. Hemmett.* 5 T. R. 417, n.

CONUSANCE.

CONUSANCE, HOW CLAIMED.

- 1 Claim of conusance made by the vice-chancellor of the University of Oxford, in the vacancy of the office of chancellor by death, on behalf of the University, allowed in a plea of trespass. *Williams v. Brickenden*.

11 E. R. 543

- 2 Conusance of a plea of trespass sued against a resident member of the university of Cambridge, for a cause of action verified by affidavit to have arisen within the town and suburbs of Cambridge, over which the university Court has jurisdiction, was allowed upon the claim of the vice-chancellor on behalf of the chancellor, masters, and scholars of the university, entered on the roll in due form, setting out their jurisdiction under charters con-

firmed by act of parliament, and averring the cause of action to have arisen within such jurisdiction. *Brown, D. D. v. Renouard*.

12 E. R. 12

- 3 Claim of conusance by the university of Oxford was allowed in an action of trespass against a proctor, a pro-proctor, and the marshal of the university; though the affidavit of the latter, describing him as of a parish in the suburbs of Oxford, only verified that he then was and had been for the last fourteen years a common servant of the university, called marshal of the university; and that he was sued for an act done by him in discharge of his duty, and in obedience to the orders of the other two defendants, without stating that he resided within the university, or was matriculated. *Thornton v. Ford*.

15 E. R. 634

CONVICTION.

GENERAL FORM AND QUALITIES OF.

- (a) Information, Form of.
- (b) Evidence, how stated.
- (c) Judgment, Form of.
- (d) Penalty, how levied and appropriated.
- (e) Surplusage, when it vitiates.

(a) Information, Form of.

- 1 An information founded on a penal statute must negative the exceptions in the enacting clause creating the penalty, and also those contained in a former clause to which the enacting clause refers in express terms. *Rex v. Pratten*. 6 T. R. 559
- 2 And a summary conviction for any offence created by statute, must negative every exception contained in the clause creating the offence. *Rex v. Jukes*. 8 T. R. 542
- 3 The stat. 36 G. 3. c. 60. enacting, that no person shall expose to sale metal buttons marked with the word *gilt* (the same not being really gilt), *knowing* the same not to be gilt, under a

certain penalty; a conviction, charging that the defendants did the act *unlawfully and fraudulently contrary to the form of the statute*, is bad, without an express charge that they did it *knowingly*; and such defect is not aided by a proviso in the statute "that no conviction for any offence in the act should be set aside for want of form, or through the mistake of any circumstance, provided the *material facts alleged were proved*;" for this requires all material facts to be *alleged*, and *knowledge* is a material fact to constitute such an offence. *Rex v. Jukes*.

8 T. R. 536

- 4 So it is a material fact that the defendant does not come within any exception in the enacting clause, and such a defect is not aided by the proviso. *Rex v. Jukes*.

8 T. R. 542

- 5 The Court will not allow a conviction to be amended for a defect in the information. *Rex v. Jukes*. 8 T. R. 625

- 6 A conviction on the Excise Laws, against *A. and Company*, cannot be supported. *Rex v. Harrison & Co*.

8 T. R. 503

- 7 Conviction on stat. 22 G. 3. c. 47. for

insuring a ticket in the lottery, authorized by 25 G. 3. quashed, because the information did not state that the ticket on which the insurance was made was a ticket in the *state lottery*.

Rex v. Trelawney. 1 T. R. 222

- 8 The stat. 39 and 40 G. 3. c. 106, enacts that all *agreements, &c.* in writing or not, by any journeyman manufacturers, for *controlling* any person carrying on any manufacture, &c. in the conduct thereof, &c. shall be illegal; and it gives a summary form of conviction, in which the offence is required to be stated: Held, that a conviction, alleging generally that the defendants were concerned in entering into a *certain agreement for the purpose of controlling A. B. &c.* without stating what the agreement was, was bad; even if the variance in stating the agreement to be *for the purpose of controlling*, instead of *for controlling*, were not fatal. *Rex v. Nield.*

6 E. R. 417

- 9 An allegation in an information, that the defendant bought "a certain quantity of wheat containing divers, to wit, fifteen bushels," is sufficiently certain. *Rex v. Arnold.* 5 T. R. 356

- 10 A conviction on the stat. 5 Geo. 3. c. 14. for fishing without consent of the owner, "in part of a certain stream which runneth between B. in the parish of A. in the county of W. and C. in the same parish and county," quashed, because it did not appear that the intermediate course of the stream between the two *termini* in which the offence was alleged to be committed, was in the county of W. and within the jurisdiction of the convicting magistrate. *Rex v. Edwards.*

1 E. R. 278

- 11 It is no objection to a conviction, to state, that the informer *came and gave the justice to be informed*, in the preterperfect tense. *Rex v. Hall.*

1 T. R. 320

- 12 A conviction of a journeyman calico-printer, under stat. 39 & 40 G. 3. c. 106, & 41 G. 3. c. 38, for refusing to work: Held bad for want of stating that such refusal was made within the jurisdiction of the convicting magistrates. *Rex v. Hazell.* 13 E. R. 159

- 13 A conviction stated to be made by justices of the peace, &c. *at the public office in Great Marlborough Street, &c.* does not legally denote that it was

made by one of the police magistrates under the stat. 42 Geo. 3. c. 76, &c. *Rex v. Seale.* 8 E. R. 568

- 14 An information, appearing to be laid more than ten days after the offence charged and proved to be committed, is sufficient upon the stat. 19 G. 3. c. 50. s. 2.; without negativing that the owner had, within ten days after the seizure, claimed the vessels seized. *Rex v. Chandler.* 14 E. R. 267

- 15 An information, charging the defendant with having in his custody and possession certain private and concealed vessels for distillation, to wit, *one still, &c.*, one head, &c. (for each of which the offender is liable to a separate penalty;) and then alleging that he forfeited for the *said still one penalty*; and the justices, after proof of the *several offences* stated in the first part of the information under the *videlicet*, convicting the defendant in the *single penalty* prayed for "*for his said offence mentioned in the said information*;" such conviction was holden to be sufficiently certain and good. *Rex v. Chandler.* 14 E. R. 267

(b) *Evidence, Statement of.*

- 1 The magistrate ought to state in the conviction, the whole of the evidence for and against the defendant. *Rex v. Clarke.* 8 T. R. 220

- 2 Where power of conviction is by statute given to a magistrate, he is the sole judge of the weight of the evidence given before him; and the Court will not examine whether or not he has drawn a right conclusion from the evidence: but if no evidence appear in the conviction to support a material part of the information, the Court will quash the conviction. *Rex v. Smith.* 8 T. R. 588

- 3 In a conviction, if the defendant appear and plead, and the evidence be given on the *same day*, the Court will intend that the evidence was given in the *defendant's presence*. *Rex v. Thompson.* 2 T. R. 18

And see *Rex v. Lovet.* 7 T. R. 152

- 4 And this, even though it be stated that the appearance was at A., and that the evidence was given at B. *Rex v. Swallow.* 8 T. R. 284

- 5 It is a good objection to a conviction, that it does not *state* that the evidence was given in the defendant's presence. *Rex v. Benwell.* 6 T. R. 75

6 *Per Lord Kenyon.*—One point in the case of *Rex v. Thompson* (2 T. R. 18 *ante*, art. 3.) has always afforded me great dissatisfaction; namely, that the Court would in any case intend that the evidence was given in the defendant's presence, without its so appearing upon the face of the conviction.

1 E. R. 648, n.

7 Conviction on 5 *Anne*, c. 14. quashed because the witness was not sworn and examined in the defendant's presence. *Rex v. Crowther.* 1 T. R. 125

8 It is not sufficient to read over the deposition in the defendant's presence. *Rex v. Crowther.* 1 T. R. 125

But if the defendant confess the charge, the irregularity is cured. *Rex v. Hall.* 1 T. R. 320

9 Where a penalty is to be sued for, before justices of the peace, within a certain time after the offence committed, it must appear on the face of such conviction upon the recital of the evidence of the witness that the prosecution was in time. *Rex v. Woodcock.* 7 E. R. 146

10 And if the witness be only stated to have mentioned the month and day, omitting the year in which the offence was committed, and there be no reference to connect it with the true date, the omission cannot be supplied by any presumption. *ibid.*

11 It is enough that the conviction sets forth that the witness was examined on oath, without stating that the magistrate had authority to administer the oath. *Rex v. Picton.* 2 E. R. 195

12 Conviction on the Lottery Act quashed because the evidence did not state the offence to have been committed where laid. *Rex v. Jefferies.* 1 T. R. 241

13 A conviction under the Malt Act 42 G. 3. c. 38 s. 30. stating that *J. F.* deposed before the justices as follows: "that the defendant *is* a maltster, that he, together with one *W. R.* surveyed the malthouse of the defendant on the 12th of May now last past, and found a floor of malt in operation very wet, and the said *W. R.* saith that he surveyed the said malthouse with the said *J. F.*" It was objected that this evidence did not prove the defendant to have been a maltster at the time of the offence alleged to have been committed, for the statement that the defendant *is* a maltster must refer to the day on which the witness was examined; and *non constat* that the defendant was a

maltster on the 12th of May, but held good, for the malthouse could not have been surveyed if the defendant had not entered it as a maltster. *Rex v. Crisp.* 7 E. R. 389

14 The stat. 14 Car. 2. c. 24. s. 45., giving summary jurisdiction in offences against the excise, committed within the limits of the chief office of excise in London, to the chief commissioners, &c.; and "within all or any other the counties, cities, &c. within this kingdom, &c. to two or more justices of the peace residing near to the place where such offence shall be committed;" must be understood to be confined to justices of the peace of the county, &c. wherein the offence was committed: and therefore if a defendant be convicted by two resident justices of the peace upon the stat. 19 G. 3. c. 50. s. 2. for having in his custody and possession a private and concealed still for illicit distillation; and the evidence only shew that his house was in the county, and that the still was found concealed in the garden of the said house; such garden not appearing to be in the same county; the conviction is bad. *Rex v. Chandler.* 14 E. R. 267

15 *Quere*, how far evidence that the still was found concealed in the garden of the defendant's house, apparently just worked off; but without proof that the defendant himself was in or near his house at the time; would warrant a conviction of him as having such illicit and concealed still in his custody and possession? *id. ibid.*

(c) Judgment—Form of.

1 If a conviction do not state an adjudication, it cannot be supported whether the punishment be or be not fixed by the statute. *Rex v. Harris.* 7 T. R. 238

2 A conviction "for the said offence," where there are two distinct offences charged in the information, was held bad. *Rex v. Solomons.* 1 T. R. 249

3 Where the conviction, after setting forth the evidence, stated, "thereupon the defendant, on, &c. at, &c. before me, &c. by the oath of one credible witness, according to the form of the statute is convicted;" it was held to be an adjudication by the justice, that he is convicted of the offence. *Rex v. Thompson.* 2 T. R. 18

4 Where an Act gives power to a magis-

trate on a summary conviction to award the *reasonable* charges of taking a distress, he must ascertain the amount in the conviction; and an adjudication that the defendant shall pay the *reasonable charges* of the levy is bad. *Rex v. Symonds.* 1 E. R. 189

- 5 By the Vagrant Act, 17 G. 2. c. 5., after a rogue and vagabond has been committed to the Sessions, and they adjudging him to be a *rogue and vagabond*, order him to be further imprisoned and kept to hard labour for six months, and to be publicly *whipped* during that time, and that after the expiration of his imprisonment he should be *sent and employed in his Majesty's service, pursuant to the statutes*: Held, that the whole forms one sentence, and being defective in the latter part for want of adjudicating whether the Sessions state whether by *sea or land*, the conviction shall be quashed though the former part be valid. *Rex v. Patchett.* 5 E. R. 339

(d) *Penalty, how levied and appropriated.*

- 1 Where justices of the peace are required by a penal statute to distribute the penalty on conviction among certain persons according to their discretion, an adjudication that the forfeiture *be disposed of as the law directs*, is bad, and the Court will quash the conviction. *Rex v. Dimpsey.* 2 T. R. 96

In such cases the justices ought to adjudge what the several proportions should be. *ibid.*

- 2 The statute 42 G. 3. c. 119. against illegal lotteries, directing the penalty to be distributed, 1-3d to the king, 1-3d to the informer, and 1-3d to the *person apprehending or securing the offender*; a conviction directing the penalty to be distributed *as the law directs*, without ascertaining to whom the last third is to be paid (the person being uncertain), is bad. *Rex v. Seal.* 8 E. R. 568

- 3 But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose. *ibid.*

- 4 A conviction, adjudging a distribution of part of a forfeiture (which a statute says shall be paid to the overseers of the poor of the parish for the use of the poor of the parish) to the overseers of the poor of a township, cannot be supported. *Rex v. Priest.* 6 T. R. 558

- 5 *Quare*, Whether the conviction could be supported, if it appeared on it that the township maintained its own poor separately? *ibid.*

- 6 *Qu.* Whether a person can be convicted of two distinct penalties in the same information? but if he can, he ought to be convicted of both. *Rex v. Salomons.* 1 T. R. 249

- 7 But it is now held that a defendant may be convicted of several offences in the same conviction. *Rex v. Swallow.* 8 T. R. 284

- 8 *Each* of several defendants convicted on stat. 1 W. & M. c. 18. for disturbing a dissenting congregation, is liable to the penalty of 20*l.* imposed by that Act. *Rex v. Hube.* 5 T. R. 542

- 9 One may be convicted on the stat. 28 G. 3. c. 57. as the *driver* of a stage-coach, for permitting and suffering beyond the proper number of persons to go upon the roof of it; although he be not stated to be a driver *employed* by the owner, and although he *did not appear when summoned* before the magistrate; in which case the 2d sect. of the Act directs, *that the owner shall be liable to the penalty thereby laid on such driver.* *Rex v. Barker.* 3 E. R. 504

- 10 A person who was the servant of B. and A., mast-makers, at weekly wages, was not considered as liable to a penalty, under the 2 G. 2. c. 26. s. 4. for rowing on the Thames, not being qualified, &c. for hire and gain, by reason that he was in a skiff, rowing and towing some articles of his masters' manufacture to a ship in the river, having been sent by them with their apprentice to assist him in some work on board the ship, and not being to receive any thing in addition to his wages for going thither or rowing the skiff to the ship: and therefore the Court quashed the conviction. *Rex v. Hobson.* 2 M. & S. 145

- S. P. *Rex v. Taylor in notâ.* 2 M. & S. 147

- 11 A person convicted of concealing naval stores may be adjudged to pay a penalty of 200*l.*, or to be punished corporally, at the election of the Court, under statutes 9 & 10 W. 3. c. 41. s. 2.: 9 G. 1. c. 8. s. 4.: and 17 G. 2. c. 40. s. 10. *Rex v. Bland.* 5 T. R. 370

- 12 And a delinquent may be adjudged under those statutes to pay the whole penalty of 200*l.* and the costs. *Rex v. Chapple.* 5 T. R. 371, n.

(c) *Surplusage, when it vitiates.*

- 1 Surplusage will not vitiate a conviction. *Rex v. Jefferies.* 4 T. R. 767
- 2 If a conviction under stat. 31 G. 3. c. 21. s. 4. which enacts that all convictions against that Act may be made out 'in the form or to the effect following' (giving the form), contain all the substantial parts of that prescribed, it is good, though it also contain something more. *ibid.*
- 3 Where the prosecutor is not obliged to negative the exceptions in a sta-

tute, but negatives some of them only, that part of the information will be rejected as surplusage. *Rex v. Hall.* 1 T. R. 320

- 4 If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage. *Rex v. Pictou.* 2 E. R. 195

COPYHOLD.

- I. NATURE OF THE TENURE.
- II. CUSTOMS, RELATIVE TO.
- III. SURRENDER AND ADMITTANCE.
- IV. FINES PAYABLE ON ADMISSION.
- V. FORFEITURE AND WASTE.
- VI. COURT-ROLLS AND EVIDENCE.

I. NATURE OF THE TENURE.

- 1 A copyhold cannot be created by operation of law, but must have been demised and demisable by copy time out of mind. *Revell v. Jodrell.* 2 T. R. 415 & 705
- 2 One may hold the *prima tonsura* or fore crop of land as copyhold, and another may have the *soil* and every other *beneficial enjoyment* of it as freehold. *Stammers v. Dixon.* 7 E. R. 200
- 3 The freehold of an estate, parcel of a manor and demisable only by the leave of the lord passing by surrender and admittance to hold to the tenant and his heirs of the lord by the accustomed rent, &c. is in the lord and not in the tenant, though not holden at the will of the lord. *Doe d. Cook et Ur. v. Danvers.* 7 E. R. 298
And see tit. EJECTMENT, post.

II. CUSTOMS, RELATIVE TO.

N. B. For manorial customs, see *post, tit. MANOR.*

- 1 Custom is the very essence of a copyhold; and if the custom be silent, the common law must regulate the course of descent. *Denn v. Godwin v. Spray.* 1 T. R. 466
- 2 A lord of the manor cannot seize a copyhold estate as forfeited *pro defectu tenentis*, without a custom.
- 3 Therefore, where on the death of a copyholder of inheritance, the lord,

after three proclamations for the heir to come in and be admitted, seized the estate into his hands, and afterwards granted it in fee to another, the Court considered it as an *absolute seizure*, and consequently irregular there being no custom to warrant it; and being irregular as an absolute seizure, it could not afterwards be set up by the lord as a *seizure quousque*. *Roe d. Tarrant v. Hellier.* 3 T. R. 162

- 4 If there be a custom within a manor, for a lord to grant parcels of the waste by copy of Court-roll, the premises granted in that mode are well described as copyhold premises, though the date of the grant be modern. *Lord Northwick v. Stanway.*

3 B & P. 346

- 5 Where a copyholder in fee, who had paid a fine on his original admittance, surrendered to the use of himself for life, remainder to his wife for life, remainder over: on which surrender and re-admittance no new fine was paid; and by the custom a remainder-man coming into possession on the death of tenant for life must be admitted and pay a fine: Held, that such a custom is good; and that on the death of tenant for life, the next in remainder not coming in to be admitted and pay her fine after proclamations made and presentment by the jury, the lord may seize *quousque* the tenant comes in, and maintain ejectment to recover the possession in the mean time. And such proclamations being in general terms for *any* person to come in and make title, &c. and the presentment of default being also general, are good; though the person next in re-

mainder were known and named in the surrender. *Doe d. Whitbread v. Jenney*.

• 5 E. R. 522

- 6 Under a grant by copy of Court-roll of a reversionary estate to A. (who had before a life-estate in the premises) *habendum to him for the lives of B. and C.*, his grandsons, *during the life of either of them longest living, successively*, according to the custom, &c. reserving a heriot at 6s. rent; A. alone takes the legal estate in reversion, and not the *cestuy que vies*; there being no custom to enable them to take; although they were stated to be admitted tenants in reversion. *Right v. Burden*. 3 E. R. 260

And though in consideration of the fine paid by the grandfather, the lord suffered the first in succession of the *cestuy que vies* to enter as tenant upon the death of his grandfather, and received the 6s. rent from him till his death; yet he not dying *seised* of the legal estate, his widow could not claim her free-bench according to the custom. 3 E. R. 260

Nor did such receipt of rent from the *cestuy que vie* constitute a tenancy from year to year, so as to intitle his widow to notice to quit, the rent not being received as between landlord and tenant, but attributable to another consideration. *ibid.*

- 7 Where three lives in a copy are to take successively, and a father, the sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as by taking at the same court a license from the lord to himself and his mother (who had her free-bench) to lease for 70 years. In which case, if the father afterwards lease by way of mortgage pursuant to such license, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may operate to divest the legal estate of the lives in reversion, and give it to the lessee; or if that were doubtful, or if the license of the lord might be construed to extend only to the first taker of the new copy *jointly* with his mother, and the first *taken alone* executed such license after her death; yet a court of equity (even if the surviving life, the son,

succeeded at law on his first legal title) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity. *Swift d. Farr, v. Davis*.

8 E. R. 354, n.

- 8 A copyhold having descended to a wife as heir at law, who died before admittance, having first borne a child to her husband, which died an infant, the husband was held entitled to hold for his life, in the nature of a tenant by the curtesy of *England*, according to the custom of the manor; though the only evidence of such custom on the rolls was three instances of husbands admitted as tenants by the curtesy, according to the custom, whose respective wives had been admitted during their lives; the title of a wife claiming as heir by descent being complete without admittance, by the general law of copyhold, and the title of a tenant by the curtesy being also by operation of law. *Doe d. Milner, Bart. v. Brightwen*. 10 E. R. 583

- 9 And having such good title to the possession as tenant by the curtesy, his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title: though he were admitted after his wife's death to hold to him *pursuant to the settlement*, by which the estate of the wife was limited to the survivor in fee; so as to let in the title of the heir at law of the wife in ejectment brought within 20 years after the husband's death. And though one third of the copyhold had been settled many years before upon a third person for life; but no surrender having been made to the trustees under the settlement, the legal estate had remained in the heirs of the tenant last *seised* and admitted; and the steward of the manor appointed by the heir at law and her husband had in his accounts after the wife's death (which was evidence of his having done the same in her lifetime) for above 20 years back, debited himself with the receipt of 2-3ds of the rent for the husband on account of his wife, and the remaining 1-3d for such other person claiming under the settlement: yet such payment to the latter must be taken to have been made by the consent of the person entitled at law to the whole: so as to do away the

notion of an adverse possession by the husband of that 1-3d, distinct from his possession of the other 2-3ds; as tenant by the curtesy after his wife's death; in answer to a claim by the heir at law of the wife against the devisee of the husband who set up an adverse possession for above 20 years after the wife's death. *Doe d. Milner, Bart. v. Brightwen.* 10 E. R. 583

- 10 Nor will any release from the heir at law living at the time of such curtesy estate be presumed during that period; nor after his death from the present heir at law, who might be called upon in equity to discover it, if given; though such release if proved or presumed would bar the copyholder's claim. 10 E. R. 583

III. SURRENDER AND ADMITTANCE.

- 1 The title to copyhold lands relates back from the time of the admittance, to the surrender, as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. *Holdfast d. Woollans v. Clapham.* 1 T. R. 600

- 2 The surrenderor, before admittance, is considered as a trustee for the surrenderee; and as between them, admittance is not at all necessary to maintain ejectment. *id.*

- 3 *Quare*, Whether the surrenderee, before admittance, can recover against the lord, or a stranger? *ibid.*

- 4 In order to effectuate the intention of the parties, the Court will construe the word "or" to mean "and," as well in a surrender of copyhold premises as in a will. *Wright v. Kemp.* 3 T. R. 470

- 5 Therefore where the surrender was to the surrenderor himself for his life, and after his decease to his widow *durante viduitate*, and upon her decease or marriage, to *W. Wallis* for life, remainder to the issue of his body; with a proviso that in case *W. W.* should die in the lifetime of the surrenderor, or without issue, &c. remainder to the surrenderor's right heirs; the issue of *W. W.* were held entitled to the premises after the death of the surrenderor and his widow, although *W. W.* died in the lifetime of the surrenderor. *ibid.*

- 6 A surrender of copyhold lands to the

use of a will, only operates on the estate which the surrenderor has at the time of the surrender. *Doe d. Ibbot v. Cowling.* 6 T. R. 63

- 7 And therefore if a copyholder, having an estate *pur autre vie*, surrender all his estate in possession, remainder or expectancy, to the use of his will, and afterwards take the fee by descent, and then dispose of the fee by will, the fee will not pass by it. 6 T. R. 63

And see *tit. DEVISE.*

- 8 Till admittance of the surrenderee of the copyhold upon mortgage, the surrenderor continues the legal tenant, and he cannot devise the equity of redemption even after the surrender made, without a new surrender to the use of his will, but the legal estate, which on his death descends to his heir at law, will carry the equity of redemption also to the heir in respect to the mortgage. *Doe d. Shewen, v. Wroot.* 5 E. R. 132

- 9 *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate (over which latter he had no controul, and by which he let in *B.*'s remainder), and takes a new copy for the lives of himself, *C.*, and *B.*, successively; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant: Held, that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years' adverse possession by *A.* might have barred *B.*'s possessory right against him; or might have disabled *B.*, if he had continued out of possession, from recovering in ejectment. *Doe v. Reade.* 8 E. R. 353

- 10 *John Lealand* surrendered a copyhold in his occupation, to the use of *Joseph Lealand* and *John Lealand* his son, for their lives and the life of the survivor; remainder to the heirs of the body of the said *John Lealand*, son of *Joseph Lealand*; remainder to the right heirs of the said *John Lealand*: Held, that the ultimate remainder was meant for the right heirs of *John the surrenderor*; as well because *John the surrenderee* is before described with the addition of the son of *Joseph*; as of the manifest futility of giving *John the surrenderee* an estate tail, and afterwards a fee in suc-

cession. Though if the construction had even been left doubtful, the ultimate remainder would have continued in the surrenderor. *Roe d. Hucknall v. Foster.* 9 E. R. 405

- 11 A copyholder surrenders "his copyhold cottage with a craft adjoining" and a common right, &c. belonging to the same, "all which premises (as the surrenderer described) were then in his own possession;" and on the same day he devises "all his copyhold cottage and premises then in his own possession." In fact the craft, between which and the cottage and garden there was only a gooseberry hedge, was in the actual occupation of a tenant at the time. Yet the Court held, that the whole passed under the description of "all his copyhold cottage and premises;" the words, "then in his own possession," being merely a mistaken description, following the mistake of the surrenderer, which mentions the craft with the rest as then being in his possession. *Goodright d. Lamb v. Peers.* 11 E. R. 58
- 12 Devises of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe d. Blacksell v. Tomkins.* 11 E. R. 185
- 13 A surrender out of Court to the use of his will, made by the surrenderee of a copyhold before his admittance, is absolutely void and of no effect, and cannot be made good by his subsequent admittance. *Doe d. Tofield, v. Tofield.* 11 E. R. 246
- 14 A person claiming to be admitted as heir to a copyhold, need not tender himself to be admitted at the Lord's Court, if the steward upon application to him out of Court, has refused to admit him. *Doe d. Burrell v. Bellamy.* 2 M. & S. 87
- 15 A *feme covert*, who surrenders copyhold lands, ought previously to be examined separately from her husband, by the steward of the manor. *Driver v. Thompson.* 4 Taunt. 294

But by special custom she may be separately examined before two customary tenants. *ibid.*

If a copyhold be surrendered to such uses as a *feme covert* shall, by will or codicil, appoint, a paper purporting to be a will, though made by

her, living her husband, is a good execution. 4 Taunt. 294

IV. FINES ON ADMISSION.

- 1 A covenant made by a copyholder with a stranger to assign and surrender his copyhold to him, which covenant is afterwards presented by the homage, does not give the lord any right to a fine. *Rex v. Hendon, (Lord of Munor).* 2 T. R. 484
- 2 A. a copyholder covenants to assign and surrender to B., which covenant is presented by the homage, but before any surrender B. assigns his interest to C., to whom A. surrenders; C. has a right to be admitted, on payment of a fine for his own admittance only. *ibid.*
- 3 A covenant to surrender a copyhold to a purchaser, and to make and do all acts, deeds, &c. for the perfect surrendering and assuring the premises at the costs and charges of the seller, is not broken by non-payment of the fine to the lord on the admission of the purchaser; for the title is perfected by the admittance of the tenant, and the fine is not due till after the admittance. *Graham v. Sims.* 1 E. R. 632
- 4 Devises of a copyhold holding as tenants in common have several estates to which they must be severally admitted; and for which several services are due to the lord: and several heriots on the death of each tenant: and the multiplication of heriots and fees on admission still continues, notwithstanding the re-union of the same land afterwards in one person; the estates or interests in the land once divided in severalty continuing several. *Attree v. Scuit.* 6 E. R. 476
- 5 The lord may recover from a copyholder the fine assessed by him on admittance, not exceeding two years' value of the tenement, although there be no entry in the assessment of such fine on the Court-rolls, but only a demand of such a sum for a fine after the value of the tenement had been found by the homage. *Northwick (Lord) v. Stanway.* 6 E. R. 56
- 6 If an assessment of a copyhold fine be entered in the Court-rolls, as of 100l. but that out of especial favour the lord remitted 40l. and thereby reduced it to 60l., and the lord sued for the fine, and the jury finding the annual value of the premises 80l., give a verdict

for 60*l.*, the lord cannot retain the verdict for the sum actually due, but must make a new assessment; the old assessment, notwithstanding the *remitter*, being in law an assessment as of 100*l.* *Northwick (Lord) v. Stanway*. 3 B. & P. 346

V. FORFEITURE AND WASTE.

- 1 If one of several co-heirs of a copyholder be a *feme covert* at the time of the ancestor's death, and the lord seize the whole estate (in default of the heir's not coming in to be admitted after three proclamations), without first appointing an attorney or guardian for the *feme covert*, according to the requisites of stat. 8 G. 1. c. 29. a seizure of the *whole* estate is irregular, though it be not known to the lord that one of the heirs is a *feme covert*. *Roc d. Tarrant v. Hillier*. 3 T. R. 162
- 2 The proclamations need not enumerate the *particular* estate of which the tenant died seised. *ibid.*
- 3 A forfeiture by a copyholder's levying a fine may be waved by the lord. *ibid.*
- 4 A forfeiture of a copyhold estate can only be taken advantage of by him who is lord at the time of the forfeiture, except in those cases where the act of forfeiture destroys the estate. *ibid.*
- 5 A fine levied by a copyholder who continues in possession, is void as against the lord. *ibid.*
- 6 *Quære*, Whether the lord's right of entry for a forfeiture is not barred after 20 years by the statute of limitations? 3 T. R. 162
- 7 A copyholder demised for one year, and from thence from year to year for the term of 13 years more, *if the lord would license, and so as the same should not be liable to forfeiture*: Held, that the license of the lord, &c. was a condition precedent to the lease for the further term of 13 years; and the lord having given notice that he would not give such license, the assignee of the lessor, to whom the premises were surrendered, was holden entitled to recover in ejectment against the tenant after six months' notice to quit; although it appeared that such surrender was a trustee for the lord (the real purchaser), who had notice of the terms of the demise when he purchased, with an *exception* in the

contract of purchase of *all subsisting leases*, and afterwards accepted of quit-rent from the tenant; the consideration of these latter circumstances belonging to a Court of equity. *Doe d. Nunn v. Luffkin*. 4 E. R. 221

- 8 The same case being sent by the Lord Chancellor for the opinion of the Court of C. P. with the additional fact, that the lessor had covenanted that the lessee should quietly enjoy during the Term; that Court certified their opinion; that the ejectment would lie; and that no action would lie on the covenant for quiet enjoyment. *Luffkin v. Nunn*. 1 N. R. 163
- 9 A copyholder licensing his lessee to commit waste, on condition of his doing a subsequent act to diminish the damage thereby occasioned, cannot eject him for a forfeiture incurred by his committing the waste without performing the subsequent act. *Doe d. Wood, Bart. v. Morris*. 2 Taunt. 52
- 10 The lord may enter for waste committed by copyholder for life, though there be an intermediate estate in remainder between the estate of copyholder for life and the lord's reversion. *Doe d. Folkes v. Clements*. 2 M. & S. 68
- 11 Where a copyhold estate is granted for three lives to a man and his heirs, and he has no power of compelling the lord to renew, on the falling in of the lives, the copyholder cannot cut timber growing on the estate. *Mardiner v. Elliott*. 2 T. R. 746
- 12 *Secus*, if the copyholder has a power of nominating his successors. *ibid.*
- 13 Where a copyholder of inheritance, having power by custom to cut timber, surrendered to the use of his will, and devised to A. for life, without impeachment of waste, with remainders over, though there was no instance in fact of a copyholder for life in the manor cutting timber; yet the right being annexed to the fee and inheritance, the copyholder in fee, in carving out his estate, may make a tenant for life punishable of waste; and at any rate, the lord cannot enter upon the copyholder for life's estate, as for a forfeiture, upon his cutting timber; for the injury, if any, is to the remainderman of the inheritance. *Denn d. Joddrell v. Johnson*. 10 E. R. 266
- 14 Where copyholder for life cut trees, though none were applied to the repair

of the premises till several months after, and after ejectment brought as for a forfeiture, and most of them still remained unapplied, but parts of the premises were still out of repair; it is a question for the jury whether they were cut *bonâ fide* for the purpose of repair, and were in a course of application for that purpose: and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant. *Doe d. Foley v. Wilson.* 11 E. R. 56

VI. EVIDENCE.

- 1 Where the tenants of a manor, formerly belonging to a monastery, holding *by border service, and the defence of Tynemouth Castle, under copy of Court-roll, and whose estates passed by surrender and admittance*, shewed in evidence by ancient surrenders, admissions, Exchequer decrees between the lords and tenants, and by an inquisition of the jury at the court-baron of the lord; that they were *copyholders of inheritance, with fines certain, holding according to the custom of husbandry of the manor (or according to the custom of the manor generally,)* without stating them to hold *at the will of the lord*: admitting this evidence to outweigh proof of minister's accounts, a grant of the manor from the crown including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal-mines, &c. in certain districts; and modern admissions (including admissions of the several tenants to the estate immediately in question): in all which they were stated to hold *at the will of the lord* as well as *according to the custom of husbandry of the manor, &c.*; yet as there was evidence for more than a century past that the lord had leased the coal and limestone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants had taken the coals and limestone, the Court held that such *acts of ownership* explained the nature of the tenurc, *according to the custom of husbandry of the manor, &c.* and shewed, in aid of the other evidence, that the *freehold* was

in the *lord*, and not in the *tenants*. And at any rate the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him. *Brown v. Rawlins.* 7 E. R. 409

- 2 The enfranchisement of a copyhold may, upon proper evidence, be presumed even against the Crown. And where a surrender had been made to churchwardens and their successors in 1636, without naming any rent: but in 1649 the *parliamentary survey* charged the churchwardens with 6d. rent, under the head of "*freehold rents*;" and there was no evidence of any different rent having been paid since that time, and receipts had been given for it, as for a *freehold* rent, by the steward of the manor: Held, that this was evidence to be submitted to a jury, on which they might presume a grant of enfranchisement, although the manor had continued out in lease from before 1636 to 1804; and though a tablet of parochial benefactions, at least as old as 1656, which was suspended in the parish church, noticed the gift of the copyhold by surrender, but did not notice any enfranchisement of it. *Roe d. Johnson v. Ireland.* 11 E. R. 280

- 3 Ancient admissions of the copyholder and those under whom he claims the land by the description of *tres acras prati*, may be construed only to carry the fore crop, or *prima tonsura*, if, in fact, no more has ever been enjoyed under such admissions. *Stammers v. Dixon.* 7 E. R. 200

- 4 It is not necessary to prove proclamations by *viva voce* testimony; the entry in the Court-rolls is sufficient. *Doe v. Hillier.* 3 T. R. 164, n.

- 5 Entries on the rolls of a manor court, of admissions of tenants in remainder after the determination of the estate of the last tenant's widow, who held *during her chaste viduity*, are evidence of a custom for the widow to hold on that condition, so as to maintain ejectment against her as for a forfeiture, on proof of her incontinence: although there were no instances in fact stated on the rolls or known of such a forfeiture having been enforced. *Doe d. Askew v. Askew.* 10 E. R. 520

And see *Doe d. Brown v. Brown.* 11 E. R. 441: *Roe d. Beeble v. Parker.* 5 T. R. 26. *Dunn d. Goodwin v. Spray.*

- 1 T. R. 466: and *Chapman v. Cowlan*. 13 E. R. 10. *post*, *lit.* EVIDENCE.
 6 A surrender of and admittance to a copyhold may be proved by the original entries on the Court-rolls, without shewing a copy stamped as required by stat. 48 G. 3. c. 149. *Doe d. Bennington v. Hall*. 16 E. R. 208
 7 A single instance of a surrender in fee by tenant in special tail of a copyhold estate, is evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor has not been dead twenty years, and though one instance be proved of

a recovery suffered by tenant in tail to bar the entail. *Roe d. Bennett v. Jeffery*. • 2 M. & S. 92
 8 If a copyholder in the manor of *A.* has common in the wastes of the same lord's manor of *B.* for his cattle, *levant and couchant*, on his tenement in *A.*; this is a proof that the manors were formerly in different hands: for the estate of the copyholder was too weak to support a grant by the lord to his copyhold tenant of common appurtenant in another manor. *Barwick v. Matthews*. 5 Taunt. 365

CORPORATION.

- I. POWERS AND INCAPACITIES.
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 VII. DISSOLUTION, EFFECTS OF.

- I. POWERS AND INCAPACITIES.
 1 A power reserved to the Crown in a charter of incorporation to remove, by order of council, *one or more* of the corporators, which charter also declared that *all or any of them* so removed should actually and without further process be removed, and which also provided at the same time that upon such removal the remaining corporators might proceed to fill up the vacancies, cannot be exercised to such an extent as not to leave a sufficient number to make a re-election; and therefore an removal of all is illegal and void. *Rex v. Amery*.
 2 T. R. 568

N. B. *This judgment was reversed in Dom. Proc.* 4 T. R. 122

- 2 Where a power of creating freemen is shewn to have been once vested in the body at large of a prescriptive corporation, the exercise of it cannot be sustained in a select part of the same corporation continued by charters under other names of incorporation: there being no express grant of

such a power to the select body by any such charters, nor even any bye-law to that effect; even supposing such a power could be transferred by a bye-law from the whole to a part of the same corporation: although it be stated in the plea and admitted by the demurrer, that the same power which was immemorially exercised by the whole body down to the period of the granting and acceptance of the charters of *James I.* and *Charles II.* had been since those charters, &c. continually exercised by the select body in question; and although such charters contained a confirmation of all former privileges, &c. under whatever name, of incorporation theretofore enjoyed. *Rex v. Holland*. 2 E. R. 70

- 3 A prescriptive right in persons of a definite description to be admitted burgesses of *Nottingham*, was held by the Court not to exclude the incidental power arising by implication of law to the corporation at large, to secure their perpetual succession, by voluntary elections of burgesses *ad libitum*: and this, though it was averred that the place had always been and yet is a populous town, containing numerous resident and trading burgesses; and that by the prescriptive modes of supply by birth and servitude, the succession of a sufficient and large number of burgesses is fully secured; for *non constat* that these sources had *at all times* been sufficient during the existence of the corporation, without occasional supplies of burgesses by election, or even

that they were so at the time of the election in question, and they could not have operated at all for some years after the creation of the corporation; and therefore, no presumption can be made from thence that the Crown meant to exclude the incidental power of the corporation to make voluntary elections of burgesses in aid of such prescriptive modes of supply. *Rex v. Bird.* 13 E. R. 367

4 Whether the power of making such voluntary elections be incidental to the corporation at large, or exist in them by prescription; it is competent for them to delegate it to a select part of themselves, but not to any stranger; and the recorder of the town must be taken to be such, if he be not stated to be a burgess. *ibid.*

5 As such select body is the creature of the corporation, its constitution and mode of acting may, it seems, be modelled (with the exception before stated) according to the pleasure of its maker. 13 E. R. 367

And see *Bye-laws*, post, page 207.

6 The stat. 11 G. 1. c. 4. was passed in order to secure the tranquillity of corporations, and to quiet possession. And the Court are bound to guard their peace. *Rex v. Stacey.* 1 T. R. 3

7 The Crown, by letters patent, granted to the master and wardens of the corporation of bakers (there being four wardens), by themselves and their deputy or deputies full power to overlook and correct the trade of baking: Held, that the master and one warden could not justify entering the house of a baker to overlook bread; for if they acted as principals, they did not amount to a majority of persons to whom the power was given; and if they acted as deputies, they were bound to shew that they were appointed by the majority. *Cook v. Loveland.* 2 B. & P. 31

8 *Quare*, Whether an authority to enter the house of a person of a particular trade, be incident to an authority given by charter to overlook and correct that trade? and *Qu.* whether the Crown have power to grant such authority? 2 B. & P. 33

8 *Semble*, that a corporation cannot make a freernity. *Rex v. Coopers' Company of Newcastle-upon-Tyne.* 7 T. R. 548

II. CHARTERS, CONSTRUCTION OF.

1 A charter granting jurisdiction to

borough magistrates over a district not within the borough, does not exclude the county justices without express words. *Blankley v. Winstanley.*

3 T. R. 279

2 And though such charter contain words of reference to former charters in which exclusive jurisdiction is given to the borough justices within the borough, and add that they shall have jurisdiction within the new district in *tam amplo modo et formâ*, &c. yet if there be in the latter charter a saving clause of the rights of the Crown, and of all other persons, the borough justices have only a concurrent jurisdiction with the county justices. *ibid.*

3 For acceptance of charters, their validity, and pleadings in quo warranto informations. See *Rex v. Amery.* 1 T. R. 575

4 Where the words of a charter are doubtful, they may be explained by contemporaneous usage. *Blankley v. Winstanley.* 3 T. R. 279. *Gape v. Handley.* 3 T. R. 238, n. and see 4 T. R. 821. and 4 E. R. 338.

5 The constitution of a corporation, as settled by Act of Parliament, cannot be varied by the acceptance of any charter inconsistent with it. *Rex v. Miller.* 6 T. R. 268

6 *Quare*, Whether usage may be pleaded to assist the Court in the construction of a doubtful charter? *Rex v. Bellringer.* 4 T. R. 821: *Rex v. Miller.* 6 T. R. 268.

7 The proclamation of James II. in the fourth year of his reign, for restoring corporations to their ancient charters, &c. operates (when accepted) as a grant of revival to such of the old corporations as had surrendered their corporate franchises to Charles II. (but which surrenders were not enrolled) who had granted new charters; and overturns such new charters. *Newling v. Francis.* 3 T. R. 189

8 The corporation of Cambridge did accept and act under that proclamation. *ibid.*

9 The surrender of a charter is void, if not enrolled. *Rex v. Osborne.* 4 E. R. 327

10 Where a charter authorized the election of a mayor on the charter day, with power to the mayor to hold over, and on the mayor's death within the year after his election and swearing in, and in the mean time the alderman next in order to officiate as mayor: Held, that in the case of a

mayor's holding over and dying more than a year after his election and swearing in, the charter did not authorize a new election of mayor, nor the alderman next in order to officiate as mayor: but it was *casus omissus*. *Rex v. Smith*. 2 M. & S. 583

N. B. For the Construction of a charter of *Edw. 6. as to the liability of a corporation to repair a bridge*. See *Rex v. Mayor of Stratford-upon-Avon*, ante, page 173.

III. OFFICERS AND MEMBERS.

(a) Qualifications and Powers.

1 Where residence in a borough town is a necessary qualification in a candidate for an office, it is immaterial how long the party has been resident, if the residence has been *bonâ fide*. *Rex v. Sarjent*. 5 T. R. 496

2 Therefore where the defendant, having prior connections with a borough-town previous to his being elected to the office of bailiff, for which previous residence is a necessary qualification, took a house at first for four years, but afterwards at his landlord's request for one, and slept there only one night before the election, and did not return again for near a month afterwards, when he stayed two days, but retained possession of his house under his lease the whole time; as the taking of the house appeared to the Court to be *bonâ fide*; that was held, on a rule for a *quo warranto* information, a sufficient legal residence to satisfy the qualification required. *ibid.*

3 A charter which requires that the mayor should be inhabitant *resident* within the borough, on pain of forfeiting such sum as should be imposed by the mayor, recorder, and major part of the common council, not exceeding 100*l.* does not require *residency* as a qualification for holding the office, but only under a penalty. *Rex v. Williams*. 2 M. & S. 141

4 Where by the constitution of a corporation, a person having served a seven years' apprenticeship to a freeman residing in the town, is entitled to his freedom, and where, by a bye-law, the indentures must be enrolled by the town-clerk within a certain time, an apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled; nor will the Court

grant a *mandamus* to the town-clerk for that purpose. *Rex v. Marshal*. 2 T. R. 2

5 A charter ordained that no person should be admitted a burgess except he had for three years before been seised and possessed of an estate of freehold for the term of his life, or some greater estate in land of a certain value; with an exception of those, who should be seised of *such estate* of the said value coming to them by descent or marriage: The Court held that one who by virtue of his marriage became seised of an estate in right of his wife for *her life* was not within the latter exception, and therefore not qualified. *Rex v. Powell*. 8 T. R. 639

6 A *jurat* of the corporation of *Hastings* may be elected town-clerk of that corporation. *Milward v. Thatcher*. 2 T. R. 81

7 But the two offices are incompatible; and the acceptance of the latter, though an inferior office, will vacate the former. *ibid.*

8 The offices of town-clerk and alderman are not necessarily incompatible. *Rex v. Pateman*. 2 T. R. 777

9 But where the town-clerk's accounts are allowed by the aldermen, or where a town-clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible: and the appointment to the former office is equivalent to an amotion by the corporation from the latter office. *ibid.*

10 And if the person so appointed continue to exercise the office of alderman, a *quo warranto* information will be granted against him. 2 T. R. 777

11 Where a charter of incorporation ordained that the mayor, &c. should yearly be chosen justices within the borough, and that the said justices should not permit any one to retail ale or beer within the borough, without a license under the hands of two of the said justices, whereof the mayor to be one: Held, that the defendant, who was a dealer in spirituous liquors, and by that means disqualified by 26 G. 2. c. 13. from concurring in granting licenses, was not disqualified from being elected mayor. *Rex v. Smith*. 2 M. & S. 582

And see *Election*, post, pages 205, 6.

12 The stat. 15 Car. 2. c. 17. creating the corporation of the *Bedford Level*, directs, that *they* shall appoint a *registrar*, &c. and other officers at their plea-

sure; the duty of which *registrar* is to register titles to land within the Level, and he takes an oath of office: and the corporation having, at the request of the registrar, elected a deputy registrar, held 1st, that the latter officer must be considered as much a deputy of the principal registrar, as if nominated by him; 2dly, that however such deputy were properly or not constituted in the first instance, yet his authority necessarily expired on the death of his principal; 3dly, that however the acts of a legal deputy to a ministerial officer may be good after the death of his principal, before notice thereof to those who are interested in his acts, as being done under a colour of authority, yet that the titles of landowners within the Level, registered by the deputy after the death of his principal was known, were invalid; 4thly, that the persons whose titles were so illegally registered had no authority under the Act of Parliament, to vote at the election of a new registrar. *Rex v. Bedford Level Corporation.* 6 E. R. 356

- 13 The borough of *St. Alban's* having first received a recorder by a charter of *Car. I.* a subsequent charter of *Car. 2.* after nominating *J. S.* to be the first and modern recorder under that charter, declared that it should be lawful for him the aforesaid *J. S.* to nominate a deputy: the Court held that this did not extend the power of appointing a deputy to the successors of *J. S.* in the office of recorder. *Rex v. St. Alban's (Mayor.)* 12 E. R. 559

(b) *Election, when and how made.*

- 1 When the mode of electing officers is not regulated by charter or prescription, the corporation may make by-laws to regulate the election. *Newling v. Francis.* 3 T. R. 189
- 2 Where a charter required that the mayor and common clerk for the time being, and the common council for the time being, or the major part of them, should elect corporate officers, and directed that the common council should consist of 36: it was held that a majority of the whole number must meet to form an elective assembly; and that, if the corporation be reduced to a smaller number than a majority of the whole, no election of officers could be had. *Rex v. Bellringer.* 4 T. R. 810

3 But where a corporation consists of an indefinite number, a major part of the existing body are competent to elect, and do other corporate acts. 4 T. R. 822

4 Where an integral part of a corporation composed of a definite number is required to vote at an election of a corporate officer, a majority of such integral definite part must attend, otherwise there can be no elective assembly: although other parts of the corporation also join in such election, and a majority of the whole existing body actually attend; but a majority of those present, when legally assembled, will bind the rest. *Rex v. Miller.* 6 T. R. 268

5 A charter, directing an election to be made by the remaining members of a definite body of a corporation, is good in law. *Rex v. Hoyte.* 6 T. R. 430

6 In a prescriptive corporation, an usage to this effect is evidence of such a charter. *ibid.*

7 Consequently, in either case a person is well elected by a majority of the subsisting members as distinguished from a majority of the full body. 6 T. R. 400

8 If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void. *Rex v. Buller.* 8 E. R. 389

9 Where the whole corporation are summoned for a particular purpose (e. g. to receive the resignation of a common-councilman) a select body, who are all present and consenting, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common-councilman in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons. *Rex v. Theodorick.* 8 E. R. 543

10 Where a charter granted to the mayor and commonalty that "any alderman being wanted, the rest of the aldermen might nominate two burgesses, for the choosing of one of them as alderman by the commonalty (per communitem): Held, that commonalty included the whole corporation, and that an al-

derman so elected by the votes of the other aldermen, as well as the burgesses at large, was properly elected. *Rex v. Osborne.* 4 E. R. 327

- 11 A charter constitutes a corporation to consist of two bailiffs (senior and junior), twelve aldermen, and an indefinite number of burgesses; and after nominating the two first bailiffs, and directing the election of the first twelve aldermen, provides that on a certain day in the year, the *senior* bailiff shall be chosen by the bailiffs and aldermen, or the major part of them, *out of the aldermen*, for one year, and *until* another of the aldermen to that office in due manner should be *elected, perfected, and sworn*; and also provides for the election of the *junior* bailiff on the same day, *by a different mode of election* for one year, and *until, &c.* (as before): Held, that the *two bailiffs* do not thereby constitute *one officer*, but two officers; and that the senior and junior bailiffs of different years *last legally appointed* (their respective successors *de facto* for several years having been ousted by *quo warrantos*), might coalesce together, and preside at a corporate meeting of the bailiffs and aldermen for the election of a senior bailiff. And that the charter having directed the future election of a senior bailiff to be made *of one of the aldermen*, must be taken to mean that there should be only *eleven* acting efficient aldermen apart from the senior bailiff, who was also an alderman; and consequently that *six* aldermen were a majority of that integral part, capable of making, together with the two last legal bailiffs, an elective assembly for the purpose of choosing a senior bailiff. *Rex v. Thornton.*

4 E. R. 294

- 12 A charter granted to the mayor, bailiffs and burgesses, or the greater part of them, to chuse *one of themselves* to be mayor; but the same charter appointed the first mayor to continue for a year, and until some *other burgess* should be elected and sworn, and the two first bailiffs to continue until *two other burgesses* should be elected and sworn; and it also directed the new mayor to be sworn in before the *last mayor, his predecessor*, and the bailiffs for the time being, and the burgesses present; and in like manner the new bailiffs to be sworn in before the

mayor and the *last* bailiffs and the burgesses present: These latter provisions explain the first, and shew that the mayor *must be chosen out of the burgesses at large*, and not out of the *bailiffs*; and this avoids any question as to the validity of a *swearing in* of an officer *before himself* by his name of office. *Rex v. Harper.* 5 E. R. 208

- 13 Assuming that under the stat. 11 G.

1. c. 4. an election, begun at a corporate meeting, whereat the mayor presided, may be completed, in case of his absenting himself pending the proceedings, under the presidency of the next in place and order to him; yet where a question arose upon the right of a voter, on which the mayor as presiding officer decided by rejecting the vote; and thereupon, the remaining votes being equal, he declared the same, and that no election could be made; and thereupon ordered the meeting to be dissolved; and no objection was made at the time, nor any notice given to the electors present that any of them intended to proceed in the election notwithstanding the decision. (which turned out to be erroneous); but after suffering the mayor and many of the freemen to depart, without notice, the rest who remained together proceeded to complete the election; The Court held that such election was void even under the statute, as a surprise and fraud on the other electors. *Rex v. Gaborian.* 11 E. R. 77

- 14 It is necessary that a presiding officer, who by the charter of a borough forms an integral part of an elective assembly, should be present up to the time when the election is completed. And the election cannot be proceeded in during his absence, although he should improperly absent himself. *Rex v. Williams.* 2 M. & S. 141

- 15 An election of *A.* to a corporate office in place of a supposed vacancy. created by *B.* cannot be referred to an existing vacancy created by *C.* *Rex v. Smith.* 2 M. & S. 406

- 16 One who has not taken the Sacrament within a year, being incapable of being elected into a corporate office by stat. 13 Car. 2. c. 12. his disqualification was held not to be removed by the annual act of indemnity (47 G. 3. stat. 2. c. 35.) the 6th sect. of which restrains its operation in cases where the office shall have been "already

legally filled up and enjoyed by any other person," at the time of passing the Act; the fact being, that the defendant and another were candidates at the time of election, when forty electors were assembled; and after two electors had voted for each candidate, the candidates were asked whether they had previously taken the sacrament; to which the defendant answered in the negative, and the other candidate in the affirmative: whereupon notice of the defendant's incapacity was publicly given to the electors, and was heard by all who afterwards voted for the defendant, being twenty in number, except two or three; and sixteen afterwards voted for the other. *Rex v. Hawkins.*

10 E. R. 211

Held, 1st, That all the votes given for the defendant after such notice were thrown away. *ibid.*

2dly, That the other candidate, having the greatest number of legal votes, was duly elected; though some of the defendant's votes (not being equal in number to the good votes ultimately given for the other) had voted before such notice. *ibid.*

3dly, That the presumption of law being, that every person has conformed to the law till something appear to rebut that presumption; it must be taken that the other candidate, who affirmed his qualification, which was not negated by the jury, was duly qualified, and that such his election, perfected by swearing in, was a filling up and enjoying by him of the office, within the proviso of the Indemnity Act, so as to preclude its operation by relation in favour of the defendant. 10 E. R. 211

17 One who has not taken the sacrament according to the rites of the Church of England, within a year before his election in fact to a corporate office, is disqualified by the Corporation Act, 13 Car. 2. st. 2. c. 1. s. 12. from being elected: and if such disqualification be notified to the electors at the time of election, votes afterwards given to such persons are then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, is duly elected and entitled to be sworn in: but until he be sworn in, the office is not legally filled up and enjoyed by him,

within the exception in the annual Indemnity Act. And therefore, if the disqualified person who had the greatest number of votes be sworn into the office, and afterwards qualify himself by taking the sacrament, &c. within the time allowed by the Indemnity Act, he is thereby re-capacitated and freed from all disability, and his title to the office thereby protected; such office not having been then already vacated by judgment, or legally filled up and enjoyed by another person. *Rex v. Parry.* 14 E. R. 549

18 Upon the nomination of two aldermen of a borough, in order that one of them might be afterwards elected mayor pursuant to charter: Held, that votes which were given before notice of the ineligibility of one of the candidates, on account of his not having received the sacrament within one year, were not thrown away, so as to authorize the returning officer to return another candidate who was in a minority. *Rex v. Bridge.*

1 M. & S. 76

(c) *Office, when forfeited.*

1 A corporate office does not become *ipso facto* vacant by the non-residence of the corporator. *Rex v. Heaven.*

2 T. R. 772

2 And the Court will not grant an information in nature of a *quo warranto* against him, until he has been removed by the corporation. *ibid.*

3 It may be a cause of forfeiture; but the corporator does not lose his franchise, till a sentence of amotion by the corporation has been pronounced.

2 T. R. 772

IV. BYE-LAWS.

How made, and Requisites of.

1 A corporation created by letters patent, with a power of making the bye-laws, cannot make any laws to incur a forfeiture. *Kirk v. Nowill.*

1 T. R. 118

2 Neither can a corporation, created by Act of Parliament, unless such a power be expressly given. *ibid.*

3 A power granted by charter to a company exercising a particular trade in a certain place, to make bye-laws for

- the government of *all persons* exercising that trade in that place, enables it to make bye-laws binding, as well on persons so exercising the trade who are *not members of the company*, as on those who are. *Butchers' Company v. Morey.* 1 H. B. 370
- 4 A corporation cannot make a bye-law contrary to their constitution. *Rex v. Ginevar.* 6 T. R. 736
- 5 Where a charter directed the election of senior bailiff to be made by a majority of a select body, a bye-law giving a casting voice to the presiding officer in case of an equality of votes, was held to be bad. 6 T. R. 732
- 6 A bye-law may be good in part and bad in part, where the two parts are entire and distinct from each other. *Rex v. Faversham Fishermen Company.* 8 T. R. 336
- 7 *Seemle*, A bye-law made by a company carrying on trade in partnership, to prevent any one of the members carrying on a separate trade on his own account, is good. *ibid.*
- 8 A bye-law requiring the indentures of apprenticeship of such who are bound apprentices to freemen to be inrolled within four months from the date, in order to entitle themselves to their freedom, seems good. *Rex v. Marshal.* 2 T. R. 2
- 9 A bye-law made by a company in a corporation to restrain the number of apprentices to be taken by any of the members, is void. *Rex v. Coopers' Company of Newcastle-upon-Tyne.* 7 T. R. 543
- 10 A bye-law altering the *qualification* of persons to be taken as apprentices by the members of a corporation, in order to acquire their freedom by a certain servitude, is not warranted by a custom in such body, which claimed by prescription to make bye-laws regulating the *number* of persons to be taken as apprentices. *Rex v. Tappenden.* 3 E. R. 186
- 11 A charter giving the right of electing an alderman to the mayor and burgesses at large from themselves, a bye-law, stated to be made in 1577, by the then mayor and burgesses, *but not now extant in writing*, whereby the right of electing was restrained to "the mayor and certain of the burgesses of the town, *viz.* the recorder, aldermen, coroners, common council men, and such of the burgesses of the said town as

had served or did serve the office of chamberlain or sheriff of the said town, and called the *livery or clothing burgesses* for the time being, or so many of them as should be duly assembled together for that purpose, whereof the mayor to be one, or the major part of them," was held to be a valid and reasonable bye-law. But every bye-law may be repealed by the body which made it; and the office of *chamberlain of the town*, as stated in such bye-law, was taken to be a corporate office as well as the other offices; the serving of which was made the qualification of the electing burgesses. *Rex v. Ashwell.* 12 E. R. 22

- 12 A bye-law made by the freemen of a company of oyster fishermen, prohibiting any freeman from being engaged in the trade of sending oysters to market from any other ground on the Kentish shore, than the oyster ground of the company, under a penalty of 10*l*, and in case of refusal to pay the same, that such freeman shall thenceforth, and until the fine be paid, be excluded from all share of the profits to be made thereafter by the joint trade of the company, is a void bye-law; there being no usage stated to that extent, but only an usage for the freemen to make orders for regulating the company and fishery, with fines and penalties for the breach of such orders, and for prohibiting the freemen from being engaged in other oyster grounds, under penalties to be stopped out of the money arising by the sale of the stint of oysters of such freemen. *Adley v. Reeves.* 2 M. & S. 53

V. CORPORATE PROCEEDINGS, WHERE REGULAR.

- 1 The charter of *Saltash* empowers the mayor, justice of the peace, and the rest of the aldermen (seven in all), or the major part of them, of whom the mayor and justice to be two, when it shall seem to them *convenient and necessary*, to elect as many free burgesses as shall please them, *and to the same free burgesses so elected to administer an oath, &c.* The defendant was elected a free burgess in *October 1804*, and in *December 1806*, at a meeting of six out of the seven aldermen, in consequence of a *mandamus* to them to fill up the vacant place of alderman,

and which meeting the mayor *said* was held for that sole purpose, the defendant tendered himself to be sworn in; against which three aldermen protested, one of whom immediately left the assembly; but before the other two protestors withdrew, the mayor, with the assent of two other aldermen, administered the oath of office to the defendant. *Rex v. Courtenay.*

9 E. R. 246

Held, 1st, That the swearing in of the burgess might well be at a time subsequent to the election: he having had a present legal capacity to be sworn in at the time of his election; and therefore not like the case of an infant elected. *ibid.*

2dly, That the act of swearing in, being merely ministerial, may be done by the mayor, as presiding officer, in the presence of the majority of the mayor and aldermen by whom such act was required to be done, whensoever and howsoever assembled, and without any previous summons for this purpose; there being no dissent by the majority at the time when the oath was so administered: and, *ibid.*

3dly, Though three, an equal number of those first assembled, *protested* against the defendant's being sworn in when he first tendered himself to take the oath; yet one of the protestors having withdrawn, it was competent to the majority who remained to administer the oath; no vote having been come to by the major part at first assembled, to exclude the body from doing the act at that meeting. 9 E. R. 246

2 But where the new mayor of *New Romney* was required by charter to be sworn in *before* the old mayor, a swearing in by the town-clerk, (the usual officer to administer the oath,) *before* the old mayor, but against the consent and direction of the latter, was held void. *Rex v. Ellis.* 9 E. R. 252, *n.*

3 The neglect to be sworn into an office for above twenty years after the party's election to it, is evidence of his refusal to accept the office; as his acquiescence unexplained for so long a time, in the election of another person into the office, is an evidence of his renunciation of it, and the acceptance of such renunciation by the body. *Rex v. Jordan.* 9 E. R. 263

4 Though the affixing of the common seal to the deed of conveyance of a corporation be sufficient to pass the estate, without a formal delivery, if done with that intent; yet it has no such effect if the order for affixing the seal be accompanied with a direction to their clerk to retain the conveyance in his hands till accounts were adjusted with the purchaser. *Derby Canal v. Wilmot, Bart.* 9 E. R. 360

5 The mayor having summoned the corporation to meet and elect a new mayor on the usual day, a majority when met, cannot, against the consent of the mayor (nor, as it seems, without the unanimous consent of the whole body), proceed to any other business, such as that of filling up vacancies in; the common council; there being no certain day fixed for that purpose, though the general custom had been to fill up all vacant offices on the day of electing the new mayor. *Machell v. Nerinson.* 11 E. R. 84

6 If defendant sets out a charter authorizing the election of a mayor in two instances only, *viz.* on the annual charter day, and on the mayor's death within the year after he is sworn in; and pleads, that the office of mayor became vacant, without shewing how it became vacant, it cannot be intended that it was a vacancy within either of the instances named, nor that in instances not named, there was to be an election in the mode prescribed in the instances named. *Rex v. Smith.*

2 M. & S. 583

7 If a corporation consist of a definite number of aldermen, of whom the mayor is one, and it is pleaded that the office of mayor became vacant, it is not to be inferred from thence that the number of aldermen did not remain complete; and therefore the plea averring an election by the residue of the aldermen, which might consist of ten or less, according to the circumstance, whether the vacancy of mayor made a vacancy of aldermen, it was held a good replication that only five attended, for it was matter of rejoinder that under the circumstances five were a majority: *Secus*, where it was pleaded that the mayor died, for there the presumption was, that there was a vacancy of alderman. *Rex v. Smith.* 2 M. & S. 583

And see QUO WARRANTO, post.

VI. ACTIONS BY AND AGAINST.

N. B. For proceedings against Corporations, see INFORMATION, MANDAMUS, QUO WARRANTO, *post*.

- 1 The highest bidder for certain land sold by auction, and the mayor of a corporation, on behalf of himself and the rest of the burgesses and commonalty of the borough, the vendors of the lands signed a contract, in which they mutually promised to fulfil the conditions of sale on their respective parts. The conditions stated the title of the corporation to the premises, and stipulated that they should convey, and might re-sell on default. The only act therein mentioned to be done by the plaintiff, was the receiving the deposit: Held, that the plaintiff could not maintain an action in his individual capacity against the purchaser for breach of this contract. *Bowen v. Morris, in Cam. Seac. (in error)*.
2 Taunt. 374
- 2 Trover lies against a corporation; and if it be essential to their conversion of the property, (*i. e.* in this instance the detainer of bank-notes by the Governor and Company of the Bank of England,) that they should have authorized it under their seal, such authority will be presumed after verdict: but it does not seem necessary that the act of detention, done by their servants within the scope of their employment, should be authorized under their seal. *Narborough v. The Bank of England*.
16 E. R. 6
- 3 By indenture between A. B. and C., bailiffs, and D. E. and F., aldermen, with the assent of the burgesses of the borough of M. of the one part, and J. S. of the other part; the said bailiffs, aldermen, and burgesses, demised lands to J. S. for years, to be holden of the said bailiffs, aldermen, and burgesses; and the deed was executed by A. B. and C. D. E. and F.; but not sealed with the corporation seal; J. S. having paid rent to the bailiffs as chief officers of the borough: the Court of C. P. held that their servant might make cognizance for taking a distress under a demise by the corporation, notwithstanding a notice had been given by the aldermen, (one of whom was a party to the indenture), to pay the rent to them; for the payment of rent to the bailiffs

admitted a tenancy from year to year under the corporation. *Wood v. Tate*.

2 N. R. 247

- 4 An ejectment against the bailiffs *pro tempore* of a corporation, cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs: for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation: But at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman*.
8 E. R. 228
And see *Goodtitle d. Miller v. Wilson*.
11 E. R. 334

And see *tit. EJECTMENT, post*.

- 5 The master, wardens, and commonalty of a company cannot sue for a penalty forfeited to the master and wardens, to the use of the master, warden, and company. The first count in a declaration in debt for a penalty under a bye-law, set forth the charter empowering the company to make bye-law, the bye-law made, and the breach of it; the second count, omitting the above particulars, stated the penalty as being forfeited "under and by virtue of a bye-law of the company before that time duly made," &c. and this count was on special demurrer held bad. *Feltmakers (Master, Wardens, and Commonalty of) v. Davis*.
1 E. & P. 98
- 6 A penalty of 20s. having been imposed by one of the bye-laws of the butcher company on all persons selling meat on a Sunday, within their jurisdiction, it was declared by the subsequent clause, that if any offender should deny, refuse, or neglect to pay the penalty, he should be liable to an action of debt: Held, that it was not necessary to prove a previous demand in order to maintain such action, although averred in the declaration. *The Butchers' Com. v. Bullock*. 3 B. & P. 434
- 7 Where a corporation declaring its covenant by their modern name, stated

that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* which they declared on, were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: Held, that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *Mayor, &c. of Carlisle v. Blunire.*

8 E. R. 487

- 8 Where a corporation are defendants, they are not entitled to an essoin. *Argent v. Dean of St. Paul's.* 2 T. R. 16, n.

VII. DISSOLUTION, EFFECTS OF.

- 1 A judgment of seizure *quousque*, &c. against a corporation, in default of appearance, operates as a final judgment to dissolve the corporation, if they do not appear in the same Term, or the next at farthest. *Rex v. Amery.* 2 T. R. 515 to 569
- 2 The only use of a final judgment in such a case is to shew the Crown's election to take advantage of the forfeiture: but any other matter of record, shewing the election, may equally answer the purpose. *id.*
- 3 Therefore a new charter of incorporation granted after that time to a new

body of men in the same place is good, notwithstanding a charter of restitution be afterwards granted to the old corporation: and such charter of restitution is absolutely void. 2 T. R. 515

- 4 This case was reversed in *Don. Proc.* 4 T. R. 122

- 5 When an integral part of a corporation is gone, and the corporation has no power to restore it, or to do any corporate act, the corporation is so far dissolved that the Crown may grant a new charter. *Rex v. Pasmore.* 3 T. R. 199

- 6 The major part of an integral part of the corporation whose attendance is required at the election of officers being gone, it operates as a dissolution of the whole corporation, which has thereby lost the power of holding corporate assemblies for the purpose of filling up vacancies and continuing itself. *Rex v. Morris and Stewart.*

3 E. R. 213

- 7 Where the election of mayor was to be made by the majority of an assembly composed of several integral definite parts of a corporation, and other burgesses and inhabitants *for the time being*: Held, that one of such definite integral parts, being reduced below a majority of its proper number, could no longer be represented in such corporate assembly, and the whole corporation was thereby dissolved, being no longer capable of continuing itself. *Rex v. Morris.*

Rex v. Stewart. 4 E. R. 17

COSTS.

I. PLAINTIFF'S RIGHT TO COSTS.

- (a) *By particular statutes.*
 (b) *In personal actions.*
 (c) — *actions of slander.*
 (d) — *assault and battery.*
 (e) — *trespass.*
 (f) *Where several matters are pleaded.*

II. DEFENDANT'S RIGHT TO COSTS.

- (a) *On nonsuit, verdict, or judgment.*
 (b) *How restrained by Court of Conscience Acts.*

III. EXECUTORS' AND ADMINISTRATORS' LIABILITY.

IV. COSTS IN ERROR.

V. COSTS ON PAYMENT OF MONEY INTO COURT.

VI. ——— JUDGMENT, OR A VERDICT AS TO PART.

VII. ——— NEW TRIAL.

VIII. ——— OF WITNESSES.

IX. SECURITY FOR, WHERE REQUIRED.

X. OF STAYING PROCEEDINGS IN A SECOND ACTION FOR THE COSTS OF A FORMER.

XI. OF DOUBLE OR TREBLE COSTS.

XII. COSTS IN CRIMINAL PROSECUTIONS.

XIII. TAXATION AND ALLOWANCE OF, IN PARTICULAR PROCEEDINGS.

I. PLAINTIFF'S RIGHT TO COSTS.

(a) By particular statutes.

- 1 The statute of *Gloucester* gives costs, where damages are given by any subsequent statute. *Jackson v. The Inhabitants of Calesworth*. 1 T. R. 73
- 2 Wherever an action is given to the party grieved by an Act since the stat. of *Gloucester*, he is entitled to costs if he succeed, though he had no remedy before such Act. *Tyte v. Glode*. 7 T. R. 268
- 3 Costs are always given in actions on the statute of hue and cry, where damages are recovered. *Jackson v. The Inhabitants of Calesworth*. 1 T. R. 72
- 4 A party grieved who recovered damages against the sheriff for not taking bail under stat. 23 H. 6. c. 9. is also entitled to costs. *Creswell v. Hoghton*. 6 T. R. 355
- 5 Costs are due to the plaintiff, who recovers treble damages in an action on stat. 29 Eliz. c. 4. against the sheriff for taking more than the fee allowed by that statute on levying under an execution against the plaintiff's goods. *Tyte v. Glode*. 7 T. R. 267
- 6 A prisoner suing as a party grieved on the *Habeas Corpus* Act, a copy of the warrant of commitment being refused him, having recovered the penalty, is entitled to costs. *Ward v. Snell*. 1 H. B. 10
- 7 In an action of debt for a penalty on the stat. 2 & 3 E. 6. c. 13. for not setting out tithes, with a count in the declaration for the single value: after a demurrer to the declaration, the parties submit to arbitration, and the arbitrator awards the single value to be less than 20 nobles (6l. 13s. 4d.) the plaintiff is not entitled to costs on the counts for the penalty, under the stat. 8 & 9 W. 3. c. 11. s. 5. the value not having been found by a jury; but the Court will allow him to have the costs taxed, on the count for the single value. *Barnard v. Moss*. 1 H. B. 107
- 8 The stat. 8 & 9 W. 3. c. 11. giving costs in all suits of *scire facias*, does not extend to a *scire facias* to repeal a patent prosecuted in the name of the King. *Rex v. Miles*. 7 T. R. 367
- 9 After judgment by default in debt on bond to secure an annuity payable

quarterly; and *scire facias* thereon, suggesting a breach in non-payment of a quarter, and damages assessed to that amount on the stat. 8 & 9 W. 3. c. 11.: Held, that the plaintiff was entitled to his costs on the 8th section, which directs a stay of proceedings on payment of future damages, costs, and charges, *toties quoties*; though the 3d section only gives costs in *scire facias* after plea or demurrer. *Brooke v. Booth*. 11 E. R. 387

(b) In personal actions.

- 1 If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 Eliz. c. 6. s. 2. that the damage did not amount to 40s., the plaintiff shall not have costs; for the interest or title of the land does not necessarily come in question in such action, and did not in fact in *this case* where an action was brought by one commoner against another for a mere wrongful act. *Edmonson v. Edmonson*. 8 E. R. 294
 - 2 If a plaintiff sue for assault, battery and imprisonment, but only prove an imprisonment, and obtain one farthing damages, a certificate of the Judge under the 43 Eliz. c. 6. will deprive him of costs. *Emmett v. Lyne*. 1 N. R. 255
- And see *Wiffin v. Kincard*, next page.
- 3 If the plaintiff in trespass *vi et armis* for beating the plaintiff's dog, recover less than 40s. the Judge may certify under stat. 43 Eliz. c. 6. to prevent his recovering more costs than damages. *Dand v. Sexton*. 3 T. R. 37
 - 4 Where a statute prohibits an act, and gives damages for the violation, with costs of suit, it does not take away the Judge's power to certify, under 43 Eliz. c. 6. that the costs are less than 40s. *Williams v. Miller*. 1 Taunt. 400

(c) In actions of slander.

- 1 Where in an action for slander, some of the counts in the declaration are for actionable words, and others for words not actionable, and special damage is laid, referring to all the counts, and the plaintiff has a verdict on the whole declaration; though the damages recovered be less than 40s. he is entitled to full costs. *Saville v. Jurdine*. 2 H. B. 531

- 2 But though the defendant justify, and

it be found against him, yet if the damages be under 40s. the plaintiff cannot recover more costs than damages. *Halford v. Smith.* 4 E. R. 567

(d) *In assault and battery.*

1 If one count in a declaration state an assault on a man, and an assault on the horse which he is riding, and the jury give a verdict with general damages under 40s., the plaintiff shall have no more costs than damages. *Bannister v. Fisher.* 1 Taunt. 357

2 The plaintiff is entitled to no more costs than damages in trespass for an assault, battery, and tearing the plaintiff's clothes, if the jury find that the tearing was in consequence of the beating, and give less than 40s. damages. *Cotterill v. Tolly.* 1 T. R. 655

3 If plaintiff recover less than 40s. damages on a count, alleging that the defendant assaulted him, "and then and there tore the plaintiff's clothes, which the plaintiff then and there wore, &c." he is entitled to no more costs than damages. *Mears v. Greenaway.* 1 H. B. 291
And see *Lockwood v. Stannard.*

5 T. R. 482

4 If to an action for an assault and battery the defendant plead the general issue and a justification to the whole, and the plaintiff obtain a verdict with damages under 40s., the plaintiff is entitled to full costs. *Smith v. Edge.*

6 T. R. 562

5 In trespass for an assault and battery, where the defendant justifies the assault only, and the plaintiff obtains damages under 40s. and the Judge does not certify, the plaintiff is entitled to no more costs than damages. *Page v. Creed.*

3 T. R. 391

S. P. *Brennan v. Redmond.* 1 Taunt. 16

6 In an action for assault, battery, and false imprisonment, if the verdict be for one shilling, and the Judge certify under 43 Eliz. c. 6. the plaintiff will be deprived of his costs, though a battery was proved at the trial. *Wiffin v. Kincard.*

2 N. R. 471

(e) *In trespass.*

1 In trespass for throwing stones, &c. at the plaintiff's windows belonging to his dwelling-house, and breaking the glass, &c. if the plaintiff recover less

than 40s. he is entitled to no more costs than damages, unless the Judge certify that the title to the house came in question. *Adlem v. Grinaway.*

6 T. R. 281

2 Where to trespass at A., and throwing down, burning, and totally destroying the plaintiff's hedge there then erected, &c. whereby the defendant pleads the general issue, and justifies the throwing down the hedge, because it was erected on a common over which he prescribes for a right of common, and issue is taken on such right which is found for defendant, and a verdict for plaintiff with 20s. damages on the general issue, and the Judge did not certify, the plaintiff is entitled to no more costs than damages, because the right to the fræhold might have come in question. *Stead v. Gamble.*

7 E. R. 325

3 If the plaintiff in an action for mesne profits recover less than 40s., and the Judge do not certify that the title came in question, the plaintiff is entitled to no more costs than damages. *Doe v. Davis.*

6 T. R. 593

4 The plaintiff, in trespass for breaking his close, who recovers less than 40s. is not entitled to costs of increase, merely because a view was granted before trial, though upon the application of the defendant. *Flint v. Hill.*

11 E. R. 184

5 If a defendant pleads a justification in trespass, and the plaintiff, without traversing it, new assigns a trespass, not concerning his title, &c. on which issue is joined, and found for him, the plaintiff is entitled to no more costs than damages, under 22 & 23 Car. 2. c. 9. s. 136. *Gregory v. Ormerod.*

4 Taunt. 99

6 Where in trespass *quare clausum fregit* the defendant pleads not guilty, and a justification of a right of way, and the plaintiff traverses the right of way, and new assigns *extra viam*; and there is a verdict for the plaintiff with 1s. damages on the new assignment, and for the defendant on the justification; the plaintiff is entitled to full costs, deducting the defendant's costs on the issue found for him. *Martin v. Valance.*

1 E. R. 350

7 Where a declaration in trespass consists of one count only, the defendant justifies part of it, and the plaintiff

new assigns without taking issue on the special plea, and obtains a verdict, he is entitled to the costs of all the pleadings. *Gundry v. Sturt.*

1 T. R. 636

- 8 Where to an action of trespass for breaking and entering the plaintiff's close, &c. the defendant pleads a special plea of justification to the whole declaration; and the verdict is against him, the plaintiff is entitled to full costs, although the damages are less than 40s. and the Judge at the trial does not certify. *Redridge v. Palmer.*

2 H. B. 2

S. P. *Comer v. Baker.* 2 H. B. 341

- 9 In trespass *quare clausum fregit*, if the defendant plead not guilty and a justification which does not make title to the land, upon which issues are joined, which are found for the plaintiff with damages under 40s., still the plaintiff is entitled to full costs. *Peddell v. Kiddle.*

7 T. R. 639

- 10 If it appear on the trial that the trespass, however small, was committed after notice, and the jury give less than 40s. damages, the Judge is bound under stat. 8 & 9 W. 3. c. 11. s. 4. to certify that the trespass was wilful and malicious, in order to entitle the plaintiff to his full costs. *Reynolds v. Edwards.*

6 T. R. 11

- 11 But in a subsequent case the Court decided that it is discretionary in the Judge to certify or not according as it appears to him that the trespass was or was not wilful and malicious. And the Judge having declined to certify in a case where notice was given by the wife of the plaintiff to the defendant not to enter the *locus in quo* in his cart, there being no road there; notwithstanding which the defendant persisted in going on for the purpose of viewing more conveniently the turning in of some cattle in assertion of a disputed right of common in an adjoining inclosure of the plaintiff's, which right was found for the defendant, on a justification pleaded; the Court refused to interfere. *Good v. Watkins.*

3 E. R. 495

(f) *Where several matters are pleaded.*

- 1 Under stat. 4 Ann. c. 16. the *quantum* only of the costs of double pleading is left to the discretion of the Court.

Therefore if one of several pleas pleaded by defendant be adjudged bad on a demurrer to plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *postea*, if, afterwards upon trial of the issues joined on the other pleas defendant should have a verdict, even though it should appear on the whole of the record that the plaintiff had no cause of action. *Duberley v. Page.*

2 T. R. 391

- 2 If there be a certificate against any more costs than damages upon the stat. 43 Eliz. c. 6. s. 2., the plaintiff shall not have the costs of the double pleas, on which all the issues were found for him; although the Judge have not certified under the stat. 4 Ann. c. 16. s. 5. that the defendant had probable cause to plead the several special matters; that section, which says that "if a verdict be found on any issue for the plaintiff, costs shall be given, &c. unless the Judge who tried the said issue shall certify," &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond v. Johnson, Clerk.*

7 E. R. 583

- 3 Where some issues in replevin are found for the plaintiff which entitle him to judgment, and some for defendant, the defendant must be allowed the costs of the issues found for him out of the general costs of the verdict, unless the Judge certify that the plaintiff had probable cause for pleading the matters on which those issues are joined. *Dodd v. Joddrell.*

2 T. R. 235

- 4 The defendant is entitled not only to the costs of the pleadings which form, but also of the trial of those issues which are found in his favour. *Brooke v. Willett.*

2 H. B. 435

And see *Vollum v. Simpson.*

2 B. & P. 368

- 5 The statute of Ann. being remedial ought to be so construed as to advance the remedy: and the construction adopted in the preceding cases is analogous to that put upon the stat. of Gloucester, which, in terms, gives only the costs of the writ, but is held

- to give all the costs of the suit. *Per Heath, J.* 2 B. & P. 369
- 6 If the plaintiff take issue on several pleas, one of which is insufficient in law, and has a verdict on all the issues except that joined on the insufficient plea, which is found for the defendant, and afterwards judgment is entered up for the plaintiff, still he shall not be allowed any costs on the issue found for the defendant. *Kirk v. Nowill.* 1 T. R. 266
- 7 If an avowant in replevin after trial and verdict for the plaintiff, obtain judgment *non obstante veredicto*, in consequence of the plaintiff's pleas in bar being bad, he is not entitled to any costs on the pleadings subsequent to the pleas in bar, because he should have demurred to them. *Da Costa v. Clarke.* 2 B. & P. 376
- 8 And if judgment had been arrested in that case, no costs would have been given. *ibid.*
- 9 The defendant in replevin avows for rent in arrear, and that the goods had been clandestinely removed. The plaintiff pleads, 1st, non tenore; 2dly, no rent in arrear; and 3dly, that the goods were not clandestinely removed. The last issue only was found for the plaintiff: Held, that the defendant was entitled to deduct from the plaintiff's costs, the costs of the two first issues which were found for the defendant. *Cook v. Green.* 1 Marsh. 234
- ## II. DEFENDANT'S RIGHT TO COSTS.
- (a) *On nonsuit, verdict, or judgment.*
- 1 Where a defendant removes proceedings by a *recordari facias loquelam* from a County Court into one of the superior Courts, and signs judgment of *non pros.* in default of the plaintiff's appearing, he is entitled to costs by stat. 4 Jac. 1. c. 3. *Davies v. James.* 1 T. R. 372
- 2 An application for costs, under 43 G. 3. c. 46. cannot be supported by a reference to the notes stated on the trial; and an affidavit to support such an application, must shew on the face of it, that there was no reasonable or probable cause for the arrest. *Fountain v. Young.* 1 Taunt. 60
- 3 Liebt on bond, where the plaintiff recovers a verdict for nominal damages only, and takes his judgment for the penalty, is not within the relief of the stat. 43 G. 3. c. 46. s. 3. enabling the Court to allow the defendant costs, if the plaintiff do not recover the amount of the sum for which he had held the defendant to bail. *Cammack v. Gregory.* 10 E. R. 525
- 4 If defendant be holden to bail for a larger sum, and pay a lesser sum into Court, which the plaintiff accepted and proceeded no further in the action: The Court of C. P. held the defendant entitled to his costs under 43 G. 3. c. 46. s. 3. *Laidlaw v. Cockburn., Bt.* 2 N. R. 76
- 5 If the plaintiff enter a *noli prosecute*, the defendant is entitled to costs under stat. 8 Eliz. c. 2. s. 2. *Cooper v. Tiffin.* 3 T. R. 511
- 6 If there be two defendants in an action of *assumpsit*, one of whom suffers judgment by default, and the other obtains a verdict, he who obtains the verdict is entitled to costs. *Shrub v. Barrett.* 2 H. B. 28
- 7 Though the defendant had judgment on demurrer in *quare impedit*, the Court of C. P. held that he was not entitled to costs under s. 2. of stat. 8. & 9 W. 3. c. 11. *Thrale v. The Bishop of London.* 1 H. B. 530
- 8 A bill of exceptions, being no part of the record in the Court below till after judgment, is not to be included in the taxation of costs there. *Gardner v. Baillie.* 1 B. & P. 32
- 9 Where the plaintiff recovered a verdict at the trial and had judgment in C. P., and upon a bill of exceptions returned into this Court, judgment was reversed, and the plaintiff took nothing by his writ, the defendant cannot have costs. *Bell v. Potts.* 5 E. R. 49
- 10 Where plaintiff after arresting and holding defendant to bail for 50*l.* took 20*l.* out of Court, and stayed further proceedings; the defendant was not held entitled to costs under 43 G. 3. c. 46. s. 3. *Rouvery v. Alfson.* 13 E. R. 90
- 11 On a joint plea of not guilty to trespass and assault, if one defendant be found guilty with 1*s.* damages and 1*s.* costs, and the other acquitted, the latter is only entitled to 40*s.* costs. *Hughes v. Clitty.* 2 M. & S. 172
- 12 The only mode of recovering the

costs of a nonsuit upon the merits in ejectment, is to serve the lessor of the plaintiff with a copy of the consent rule, and *allocatur* of costs, and to attach him if he does not obey. *Doe, d. Prior v. Salter.* 3 Taunt. 485

(b) *How restrained by Court of Conscience Acts.*

N. B. See *tit.* INFERIOR COURT, *post.*

- 1 The *London* Court of Requests Act 39 & 40 G. 3. c. 104. s. 12. provides that if any action be commenced out of that Court for any debt not exceeding 5*l.* (within the jurisdiction), the plaintiff shall not, by reason of a *verdict* for him, or otherwise, be entitled to costs, &c.: the Court held, that after judgment by default, and the damages assessed upon a writ of inquiry, the defendant might come into Court and move to stay proceedings on payment of the damages assessed, without costs. *Dunster v. Day.* 8 E. R. 239
- 2 If the plaintiff in an action of assault having recovered only 20*s.* damages, whereby he is entitled to no more than 20*s.* costs, bring an action on the judgment; and obtaining judgment by default in that action, enter it up for debt and costs, the Court on affidavit of the defendant being resident in the city of *London*, and liable to be summoned to the Court of Requests, will, under the 39 & 40 *Geo.* 3. c. 104. set aside the judgment as to the costs. *Foot v. Coare.* 2 B. & P. 588
- 3 The *London* Court of Requests has jurisdiction by the stat. 39 & 40 G. 3. c. 104. over a contract for the retention of tithes by the tenant, the value of which was under 5*l.* And therefore if the vicar sue for the same, and recover less than 5*l.* upon a count *in assumpsit* for a *quantum valebant*, the defendant may enter a suggestion on the roll, stating that he was a freeman and inhabitant of the city of *London*, trading there at the time he was served with the writ, for the purpose of ousting the plaintiff of his costs, under the 12th sect. of the act. *Sandby, Clerk, v. Miller.* 5 E. R. 194
- 4 A market gardener who rented a stand with a shed over it in *Fleet* Market at an annual rent, which he occupied three times a week on market days till 10 o'clock in the morning; after which, and on all other days, it was

occupied by others; does not *keep* a stand within the meaning of the *London* Court of Requests Act, 39 & 40 G. 3. c. 104. so as to be privileged to be sued there for a debt under 5*l.* *Gray v. Cook.* 8 E. R. 336

- 5 A person rents a counting-house in the city of *London* jointly with another person, and receives orders there for his business: Held, that he is within the jurisdiction of the Court of Requests for the city of *London*, though he sleep and reside in *Southwark*. *Croft v. Pittman.* 1 Marsh. 269
- 6 Under the *London* Court of Requests Act, 39 & 40 G. 3. c. 104. a husband domiciled in *Middlessex*, where his wife carried on business, though he was employed as a clerk in the office of solicitors in *London*, is not privileged to be sued only in *London*, as a person seeking his livelihood there; for that means seeking the *whole* of his livelihood there. *Stephens v. Derry.* 16 E. R. 147
- 7 If a defendant lodge within the jurisdiction of the *Southwark* Court of Conscience Act, 22 G. 2. c. 47. having consuance of causes to the amount of 5*l.* by stat. 46 G. 3. c. 78. though he carry on his business, and the goods were delivered out of the jurisdiction, and the plaintiff had no knowledge of his lodging within it till after the process was sued out; yet he is within the statutes. *Spencer v. Holloway.* 15 E. R. 647
- 8 After action laid in *London*, and brought in *K. B.* for board and lodging of defendant's wife in *Middlesex*, which was referred to an arbitrator, who awarded less than 5*l.* for the rent of the lodging; this was held to come within s. 13. of the 39, 40 G. 3. c. 104, excepting actions for rent from the compulsory jurisdiction of the *London* Courts of Request. *Holden v. Newman.* 13 E. R. 161
- 9 The stat. 14 G. 2. c. 10. which enables certain persons to sue for debts under 40*s.* in the Court of Requests in *London*, does not extend to cases where the plaintiff recovers less than 40*s.* in a special action on the case for the breach of an agreement. *Jonas v. Greening.* 5 T. R. 529
- 10 That act only extends to cases where the demand is certain. *id.*
- 11 And only to those cases where the

- plaintiff is an *inhabitant* within the city of *London*. 5 T. R. 529: *Webb v. Brown*. 5 T. R. 535
- 12 Where the plaintiff in *assumpsit* failed to prove his special counts, but upon the common counts recovered less than 5*l.* upon the balance of an account which contained items both on the debit and credit side: Held, that by 39 & 40 G. 3. c. 104. he was deprived of costs, it appearing that the defendant resided and traded in *London*. *Fomin v. Oswald*. 1 M. & S. 393
- 13 An action upon the case for negligence in driving the plaintiff's carriage contrary to an implied *assumpsit*, is not a demand coming within the jurisdiction of the *Southwark* Court of Conscience Act. *Lawson v. Morgan*. 1 Taunt. 390
- 14 The defendant is entitled to a suggestion for costs under the *London* Court of Requests Act, though it appears that if the plaintiff had postponed the commencement of his action a few months, his cause of action would have been good for more than 40*s.* *Tucker v. Crosby*. 2 Taunt. 169
- 15 No action can be brought in the County Court unless the cause of action arise, and the defendant reside, within the county; and if that be not the case, the action may be brought in the superior Courts, although for a sum less than 40*s.* *Welsh v. Troyte*. 2 H. B. 29
- And see *Tubb v. Woodward*. 6 T. R. 175: And *Smith v. O'Kelly*. 1 B. & P. 75
- 16 It is the same with respect to the Court of Requests in *London* under stats. 3 Jac. 1. c. 15: 14 G. 2. c. 16. *Brooks v. Moravia*. 2 H. B. 220
- 17 The Court of Requests Act for *Southwark* &c. enacts, that "if in any action, &c. for recovery of any debt sued against any person (within the jurisdiction) in any of the King's Courts at *Westminster*, &c. it shall appear to the Judge, &c. that the debt to be recovered by the plaintiff doth not amount to 40*s.* &c." the plaintiff shall pay the defendant costs, &c.: the Court held that where the plaintiff's witness proved that the debt, which was originally above, was reduced below, 40*s.*, by part-payment before the action brought, the case was within the statute. *Clarke v. Askew*. 8 E. R. 28
- See also *Fountain v. Young*. 1 Taunt. 60
- 18 The same point was ruled on the *London* Court of Requests Act, 39 & 40 G. 3. c. 104. *Horne v. Hughes*. 8 E. R. 347
- 19 Where the original demand by assignees of a bankrupt was above 40*s.* but the jury found a verdict under 40*s.* the Court of C. P. gave leave to enter a suggestion under stat. 22 G. 2. c. 47. (the *Southwark* Court of Conscience Act), though it was urged that a Court of Conscience has no authority to try a question of bankruptcy. *Keay v. Rigg*. 1 B. & P. 11
- 20 But that Court refused to allow a suggestion for double costs under stat. 23 G. 2. c. 33. (the *Middlesex* County Court Act) where the original debt being above 40*s.* had by a balance of accounts been reduced below that sum. And *Eyre* C. J. said, that it seemed to him that the original demand ought to be under 40*s.* *McCollum v. Carr*. 1 B. & P. 223
- 21 If a defendant reside in *Middlesex*, and keep a warehouse within the city of *London*, jointly with another, but after the commencement of an action against him for a small demand, tell the plaintiff that he does not keep the warehouse in question; and the plaintiff, upon inquiring in the neighbourhood of the warehouse, can obtain no intelligence respecting the defendant, the Court will not, under the 39 & 40 G. 3. c. 104., exempt the defendant from payment of costs, on the ground of the verdict being under 5*l.*; and that he ought to have been summoned to the Court of Requests. *Jefferies v. Watts*. 1 N. R. 153
- 22 A person plying as a porter in the city of *London*, and resorting to a house of call there, but not lodging in the city, is not a person "seeking his livelihood in *London*," within the *London* Court of Requests Acts, 39 & 40 G. 3. c. 104. *Skinner v. Davis*. 2 Taunt. 196
- 23 Attornies, plaintiffs, are not within the *London* Court of Conscience Act 39 & 40 G. 3. c. 104. compellable to sue there for a debt under 5*l.* at the peril of costs. *Board v. Parker*. 7 E. R. 46
- 24 Neither are they, though the defend-

- ant were also an attorney. *Hodding v. Warrand.* 7 E. R. 50
- 25 When a defendant living within the jurisdiction of the Court of Requests at *Westminster*, is sued at one of the superior Courts for a debt under 40s. he may *plead stat.* 23 G. 2. c. 27. *in bar* *Taylor v. Blair.* 3 T. R. 452
- 26 But if he omit to do so, the Court will not, after verdict, either enter a suggestion on the record, that the defendant lived within that jurisdiction; nor stay the proceedings. *ibid*
- 27 Where a public statute for erecting a Court of inferior jurisdiction, enacts that "no action for any debt not amounting to 4s. and recoverable by that Act, shall be brought against any person residing within the jurisdiction," &c. such statute is a defence upon the general issue to a party bringing himself within it, who is sued in the superior Courts. *Parker v. Elding* 1 E. R. 352
- 28 The *Southwark* Court of Requests Act 22 G. 3. c. 47. cannot be *pleaded* to an action brought in a superior Court. *Barney v. Tubb.* 2 H. B. 351
- 29 The proper mode for the defendant to avail himself of it, is by *entering a suggestion* on the record after verdict, at the execution of a writ of inquiry. *id*
- 30 Where the plaintiff, having obtained judgment on a general demurrer to such a plea, executed a writ of inquiry, on which the damages were assessed at less than 40s. five days before the end of the Term, and signed final judgment on the last day of the Term; the Court of C. P. in the next Term refused to direct the prothonotary to review his taxation of costs to the plaintiff, on an affidavit stating the former proceedings, and that the defendant was *resiant* within the jurisdiction of the inferior Court; because the defendant ought to have *entered a suggestion, and that before final judgment was signed.* 2 H. B. 352
- 31 And to entitle himself to such a suggestion supposing it to be moved for in time, the defendant must state in the affidavit, not only that he is *resiant* within the jurisdiction of, but also that he is *liable to be warned or summoned to the Court of Requests.* *ibid.*
- 32 After judgment by default the defendant is *still in Court*, for many purposes, one of which is that of entering such suggestion. 2 H. B. 352
- 33 It is too late for the defendant in the Term after judgment signed, and execution levied, to apply to enter a suggestion on the Court of Conscience Act, to deprive the plaintiff of his costs, if he could have applied in the same Term. *Waichorn v. Cook* 2 M. & S. 343
- 34 If the plaintiff sue in a superior Court for a demand of above 40s., which at the trial is cut down below that sum by the defence of infancy; and the jury thereupon *find the damages for the plaintiff under 40s.*; the defendant, residing in *Middlesex* at the time of the action brought, and liable to be summoned to the County Court there, is entitled, under the stat. 23 G. 2. c. 33. s. 19., to enter a suggestion on the roll to that effect, entitling him to double costs of suit. *Bateman v. Smith.* 14 E. R. 301
- 35 Where a demand for plumber's work, and new materials found, amounting in value to 8*l.*, was reduced below 5*l.* by the plaintiff's taking the old lead and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under 5*l.*, the plaintiff is not entitled to his costs under the *Southwark Borough Act*, 45 G. 3. c. 87., and it is not a demand reduced below 5*l.* by balancing an account within the exception in the 13th section. *Porter v. Philpot.* 14 E. R. 344
- 36 No person to whom any debt of certain descriptions, not exceeding 5*l.* is owing from any person resident within the jurisdiction of the *Birmingham* Court of Requests, can recover any costs, if he sue elsewhere than in that Court, wheresoever the plaintiff may reside, and wheresoever the cause of action may accrue. *Lees v. Rogers.* 4 Taunt. 150
- ### III. EXECUTOR'S AND ADMINISTRATOR'S LIABILITY.
- 1 Where a plaintiff sued as administratrix in covenant on a breach, subsequent to the death of her intestate, and had judgment against her on demurrer: Held that she was not liable to costs. *Tattersall v. Grootie.* 2 B. & P. 253
- 2 Where the plaintiffs sued as executors

in covenant against the lessor of their testator for not providing timber for the repair of the demised premises, upon a demand made by the plaintiffs after the death of their testator: Held, that they were not liable to pay the costs of a judgment as in case of a nonsuit; inasmuch, as though the breach happened in their own time, they could only declare as executors upon the contract made with their testator. *Cooke v. Lucas.*

2 E. R. 395

- 3 On a review of all the cases, the sound doctrine seems to be, that if the executor or administrator must sue as such on the contract made with the testator or intestate, he is not liable to costs, though the cause of action arose after the death of the testator or intestate.

2 B. & P. 255. 2 E. R. 398

- 4 And perhaps the sound principle on which the exemption of executors and administrators rests, is not the degree of ignorance under which they may be supposed to lie, but the description in the stat. 23 H. 8. c. 15. of the actions in which costs are to be paid; namely, "upon any especially made to the plaintiff, or any contract supposed to be made between the plaintiff and any other person." *Tattersall v. Groot.*

2 B. & P. 255

- 5 A. sued as executrix of B. on a policy effected by B. in his lifetime, in which he was jointly interested with C. and D. now living, and was nonsuited: Held, that she was entitled to the privilege of an executrix, to be exempt from costs. *Wilton v. Hamilton.*

1 B. & P. 445

- 6 If money when recovered would be assets, in the hands of an executor, the executor suing as such, is not liable to costs. *Thompson v. Stent.*

1 Taunt. 322

- 7 If an executor sue as executor for money received by the defendant since the testator's death to the plaintiff's use, and fail, he is liable to pay costs. *Goldthwayte v. Petrie.*

5 T. R. 234

- 8 If a plaintiff name himself executor when he need not, and fail, he shall pay costs; as where his declaration states a cause of action due to him personally; but if an executor declare on a trover and conversion in the testator's lifetime, and also on a trover and conversion after his death, the evidence of-

ferred being only applicable to the first count; and he be nonsuited, he is not liable to pay costs. *Cockerill & Ur. v. Kynaston.*

4 T. R. 277

- 9 If the conversion were in the time of the administratrix, and she be nonsuited in the action of trover, she is liable to pay costs, though she never were in fact in possession of the goods since the intestate's death. *Bollard v. Spencer.*

7 T. R. 358

- 10 Where a plaintiff executor adds one count as executor, stating a cause of action for which he might declare in his own right, if he is nonsuited, he shall be liable to costs. *Grimstead v. Shirley.*

2 Taunt. 116

- 11 Administrators declaring in trover on a possession of the goods by their intestate, and a conversion in their own time, and being nonsuited, are liable to costs; for the fact of their possession is immaterial, and they may sue in their own right. *Hollis v. Smith.*

10 E. R. 293

- 12 So if they improperly lend their names to other persons.

Therefore, where plaintiff sued as administrator upon a contract made with his intestate, and assigned by the plaintiff to J. S., for whose benefit the action was brought; it appearing that the contract had been annulled, with the privity both of the plaintiff and J. S., and that the former was indemnified by the latter, and a verdict being found for the defendant: the Court of C. P. made an order for the plaintiff to pay the costs. *Comber v. Harcastle.*

3 B. & P. 115

- 13 Where the defendant pleads the general plea of bankruptcy to an action brought by an executor or administrator, and obtain a verdict, the plaintiff is not liable to costs under 5 G. 2.

30. s. 7. *Martin & Ur. v. Norfolk.*

1 H. B. 528

- 14 Executors are not liable to costs on judgment as in case of a nonsuit under stat. 15 G. 2. c. 17. *Booth v. Holt.*

2 H. B. 277

- 15 The plaintiffs as executors, having sued one of the co-obligors on a joint and several bond in K. B. to which usury was pleaded, suffered a nonsuit, and brought a second action against another co-obligor in C. P., in which the case having gone off *pro defectu juratorum*, they brought a third action

against all three co-obligors, in order to exclude the evidence of one upon the usury, and moved to discontinue the second action, without costs; but the Court of C. P. only allowed them to discontinue on payment of costs. *McLush v. Maumder*. 2 N. R. 72

16 Executors and administrators are liable to pay the costs of a *non-pros*.

Higgs v. Warry. 6 T. R. 654

17 An executor having pleaded *non assumpsit* as well as *plene administravit* and *plene administravit prater*, &c., and thereby forced the plaintiff to go to trial; the plaintiff obtaining a verdict on the *non-assumpsit*, and being entitled to judgment of assets *quando acciderint*, is entitled to the general costs of the trial, though the issue of *plene administravit* is found for the defendant. *Hindsley v. Russell*. 12 E. R. 232

18 No costs can be awarded on prohibition against executors, against whom judgment was obtained on demurrer, upon a question, Whether they were entitled to a *general* or *limited* probate. *Scammell v. Wilkinson*. 3 E. R. 202

19 Upon the pleas of *non assumpsit* and *plene administravit* the plaintiff joined issue, and omitted to pray judgment of assets *quando*: The first issue being found for the plaintiff, and the second for the defendant, the defendant is entitled to the *postea* and general costs. *Hogg v. Graham*. 4 Taunt. 135

20 Where a man sues as executor, the Court of C. P. will require a strong case against him, to subject him to costs within the meaning of the stat. 43 G. 3. c. 46. s. 3. *Foulkes v. Neighbour*. 1 Marsh. 21

IV. ERROR.

1 Costs are not allowed on the statute 3 H. 7. c. 10. where a writ of error is non-prossed before the transcript of the record by the clerk of the Errors of K. B. *Salt v. Richards*, in error. 7 E. R. 110

2 The stat. 13 Car. 2. stat. 2. c. 2. s. 10. giving double costs to the defendant in error, if judgment be affirmed after verdict, is confined to cases where the judgment so affirmed is for the plaintiff below, and not where the defendant be-

low obtained judgment upon a special verdict. *Baring v. Christie*. 5 E. R. 545

3 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to his costs on the stat. 8 & 9 W. 3. c. 11. s. 2. which is confined to judgments for defendants on demurrer. *Golding v. Dias*, in error. 10 E. R. 2

4 Executors and administrators are liable to costs in error in cases where they would be liable in the original action. *Williams v. Riley* (in *Cam. Scac.*), in error. 1 H. B. 566

5 Writ of error having been quashed, because brought by a feme covert without her husband, the defendant in error is entitled to costs under stat. 4 Ann. c. 16. s. 25. *McNamara v. Fisher*. 8 T. R. 302

6 The Court of C. P. will not compel security for costs in error on the ground of the plaintiff in error being a lunatic. *Steel v. Allan*. 2 B. & P. 437

7 The Court will not refer to the Master to tax the plaintiff his costs in error in parliament on a judgment affirmed on error in *Dom. Proc.*, without awarding costs, and remitted to this Court, to the end that such proceedings may be had thereon, as if no such writ of error had been brought. *Beale v. Thompson*. 2 M. & S. 249

8 The Court of Exchequer Chamber is bound to allow double costs to the defendant in error, on the affirmance of a judgment of the King's Bench. *Shepherd v. Mackreth*. 2 H. B. 284

9 Judgment having been given in C. P. for plaintiff on a special verdict in *assumpsit*, which was reversed on writ of error in K. B. the defendant is entitled there not only to judgment of acquittal, but also for the costs of his defence in C. P., being the same judgment which the Court below ought to have given; defendant in such case being entitled to his costs by stat. 23. H. 8. c. 15. *Gildart v. Gladstone*. 12 E. R. 668

V. PAYMENT OF MONEY INTO COURT.

1 In a special count on a policy, the risk was stated to continue until the ship was unladen, and there were common counts: Held, that the premium having been paid into Court generally

was an admission of the contract stated in the special count; and that it was not competent to the defendant to shew that the policy, by which the risk was originally made to cease after the ship was moored twenty-four hours in safety, was afterwards altered by the broker without the defendant's knowledge. But the defendant (having afterwards obtained a rule to amend the rule for paying money into Court, by confining it to the money counts, and for a new trial on payment of costs, if the plaintiffs thereupon determine to take the money out of Court, and not to proceed further), is entitled to all the costs of the action, and not merely to the usual costs of a new trial. *Andrews v. Palsgrave.*

9 E. R. 325

- 2 If after action commenced and before declaration, the defendant offered to pay the debt and costs, and the plaintiff refused to receive it, the Court of C. P. allowed the defendant to pay into Court the debt and costs up to the time of his offer only, and compelled the plaintiff to pay the costs of the application, and all costs subsequent to the offer. *Zeevin v. Cowell.*

2 Taunt. 203

This decision is doubted in the case of Burmester v. Hiltch.

13 E. R. 551

- 3 A plaintiff is entitled (at any time before trial) to all the costs till the time of the defendant's paying money into Court, notwithstanding he afterwards proceeds in the action. *Hartley v. Bateson.*

1 T. R. 629

And see *Griffiths v. Williams.*

1 T. R. 710

- 4 The plaintiff is entitled to costs up to the time of the defendant's paying the money into Court, though the plaintiff afterwards give notice of trial, which he neglects to countermand, whereby the defendant was entitled to judgment, as in case of a nonsuit. *Seymour v. Bridge.*

8 T. R. 408

- 5 And the same principle was held to apply, where the plaintiff twice carried the record down to trial, and withdrew it. *Lorck v. Wright.*

8 T. R. 486

- 6 If defendant pay money into Court, and the plaintiff afterwards proceed to trial, when a verdict is given against him; the latter is not entitled to the costs up to the time when the money

was paid into Court. *Stevenson v. Yorke.*

4 T. R. 10

- 7 When the defendant pays money into Court, which the plaintiff agrees to accept, the latter must serve the defendant with notice of an appointment before the Master to tax the costs. *Kabell v. Hudson.*

4 T. R. 10

- 8 If the defendant pay money into Court, and the plaintiff proceed to trial, when a juror is withdrawn, the plaintiff is not entitled to the costs up to the time of paying money into Court. *Stodhart v. Johnson.*

3 T. R. 657

- 9 The plaintiff is not entitled to costs to the time of defendant's paying money into Court after the defendant has obtained judgment as in case of a nonsuit. *Crosby v. Olorenshaw.*

2 M. & S. 335

- 10 Generally, if money be paid into Court, and the plaintiff does not take it out, but proceeds to trial, and recovers nothing, he is not entitled to costs up to the time of paying the money into Court; but in policy-causes, where there is a consolidation-rule, and money paid into Court, although the cause tried follows the general practice, and the defendant, if he succeeds, is entitled to the whole costs of that action, yet the plaintiff is entitled to the entire costs of the short causes up to the time of paying the money into Court. *Twemlow v. Brock.*

2 Taunt. 361

- 11 The defendants in several actions on a policy of insurance paid money into Court, which the plaintiff took out, without taking the costs at that time; afterwards they entered into the common consolidation-rule, and the plaintiff was nonsuited in the action that was tried: Ruled that the plaintiff was not entitled to the costs in any of the actions up to the time of paying the money into Court. *Burstall v. Horner.*

7 T. R. 372

- 12 If a plaintiff, for the sake of costs, deliver a declaration, and afterwards accept from the defendant a sum which was offered to him before declaration, he shall have costs only up to the time of the plaintiff's first offer. *Sawbridge v. Coxwell.*

4 Taunt. 255

- 13 In the Court of C. P. if the plaintiff proceed to trial after money paid into Court, and the verdict is against him;

he is notwithstanding entitled to costs up to the time of money paid in. *Wilton v. Place.* 2 B. & P. 56

And see *Muller v. Hartshorne.*

3 B. & P. 556

- 14 If a defendant pay money into Court upon some of the counts only, and the plaintiff take it out; the latter is only entitled to the costs of those counts.

Baillie v. Cazelet. 4 T. R. 579

And see *Skarrott v. Vaughan.*

2 Taunt. 266

- 15 If a defendant pays money into Court, which the plaintiff does not take out, but proceeds, and the defendant obtains a verdict, the defendant is entitled to full costs of the whole action. *Jeffs v. Smith.* 4 Taunt. 196

VI. COSTS ON JUDGMENT, OR A VERDICT AS TO PART.

N. B. For costs on reference to arbitration, see AWARD, ante, 96.

- 1 Where in *assumpsit* the defendant pleaded the general issue, and the statute of limitations to the whole sum demanded, and as to part of it, that the promises were made by the defendant's testator and one *A. B. jointly*, which *A. B.* survived the other, and is still living; and this last issue was found at the trial for the defendant, and the other two issues for the plaintiff, who thereupon had judgment for the rest of his damages and costs: Held, that the defendant was not entitled to have the costs of the issue found for him, deducted from the costs of the trial, which the plaintiff was entitled to on the issues found for him: *aliter* where all the issues at the trial are found for the defendant, but the plaintiff has judgment upon demurrer, and recovers damages on a writ of inquiry. *Postan v. Stanway.*

5 E. R. 261

- 2 In C. P. if plaintiff obtain judgment upon one of several counts, he is entitled to the costs of the whole declaration. *Spicer v. Teasdale.*

2 B. & P. 49

- 3 But subsequently to this case that Court declared that in future their practice should be conformable to that of the Court of King's Bench upon this point. *Penson v. Lee.*

2 B. & P. 334

- 4 In an action on a policy of insurance, with a count for money had and re-

ceived, where the defendant paid no money into Court, but established as a defence that the risk never commenced, and the plaintiff obtained a verdict for the premium only, the Court of C. P. held that the plaintiff was only entitled to the costs of the count on which he succeeded, and so much of the expenses of the trial as were necessarily incurred by him in support of that count; and that neither party was entitled to the costs of the special count. *Penson v. Lee.*

2 B. & P. 330

- 5 If there be two distinct causes of action in two counts, and as to one the defendant suffers judgment by default, and as to the other takes issue and obtains a verdict, he is entitled to judgment for his costs on the latter count, notwithstanding the plaintiff is entitled to judgment and costs on the first count. *Day v. Hanks.* 3 T. R. 654
- 6 So, where in an action of trespass there was only one count, but several pleas of justification on which issue was taken: new assignment, as to which judgment by default: *venire* as well to assess the damages on the judgment by default as to try the issues: all the issues found for the defendant: Held that the defendant was entitled to the cost in those issues. *Griffiths v. Davies.*

8 T. R. 466

- 7 An Inclosure Act directed that the parties who were dissatisfied with the determination of the commissioners, might bring actions to try their rights, adding, "that if the verdict should be in favour of the commissioners' determination, the costs should be borne by the plaintiff; and if against such determination, then by the proprietors at large;" a proprietor brought an action, claiming nine distinct rights, and recovered for three only: it was held that he should only have his costs on those issues found for him, and that the defendant should have his costs of the other issues. *Braithwaite v. Bradford.*

6 T. R. 599

- 8 Trespass for breaking and entering the plaintiff's free fishery in *A.*, and also in *B.*, and also in *A.* and *B.*; pleas, 1. Not guilty; 2. That the said free fisheries were parcel of a navigable harbour, &c. common to all the king's subjects. Replication, prescribing for a free fishery in the said place in right of the plaintiff's manor. Rejoinder,

taking issue on such prescription. On verdict for the plaintiff on the general issue, and for the defendant on the prescription; the latter going to the whole declaration: the Court held that the plaintiff was not entitled to costs. *Vivian v. Blake*. 11 E. R. 263

VII. NEW TRIAL.

- 1 Where a *venire de novo* is awarded, the party succeeding is only entitled to the costs of the second trial. *Lickbarrow v. Mason*. 6 T. R. 131
- 2 After a *venire de novo* awarded upon an imperfect special verdict, and a new trial granted after a verdict for the plaintiff on the second trial, and the jury find again for the plaintiff on the third trial, he is only entitled to the costs of the last trial, unless it be otherwise expressed in the rule granting the new trial. *Bird v. Appleton*. 1 E. R. 111
- 3 Where a verdict was found for the plaintiff subject to a case reserved, from the insufficient state of which it was necessary for the cause to be sent down to a second trial, and nothing was said respecting the costs, though the plaintiff succeeded on such second trial, the Court held that he was not entitled to the costs of the first. *Hankey v. Smith*. 3 T. R. 507
S. P. determined in *Smith v. Haile*. 6 T. R. 71
- 4 But where the defendant in such a case gave the plaintiff a *cognovit*, without going to trial a second time, he was liable to pay the costs of the former trial. *Booth v. Atherton*. 6 T. R. 144
- 5 After verdict for the defendant, and a new trial awarded upon a question of law, without any thing said as to costs: and instead of proceeding to a second trial, the parties agree to state the facts specially, as if on a case reserved at the trial; on which the *postea* is afterwards delivered to the plaintiffs; they are entitled to the costs of the first trial. *Robertson v. Liddell, Bart.* 10 E. R. 416
- 6 Where a cause is twice tried, and the verdict is found on each trial for the same party, he is entitled to the costs of both: but where the verdicts are found for different parties, the costs of the first trial are not allowed. *Trelawney v. Thomas*. 1 H. B. 641

7 When upon setting aside a nonsuit the costs are directed to abide the event, though the plaintiff succeed on the second trial, he is not entitled to the costs of the first; neither is the defendant in such case entitled to the costs of the first trial. *Austen v. Gibbs*. 8 T. R. 619

8 Plaintiff having obtained a verdict, the Court of C. P. granted a new trial, directing that the "costs of the former trial should abide the event of the new trial." On the second trial the verdict was for the defendant. The Court held that the defendant was only entitled to the costs of the second trial. *Chapman v. Partridge*. 2 N. R. 382

9 The Court of C. P. held that where a cause having been once tried, a new trial was granted, at which a *juror* was withdrawn, on the party who gained the verdict on the first trial undertaking generally to *pay the other his costs*; such an undertaking included only the costs of the second trial. *Rouse v. Bardin*. 1 H. B. 639

10 Although a defendant succeeded upon the first trial by a forgery, the Court of C. P. cannot give the plaintiff, succeeding on the second trial, the costs of both. *Goodtitle v. Walter*. 4 Taunt. 671

VIII. WITNESSES.

- 1 The party succeeding is not entitled to the costs of examining witnesses on interrogatories, or taking office copies of depositions; but each party applying pays his own expense unless it be otherwise expressed in the rule. *Stephens v. Crichton*. 2 E. R. 259
- 2 Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expense of taking the depositions in the taxation of costs, though he succeed. *Taylor v. Royal Exchange Assurance Company*. 8 E. R. 393
- 3 If a rule of Court for the examination of witnesses by commission, express that the deposition of witnesses at *Hamburgh* and *Lubeck* are to be taken, and the commission is directed to persons at *Hamburgh*, the expenses of bringing witnesses from *Lubeck* to *Hamburgh* ought to be allowed upon taxation. *Muller v. Hartshorne*. 3 B. & P. 556
- 4 The costs of a witness coming from

beyond seas, for some years past were allowed only from his coming within the jurisdiction of the Court of C. P. *Hagedorn v. Alnutt*. 3 Taunt. 379

- 5 But the costs of bringing over a necessary witness from the continent to this country are to be allowed in future. *Cotton v. Witt*. 4 Taunt. 55
But not the costs of his return. *ib.*

- 6 A plaintiff who brings over a foreign witness hither, in order to judge by his testimony whether there is ground to bring an action, and afterwards sues and examines the foreigner at the trial, may be allowed the costs of detaining him here from the time of the writ sued out until the trial, and a reasonable sum for his sustenance here during the same time, but not the costs of his passage hither, or of his return. *Schimmel v. Lousada*. 4 Taunt. 695

- 7 Otherwise in K. B., where the costs of his return are also allowed, though not of his coming hither. *ibid.*

- 8 The Court of C. P. will allow the costs of detaining a foreigner here to give evidence upon a trial, computed from the day of the writ sued out to the day of trial, and the practice of the Court of King's Bench is the same. *Sturdy v. Andrews*. 4 Taunt. 697

- 9 A. abroad furnishes goods to B. at the request of C., who draws bills on B., which C. refuses to accept. A. sends for a witness from abroad for the support of an action against B., pending which action C. arrives in this country. A. then discontinues his action against B. and commences another against C., in which he recovers, by means of the witness he had brought: Held, that C. is only liable for the costs of the witness while detained in this country, and not for those of bringing him over or sending him back. *Treemain v. Barrett*. 1 Marsh. 463

IX. SECURITY FOR, WHERE REQUIRED.

- 1 On moving for a rule *nisi* to compel the plaintiff to give security for costs, the defendant must state in what stage the proceedings are: the Court of C. P. will not grant the rule *nisi* in a cause in which interlocutory judgment has been signed, until that judgment has been set aside. *Luzaletti v. Powell*. 1 Marsh. 376

- 2 On a motion to compel the plaintiff to give security for costs, the Court of C. P. will not enter into the merits of the case, nor grant the rule on account of the hardship of the case upon the defendant. *Ciragno v. Hassan*. 1 Marsh. 421

- 3 Rule, calling on the plaintiff, who had left the kingdom, to give security for the costs made after issue joined. *Barker v. Hargreaves*. 6 T. R. 597

- 4 The Court stated that there were only three instances where they will interfere to oblige the plaintiff to give security for costs; 1st, When an infant sues; in which case his *prochein ami*, or guardian, or attorney, must give security; 2dly, When the plaintiff resides abroad; 3dly, Where there has been a former ejectment: in which case the Court will stay proceedings in the second ejectment till the costs of the former are paid. *Doe d. Selby v. Alston, Bart.* 1 T. R. 490, 1

- 5 Where the lessor of the plaintiff had abandoned his suit in another Court, and brought a fresh ejectment in K. B., the Court refused an application, requiring him to give security for the costs. 1 T. R. 491

- 6 Where an action was brought without the knowledge of the plaintiff, who was out of the realm, the Court of C. P. required security for the costs to be given on the part of the plaintiff. *Bull v. Adrian*. 1 Taunt. 64

- 7 If the plaintiff reside abroad, the Court will stay proceedings till he give security for the costs. *Pray v. Edie*. 1 T. R. 267

- 8 And this is now the practice of the Court of C. P. See *Ganeyford v. Levy*, 2 H. B. 118. overruling the former case of *Parquot v. Eling*. 1 H. B. 106. But see note (b) 2 H. B. 384. that the rule will be granted on terms, and at the discretion of the Court.

- 9 So if the plaintiff reside in *Ireland*. *Fitzgerald v. Whitmore*. 1 T. R. 362

- 10 But see now as to the practice of the Court of C. P. *Tullock v. Crowley*. 1 Taunt. 18; in which case the Court of C. P. refused to oblige a plaintiff (an English subject, a prisoner in France) to give security for costs. 1 Taunt. 18

- 11 Where a foreign seaman had brought

- an action for his wages against a foreigner, the Court (of C. P. *dissent*. *Rooke, J.*) refused to compel the plaintiff to give security for costs, on account of his being on a voyage on board an *English ship*. *Henshen v. Garves.* 2 H. B. 383
- 12 But the Court of C. P. will not now stay proceedings till security is given for the costs, in an action *against an Englishman* by a foreign seaman, serving on board an *English ship*. *Jacobs v. Stevenson.* 1 B. & P. 96
- 13 The Court of C. P. refused to require security for costs of a foreigner, a captain of a ship, who was in the habit of sailing to and from the ports of this country. *Nelson v. Ogle.* 2 Taunt. 253
- 14 And also in an action by a prisoner of war for wages earned on board an *English ship*. *Maria v. Hall.* 2 B. & P. 236
- 15 The Court of C. P. refused to require the plaintiff, in a *qui tam* action, to give security for costs, though it appeared that he was insolvent. *Field v. Carron.* 2 H. B. 27
- 16 The Court required an uncertificated bankrupt, bringing an action of trover for goods to give security for costs in case he should fail in his suit. *Webb v. Ward.* 7 T. R. 296
- 17 But the Court of C. P. refused to compel two plaintiffs, one of whom was a bankrupt, and the other a prisoner in Newgate, to give security for costs. *Anonymous.* 2 Taunt. 61
- 18 A commission of bankrupt having issued against the plaintiff who was going with his family to *New York* upon the petition of the defendant, who was the only creditor, and had chosen himself sole assignee, and the plaintiff having brought an action against the defendant to try the commission, the Court of C. P. refused to stay the proceedings till he should give security for the costs. *McCulloch v. Robinson.* 2 N. R. 352
- 19 If one of two plaintiffs reside within reach of the process of the Court, security will not be required for the costs, though the other plaintiff be a foreigner residing abroad, and though the first-mentioned plaintiff be a bankrupt in execution for debt. *McCannell v. Johnston.* 1 E. R. 431
- 20 The Court will not stay the proceedings till the plaintiff, a foreigner, give security for the costs, unless the defendant have put in bail. *De la Preuve v. The Duc de Biron.* 4 T. R. 697
- 21 If a foreigner sue two defendants, and only one of them puts in bail, that one may require the plaintiff to give security for the costs, without putting in bail for the other defendant. *Carr v. Shaw.* 6 T. R. 496
- 22 An application to make the plaintiff, who resided abroad, give security for the costs, refused, after notice of trial given; as the defendant might have applied earlier, after knowledge of the fact of the plaintiff's residence, and before so much of the costs were incurred. *Walters v. Frythall.* 5 E. R. 338
- 23 After defendant has agreed to take short notice of trial, the Court will not compel plaintiff, though a foreigner and resident abroad, to give security for costs. *Michel v. Pareski.* 2 H. B. 593
- S. P. Muller v. Gernon, and Steel v. Lacy.* 3 Taunt. 272, 3.
- 24 The Court will not oblige an infant plaintiff to give security for costs. *Anonymous.* 1 Marsh. 4
- X. OF STAYING PROCEEDINGS IN A SECOND ACTION FOR THE COSTS OF A FORMER.
- 1 The Court will stay the proceedings in a second ejectment until the costs of a nonsuit in a former ejectment be paid, if it be brought on the same title, though it be brought for different lands in a different county, and though all the defendants be not the same. *Keene d. Angel v. Angel.* 6 T. R. 740
- 2 Proceedings in ejectment were stayed till the costs of a former ejectment brought by the father of the lessor of the plaintiff, against the defendant's father on the same title, were paid. *Doe d. Fildon, v. Roe.* 8 T. R. 645
- 3 If the defendant in a former ejectment, who was then evicted, bring another ejectment for the same premises, the Court will stay the proceedings until he pay the costs of the former cause. *Thrustout d. Williams v. Holdfast.* 6 T. R. 233
- 4 Ejectment in C. P. and verdict for the plaintiff, and costs paid by the de-

defendant, who then brought an ejectment in K. B. for the same premises and recovered, but was not paid his costs; and a third ejectment being commenced in C. P. by the plaintiff in the first ejectment, that Court stayed proceedings till payment of the costs of the second ejectment in K. B. *Doe d. Walker v. Stevenson.*

3 B. & P. 22

- 5 Proceedings in ejectment stayed until the costs of a former ejectment, and also of an action for mesne profits were paid. *Doe d. Pinchard v. Roe.*

4 E. R. 585

- 6 Where the plaintiff was nonsuited in an action on the statute of bribery, the Court stayed proceedings, in a second action for the same cause between the same parties, till the costs of the first were paid. *Moulton, q. t. v. Bingham.*

2 T. R. 511, n.

- 7 The like in the case of an action for a malicious prosecution. *Baldwin v. Richards.*

2 T. R. 511, n.

- 8 After a nonsuit in trespass, the Court stayed proceedings in a second action between the same parties for the same cause until the costs of the nonsuit were paid, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued in *forma pauperis*. *Weston v. Withers.*

2 T. R. 511

- 9 But the Court of C. P. refused to stay proceedings against a defendant till the debt and costs recovered by him in a former action against the plaintiff were paid: saying they could not try the merits of the cause, on motion. *Cook v. Dobree.*

1 H. B. 10

- 10 Though the Court may in a new ejectment stay proceedings between the same parties until the costs of a former ejectment, and also the costs of an action for mesne profits dependent thereon, are paid, yet they will not extend the rule to include the damages in the action for the mesne profits; however vexatious the proceedings of the present lessors of the plaintiff may have been. *Doe d. Church v. Barclay.*

15 E. R. 253

XI. OF DOUBLE OR TREBLE COSTS.

- 1 To entitle defendant, (an officer), to double costs under the stat. 7 Jac. 1. c. 5. there must be a certificate of the

Judge who tried the cause (which may be granted either at the trial or afterwards) that the defendant was such an officer, and that the action was brought against him for something done by him in the execution of that office. *Hurper v. Carr.*

7 T. R. 448

- 2 The statutes 7 Jac. 1. c. 5. and 21 Jac. 1. c. 12. s. 3. giving double costs to parish officers sued, &c. extend not to actions against them for non-feazance, such as the non-payment of money laid out for the support of one of their paupers by another parish into which he went; and for which an action of *assumpsit* was brought against them. *Atkins v. Banwell.*

3 E. R. 92

- 3 Where a plaintiff is put to declare in prohibition, and is nonsuited at the assizes, the defendant is only entitled to single costs under the stat. 8 & 9 W. 3. c. 11. s. 3., and not to double costs under the stat. 2 & 3 Ed. 6. c. 13. s. 14., which latter only applies to cases where the party who is hindered of his suit in the Ecclesiastical Court by the prohibition, acquiesces in it; and then the party obtaining it must, within six calendar months' verify his suggestion by the depositions of two witnesses in the Court which granted the prohibition; otherwise the party hindered shall have a consultation, and double costs and damages. *Trask v. French, Clerk.*

15 E. R. 574

- 4 By a Canal Act, the company were authorized to take certain lands for the purposes of the Act on making certain payments either by annual rents or sums in gross, and the persons from whom the land was to be taken were empowered to distrain the goods of the company even off the premises in case of non-payment of such sums. An avowant stating a distress under this Act of Parliament is not entitled, on obtaining a verdict, to double costs under stat. 11. G. 2. c. 19. s. 22. *Leominster Canal Company v. Norris.*

7 T. R. 500

S. P. *The same v. Cowell.* 1 B. & P. 213

- 5 In trespass against the owner of a house adjoining to the plaintiff's in the metropolis, for taking down his party wall and building on it, the defendant shewing at the trial that he was authorized in doing the thing com-

plained of under the Building Act 14 G. 3. c. 78. is entitled to treble costs under the 100th section, upon a nonsuit. *Collins v. Poney.*

9 E. R. 322

- 6 Where in an action against officers of the excise for seizing goods, they do not tender amends before action brought, but pay money into Court and afterwards gain a verdict, they are entitled *only to single costs* under stat. 23 G. 3. c. 70. s. 31. *Collins v. Morgan.*

1 H. B. 344

- 7 *Quare*, whether they are entitled to treble costs under s. 34. of that statute, if they tender amends? *ibid.*

- 8 A Judge's certificate that a custom-house officer 'had probable cause for seizing goods' does not extend to injuries accompanying such seizure, so as to prevent the plaintiff from recovering damages and costs under statutes 23 G. 3. c. 70. s. 29; and 26 G. 3. c. 40. s. 31. *Baldwin v. Tankard.*

1 H. B. 28

- 9 A person sued on stat. 25 G. 3. c. 50., for shooting without a certificate, is not entitled to treble costs on obtaining a verdict; they being only due where a person is sued for any thing done in putting the Act into execution, and obtaining a verdict. *Smith v. Wallis.*

1 T. R. 252

XII. COSTS IN CRIMINAL PROSECUTIONS.

N. B. For costs upon removing convictions by *certiorari*, see *tit. CERTIORARI*, ante page 179.

- 1 If the defendants in an indictment for not repairing a road (and which is removed into K. B. by *certiorari*) be acquitted for want of prosecution, the Court has no power to award costs to the defendants on the ground of its being a vexatious prosecution under stat. 13 G. 3. c. 78. s. 65. but the application must be made to the Judge at *nisi prius*. *Rex v. Inhabitants of Chadderton.*

5 T. R. 272

- 2 If the Judge, on the trial of an indictment for not repairing a road, certify that the defence was frivolous, without also awarding costs in express terms, under stat. 13 G. 3. c. 78. the prosecutor is entitled to costs. *Rex v. The Inhabitants of Clifton.*

6 T. R. 344

- 3 The 12th sect. of the stat. 38 G. 3. c. 52. providing that no indictment

shall be removed into the next adjoining county, *except the person applying for such removal shall enter into a recognizance in 40*l.* for the extra costs, &c.* does not relate to an indictment sent by K. B. to be tried in the next adjoining county after a removal thither by *certiorari*. *Rex v. Nottingham.*

4 E. R. 208

- 4 Where any one of several issues in a *quo warranto* information is found for the prosecutor, on which judgment of ouster is given, he is entitled to costs on all the issues. *Rex v. Downes.*

1 T. R. 453

- 5 The prosecutor of a *quo warranto* information against a constable of Birmingham is not entitled to costs under stat. 9 Ann. c. 20. *Rex v. Wallis.*

5 T. R. 375

- 6 Justices of the peace may give costs in all cases of convictions, by stat. 18. G. 3. c. 19. *Rex v. Arnold.*

5 T. R. 356

- 7 If a sessions case be sent down to be re-stated, and the prosecutor abandon it when it is returned, the Court will discharge his recognizance for the costs given under stat. 5 G. 2. c. 19. but if he dispute the *amended order*, they will not. *Rex v. Inhabitants of Edgeworth.*

4 T. R. 218

- 8 Justices of the peace at the quarter sessions have no authority by any Act of Parliament to order the costs of a prosecution for a misdemeanor, carried on under the direction of magistrates, to be allowed out of the county rates. *Rex v. The Inhabitants of the West Riding of Yorkshire.*

7 T. R. 377

- 9 If a person give notice of his intention to appeal to the quarter-sessions against a poor-rate, but do not enter his appeal, the sessions cannot award costs to the other party under the stat. 17 G. 2. c. 38. s. 4. as coupled with 8 & 9 W. 3. c. 30. s. 3. *Rex v. Essex (Justices).*

8 T. R. 583

- 10 On a defendant's acquittal on an information, he is not entitled under stat. 4 & 5 W. & M. c. 18. s. 2. to costs, beyond the extent of the recognizance entered into by the prosecutor in 20*l.* under that Act. *Rex v. Filewood.*

2 T. R. 145

- 11 But the Court intimated that in future it might be proper to adopt some new rule, such as refusing to grant any information, unless the prosecu-

cutor will undertake to pay all the costs. 2 T. R. 145

12 However, in a subsequent case they refused to make such a rule; and said that the Court, on granting an information, would not require the prosecutor to give security for the costs, in case the defendant should be acquitted, beyond the extent of the recognizance in 20l. required by the statute of 4 & 5 W. & M. c. 18. s. 2. *Rex v. Brooke.* 2 T. R. 190

13 In future if an application is made to the Court for a *mandamus* to a bishop to license, &c. without good foundation, as if there is a specific legal remedy for the party, they will discharge the rule with costs. *Rex v. Bishop of Chester.* 1 T. R. 405
And see *Rex v. Archbishop of Canterbury.* 15 E. R. 159

XIII. TAXATION AND ALLOWANCE OF, IN PARTICULAR PROCEEDINGS.

1 On a feigned issue costs follow the verdict: but *quære*, when the Court permits parties to try a feigned issue, whether they will not compel them to consent that the costs shall be in the discretion of the Court? *Hoskins v. Lord Berkeley.* 4 T. R. 402

2 If a writ be returnable in the first return of the Term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the plaintiff is not entitled to the costs of a declaration delivered *de bene esse*. *Quære*, Whether he would be entitled to such costs if no notice had been given? *Partington v. Williams.* 2 N. R. 398

3 A defendant, against whom judgment had been obtained, sued out a writ of error, and to an action on the judgment, pleaded *nul tiel record*. The Court allowed the plaintiff his costs of the action upon the judgment. *Garnwell v. Barker.* 5 Taunt. 264

4 Where a *noli prosequi* is entered on any of the counts in a declaration, there is no rule for allowing costs on such counts. *Hubbard v. Biggs.* 16 E. R. 129

5 Where two several petitions signed by different persons were presented to the House of Commons against the return of members to serve in parliament for *East Grimstead*; which petitions were

referred to the same select committee for trial, who reported them both to be frivolous and vexatious; the costs cannot be taxed *jointly* under the stat. 28 G. 3. c. 52.: and therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners; and having afterwards by an amended certificate apportioned how much of the first-mentioned sum taxed was incurred by the sitting members in opposing the two petitions *jointly*, and how much was incurred by them in opposing each *separately*; the plaintiffs, by the advice of the Court submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for the *separate* costs certified against each, as also in a joint action against all, to recover the taxation certified against them all *jointly*. *Strachey, Dit. v. Turley.* 7 E. R. 507

6 And the Court held that both these certificates being invalid, by reason that the Act only authorizes the costs to be taxed *separately* on each distinct petition, a new and valid certificate, ascertaining the separate costs incurred on each petition, might be granted by the Speaker of a new Parliament; the Act mentioning *the Speaker* generally. *ibid.*

7 Though a local Regulating Act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or *appeal*, for any cause relating to the Act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer;" it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them, however they may afterwards reimburse themselves out of the fund in the treasurer's hands. *Rex v. Kingston.* 8 E. R. 41

And they may be indicted for non-payment of such costs. *ibid.*

8 A plaintiff who levies costs and expenses of execution in addition to the sum recovered by the judgment under 43 G. 3. c. 46. s. 5. must at his peril take care to keep them within such a reasonable sum as will be afterwards

allowed in taxation by the prothonotary, otherwise the Court of C. P. on motion will order the excess to be restored, with costs to be paid by the plaintiff. *Benuell v. Oakley*

2 Taunt. 174

- 9 The 4th sec. of stat. 43 G. 3. c. 40 providing that in actions on judg-

ments recovered the plaintiff shall not be entitled to costs, unless by the order of the Court, or some judge thereof; does not extend to an action brought to recover the costs of a judgment of nonsuit. *Bennett v. Neale*

14 E. R. 313

COVENANT.

I. BY AND AGAINST WHOM MAINTAINABLE.

II. CONSTRUCTION OF PARTICULAR AND EXPRESS COVENANTS IN LEASES.

III. OF THE DIFFERENT KINDS OF COVENANTS.

- (a) *Joint or several.*
- (b) *Valid or illegal.*
- (c) *Not to assign without License*
- (d) *For Rent and Repairs.*
- (e) — *Quiet Enjoyment and Title.*
- (f) — *Renewal.*

IV. PLEADINGS.

- (a) *Declaration, and herein of concurrent or independent Covenants.*

- (b) *Pleas in discharge and denial*

V. EVIDENCE.

I. BY AND AGAINST WHOM MAINTAINABLE.

- 1 On a covenant for further assurances where the breach happened in the time of the covenantee, but the damage accrued to the heir, the heir has a preferable title to the executor, to bring the action of covenant. *King v. Jones* 1 Marsh. 107
And see tit. EXECUTOR, post.

- 2 An action of covenant does not lie upon the statute 3 W & M. c. 14 s. 3 against the devisee of lands to recover damages for a breach of covenant made by the deviser. The remedy given by that statute being confined to cases where an action of debt lies. *Wilson v. Knubley.* 7 E. R. 127

- 3 If tenant in tail male demise for a term of 99 years, and his lessee assign over

to another, but before such assignment tenant in tail male dies without issue male, no action of covenant upon the lease can be maintained against the representatives of the grantor by such assignee, the lease being void at the time of the assignment, and no interest passing under it. *Andrew v. Pearce*

1 N. R. 158

- 4 By 32 H. 8. c. 34 grantors of reversions have the same remedy against lessees, their executors, &c. as their grantors had. Therefore, if mortgagor and mortgagee make a lease, in which the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it. *Hubb v. Russell*

3 T. R. 393

- 5 But the mortgagor himself may sue. *Sicker v. Russell*

3 T. R. 678

[A B The case was affirmed in *Cam. Sec* 1 H. B. 562 where the point is thus stated: "A being possessed of a term of years, conveys it by way of mortgage, and joins with the mortgagee in a lease for a shorter term, according to their respective estates and interests, and the lessee covenants with the mortgagor and his assigns, to pay rent and repairs. During the lease, the term, with all the estate and interest of mortgagor and mortgagee, becomes vested in the assignees of the reversion. The mortgagor may afterwards maintain an action of covenant against the lessee, the covenants being in gross.]

- 6 If tenant for a term of years, lease for a less term, and assign his reversion, and the assignee take a conveyance of the fee, by which his former reversionary interest is merged; the cove-

nants incident to that reversionary interest are thereby extinguished. *Webb v. Russell.* 3 T. R. 393

- 7 A grant by lessees for lives of all their estate, right, title, interest, &c. in the premises to one and his executors, habendum to him and his executors for 99 years if the lives should so long exist, in as large, ample, and beneficial way, &c. as the grantors, their heirs, &c.: Held, is no assignment of the freehold, and consequently not of the whole interest of the grantors in their lease; and therefore, the reversioners (the lives being expired within the term), cannot maintain covenant against the under lessee for not delivering up the premises in good repair. *Derby (Earl) v. Taylor.*

1 E. R. 502

- 8 An action of covenant lies against the assignee of a lessee of an estate for a part of the rent: as in such case the action is brought on a real contract in respect of the land, and not on a personal contract; and in case of eviction the rent may be apportioned, as in debt or replvin. *Secus*, in covenant against the lessee himself, who is liable on his personal contract. *Stevenson v. Lambard.* 2 E. R. 575

- 9 The devisee of the equity of redemption (the legal fee being in a mortgage), is not liable in covenant as assignee of all the estate, right, title, and interest of the original covenantor. *Carlisle (Mayor, &c.) v. Blamire.*

8 E. R. 487

- 10 Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction (without stating themselves to be the owners or possessed thereof) and no bidder offering, they never took possession in fact of the premises: Held, that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term; nor support an averment in a declaration in covenant for non-payment of rent for three years against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendant by assignment thereof. *Turner v. Richardson.* 7 E. R. 335

- 11 One who covenants for himself, his

heirs, &c. and under his own hand and seal, for the act of another, shall be personally bound by his covenant, though he describe himself in the deed as covenanting for and on the part and behalf of such other person. *Applcton v. Binks.* 5 E. R. 148

- 12 In a lease, the lessor reserved a right to enter and cut timber, making reasonable satisfaction to the lessee for any damage occasioned thereby; covenant does not lie by such lessee for any wrongful act of cutting down by a third person, if without the consent of the lessor, however he may countenance the act afterwards. *Griffiths v. Brome.* 6 T. R. 66

- 13 But where it only appeared that the lessor had promised to make compensation afterwards for such wrongful act, if the wrong-doer himself did not; it was not considered as an adoption of the act, nor as evidence of a prior consent to it whereon to found an action on the covenant. *ibid.*

- 14 Covenant by lessee that he will at all times during the term, plough, sow, manure, and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry; if lessee plough the rabbit-warren and sheep-walk, covenant lies against him. *Duke of St. Albans v. Ellis.* 16 E. R. 352

II. CONSTRUCTION OF PARTICULAR AND EXPRESS COVENANTS IN LEASES.

- 1 A. after granting certain premises in fee to B., and after warranting the same against himself and his heirs, covenanted that notwithstanding any act by him done to the contrary, he was seised of the premises in fee, and that he had a good right, full power, &c. to convey the same, he then covenanted for himself, his heirs, executors, and administrators, to make a cart-way, and that B. should quietly enjoy without interruption from himself, or any other person claiming under him; and lastly, that he, his heirs, and assigns, and all persons claiming under him, should make further assurance: Held, that either these general words, "good, right," &c. though introduced by the words "and that," were part of the preceding special covenant; or if not, that the general construction of the instrument required, that the

restriction in the other covenants to the acts of the covenantor and his heirs, must be applied to them also. *Browning v. Wright*. 2 B. & P. 13

- 2 But where the assignor of certain shares in a patent right covenanted that he had good right, full power and lawful authority to assign and convey the said shares, and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had over the same: it was held, that the generality of the former words of the covenant was not restrained by the latter. *Hesse v. Stevenson*.

3 B. & P. 565

- 3 In a lease of ground, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, &c. and assigns, not to have persons to work in the mill who were settled in other parishes, without a parish certificate. The Court held that this covenant did not run with the land, or bind the assignee of the lessee. *Congleton (Mayor, &c.) v. Pattison*.

10 E. R. 130

- 4 The lessee of a coal-mine, who covenants to pay a certain share of all such sums of money as the coal shall sell for at the pit's mouth, is not liable under that covenant to pay to the lessor any part of the money produced by sale of the coals elsewhere than at the pit's mouth. *Clifton v. Walmisley*.

5 T. R. 564

And see *Gerrard v. Clifton, in error*.

7 T. R. 676 :

reversing the judgment of C. P.

1 B. & P. 524

- 5 If there be any fraud upon the covenant in the lessee, in such case a Court of Equity would give relief. *Doë d. Pulteney v. Lady Cavan*.

5 T. R. 567

- 6 The lessor after the demise of certain premises, with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself whilst the same should remain there:" Held, that these words reserved to the lessor the power of removing the pump at his pleasure; and that it was no breach of covenant in the lessor to remove it during the continuance of the demise. *Rhodes v. Bullard*.

7 E. R. 116

- 7 A covenant, by a tenant to yield up in repair at the expiration of his lease, all buildings which should be erected

during the term, upon the demised premises, includes buildings erected and used, by the tenant, for the purpose of trade and manufacture, if such buildings be let into the soil, or otherwise fixed to the freehold, but not where they merely rest upon blocks or pattens. *Naylor v. Collinge*. 1 Taunt. 19

8 A. being possessed of a lease for years, covenanted with B. in an indenture for making a family provision for certain relations of both, that if he should die during the continuance of the term of the lease, his executors or administrators should assign the residue of such term to B. who was then to pay a yearly sum of money for the purposes of the deed. A. afterwards purchased the reversion in fee and died: Held, that A. was not precluded by his covenant from purchasing the fee, and that therefore his executors were not liable upon that covenant. *Williamson v. Butterfield*. 2 B. & P. 62

9 A covenant in a lease, that the lessee, his executors and administrators, shall constantly reside upon the demised premises, during the demise, is binding on the assignee of the lessee, though he be not named; being *quodam modo* annexed and appurtenant to the thing demised. *Tatem v. Chaplin*.

2 H. B. 133

- 10 In a lease for years, containing the usual covenants that the lessee shall pay the rent, keep the premises in repair, &c. there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, and from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void; it was held that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determining the term at the end of the first three years, and that his merely giving six months' notice expiring with the first three years was not sufficient. *Porter v. Shephard, in error*.

6 T. R. 665

- 11 A proviso in a lease for 21 years, that if either of the parties should be desirous to determine it in 7 or 14 years, it should be lawful for either of them,

his executors or administrators, so to do, upon 12 months' notice to the other of them, his heirs, executors, or administrators, extends, by reasonable intendment to the devisee of the lessor who was entitled to the rent and reversion. *Roe d. Bamford v. Hayley*.

12 E. R. 464

12 Lease of land for term of years with a covenant by lessee that if lessor should be desirous during the term to take all or any part of the land for building thereon, &c. it should be lawful for her to come into and enter upon all or any part, to make such buildings as she should think proper, and to do all necessary acts without interruption by lessee, provided lessor gave six months' notice of such intention, with a proviso also that the lease should be void for non-performance of covenants: Held, that lessor having agreed with a third person to the terms of a building contract, might give six months' notice of her intention to take the whole of the land for building, and at the expiration of that time, and after refusal by the tenant to deliver up possession, might bring ejectment. *Doe d. Wilson v. Abel*. 2 M. & S. 541

13 If the *reddendum* in a hospital renewed lease be "so many quarters of corn," it will be understood to mean legal quarters, reckoning the bushel at eight gallons, although the old leases before the statute 22 and 23 Car. 2. c. 12. contained the same *reddendum*, and although till lately the lessees paid by composition reckoning the bushel at nine gallons. *Muster, &c. of St. Cross v. Lord Howard de Walden*.

6 T. R. 338

14 Covenant in a lease that the lessee would not dig gravel out of any part of the demised premises without consent of the lessor, or paying to him 10s. per load, except what should be dug out of two acres, part of the premises demised, and part of a garden late in the possession of A. B.: By indorsement made on the lease before execution, it was agreed that it should be lawful for the lessor to let any part of the within demised premises for the purpose of making bricks or tiles, he paying the lessee 3l. for every acre which he should so let; and further, that it should be lawful for the lessee to break up and dig for gravel, any part of the within demised premises,

he covenanting to pay to the lessor 20l. for every acre he should break up and dig, at or before the expiration of the time, and to make good the same: Held, that the lessee was not entitled to dig for gravel in the two acres of garden ground mentioned in the lease without making them good. *Flint v. Brandon*. 1 N. R. 73

15 J. T. demised land to the plaintiff at an annual rent for 21 years with liberty to dig half an acre of brick earth annually: the lessee covenanted that he would not dig more, or if he did, that he would pay an increased rent of 375l. per half acre, being after the same rate that the whole brick earth was sold for. A stranger dug and took away brick earth; the lessee recovered against him the full value of it: it was held by the Court of C. P. that he was entitled to retain the whole damages. *Attersoll v. Stevens*. 1 Taunt. 183

For the construction of a covenant to pay the expense of raising a party wall, see LANDLORD AND TENANT, post.

16 A. conveyed to B. in fee a messuage, buildings, yard, gardens, and homestead, with the appurtenances, and certain closes of land, excepting all mines of coal under the said lands and hereditaments; with liberty to enter and sink pits for getting all such coal, and to erect engines and make drains, &c. necessary for working the coal: except as to such lands as lie within 150 yards of the messuage and buildings, and except any homestead: Held, that the seller thereby reserved to himself the right to dig coals under the messuage, buildings and homesteads, and within 150 yards of the same respectively; but was not entitled to sink pits, erect engines, or make drains within 150 yards of the messuage or buildings, or within the homestead. *Bowler v. Woolley*. 15 E. R. 444

17 A covenant in an indenture of lease for 21 years, ending at Michaelmas, that the tenant should not, during the term, cut down any of the coppice "of less than ten years' growth," or at any unseasonable time of the year, but that at the end of the term the landlord should pay the tenant the value "of all such growth of coppice as should be then standing and growing:" Held, according to its grammatical construction (uncontrolled by any other part of the instrument, shewing a different in-

ment,) to bind the landlord to pay for the value of all the coppice of *less than 10 years' growth* left on the premises at the end of the term. *Love v. Pares.*

13 E. R. 80

18 Under a beneficial long lease, reserving liberty to the lessee to cut down and dispose of all timber and coppice, &c. (the value of which was included in the purchase,) then growing or thereafter to grow during the term; subject, however, to a proviso that *when and so often* as the lessee should intend, during the term, to sell the timber, &c. growing on the premises or any part thereof, he should immediately thereupon give notice in writing to the lessor of such intention, who should thereupon have the option of purchasing it; and on the lessor's neglect or refusal to purchase, the lessee might dispose of it absolutely; if the lessee, soon after the execution of the lease, *bonâ fide* intend to cut down the whole of the then growing timber and coppice, &c. and give notice in writing to that effect, and the lessor do not accept the purchase, but disclaims it: the lessee may proceed to cut down the whole in different seasons according to his convenience, and is not obliged to give a fresh notice at every succeeding cutting: and this, though the lessor had in the interval assigned his interest in the land to another. *Goodtitle d. Luxmore v. Saville.*

16 E. R. 87

19 But after such assignment, it is sufficient for the lessee, after ejectment brought by the assignee of the lessor for a forfeiture, to give such assignee notice to produce the original notice in writing of the intention to cut the whole, and he is not bound to shew that he applied for the same to the original lessor, (who had left the country), or to his agents, or gave them notice to produce it: for it will be presumed to have been delivered up to the assignee of the reversion as a document relating to the estate; and on default of its production at the trial, he may give parol evidence of it. *ibid.*

20 By an exception of "all trees, woods, coppice, wood-grounds, of what kind or growth soever," apple-trees are not excepted. *Wyndham v. Way.*

4 Taunt. 316

21 A farmer who raises young fruit-trees for filling up his lessor's orchards, is

not entitled to sell them. *Per Heath J.*

4 Taunt. 316

22 Otherwise of a nurseryman by trade. *Per Heath J.* *ibid.*

23 A lease demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only to a specific right of way for the lessee to a third building for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved lands in one of two directions, the one by entering it from the residue of the demised premises; the other, and far the more convenient, by entering it from a public street: Held, that the lessee was entitled to a way across the reserved land from the public street in that part. *Morris v. Edgington.*

3 Taunt. 24

24 Land sown to clovers with corn is not thereby restored to a state of permanent pasture, but is still in tillage. *Birch v. Stephenson.*

3 Taunt. 469

25 Where the out-gone tenant had covenanted with his landlord to leave the manure made by him on the farm and sell it to the in-coming tenant at a valuation, to be made by certain persons; the effect of such covenant is to give the out-gone tenant a right of on-stand for his manure upon the farm; and the possession of and property in it remains in him in the mean time; and therefore if the in-coming tenant remove and use it before such valuation, he is answerable to the out-gone tenant in trespass. *Beaty v. Gibbons.*

16 E. R. 116

III. OF THE DIFFERENT KINDS OF COVENANTS.

(a) Joint or several.

1 A covenant with two and every of them is joint, though the two are several parties to the deed. *Southcote v. Hoare, (Bart.)*

3 Taunt. 87

2 In a case of collieries, B. and C. the lessees, "jointly and severally," &c. did, and each of them did covenant, &c. with A. (the lessor) in manner following, *viz.:* "here followed a set of covenants by the lessees; then followed some covenants by the lessor; and then others by the lessees, in one of which they "and each of them did" agree, &c. : Held, that *all* the cove-

- nants on the part of the lessees were several as well as joint. *Duke of Northumberland v. Errington*. 5 T. R. 522
- 3 If the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do, that the deed of covenant may be pleaded in bar, he may still sue the other obligor. *Dean v. Newhall*. 8 T. R. 168
- 4 Even if the obligee sue the first obligor, the latter cannot plead that the former released him, though he may plead the covenant in bar, which as between those parties operates *quâ* a release. *ibid.*
- 5 A covenant to and with *A.*, his executors, administrators, and assigns, and to and with *B.* and her assigns, to pay an annuity to *A.*, his executors, &c. during *B.*'s life, is a joint covenant to *A.* and *B.*, in which they have a joint legal interest, although the benefit be for *A.* only; and therefore on the death of *A.* the right of action survives to *B.*, and *A.*'s administrator cannot sue on the covenant. *Anderson v. Martindale*. 1 E. R. 497

(b) Valid or illegal.

- 1 A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further upon the commission, is good in law. *Kaye v. Bolton*. 6 T. R. 134
- 2 A proviso in a lease for 21 years that the landlord shall re-enter on the tenant's committing an act of bankruptcy, whereon a commission shall issue, is good. *Roe v. Galliers*. 2 T. R. 133
- 3 Under a power to a tenant for life to lease for years, reserving the usual covenants, &c. a lease made by him, containing a proviso, that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. *Doe d. Ellis v. Sandham*. 1 T. R. 705
- 4 By indenture between *A.* and *B.* and *C.* dissolving their partnership as rope-makers, *A.* and *B.* covenanted to allow *C.* during his life 2s. on every cwt. of cordage which they should make on the recommendation of *C.* for any of his friends and connexions, and whose debts should turn out to be good; and that

A. and *B.* should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of *C.*'s connexions whom they should be disinclined to trust. And *C.* covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of *A.* and *B.*; and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, to make all the cordage ordered of him by or for his friends and connexions, on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever: The Court held, that the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, &c. (*A.* and *B.* not being obliged to work for any other than such as they chose to trust), was not illegal and void, as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and *B.* so much of *C.*'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and *C.* was still at liberty to work for any of his friends who were refused to be trusted by *A.* and *B.*: by which construction the restraint of *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.*; and therefore the restraint on *C.* could be no prejudice to public trade. *Gale v. Reed*. 8 E. R. 80

(c) Not to assign without Licence.

- 1 If a lease contains a proviso that the lessee, and his administrators, shall not set, let, or assign over the whole or part of the premises without leave in writing, on pain of forfeiting the lease; the administratrix of the lessee cannot under-let without incurring a forfeiture, though for less time than the whole term. *Roe v. Harrison*. 2 T. R. 425
- 2 A parol licence to let part of the pre-

leases does not discharge the lessee from the restriction of such a proviso.

Roe v. Harrison. 2 T. R. 425

- 3 The lessor's receiving rent after the forfeiture is no waiver, unless the forfeiture were known to him at the time.

ibid.

- 4 A lessee, who had covenanted "not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture," &c. with a proviso that the landlord might, in such case, re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution, and sold. This was held to be no forfeiture of the lease. *Doe d. Mitclinson v. Carter.* 8 T. R. 57

- 5 But where it was found by verdict that the tenant gave such warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment; this was held to be in fraud of the covenant; and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale. *Same Parties.* 8 T. R. 300

- 6 A lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting. Nor by waiving his right to re-enter on a breach of covenant to repair, does he waive his re-entry on a subsequent want of repairs. *Doe d. Boscawen v. Bliss.* 4 Taunt. 735

- 7 Where a lessee of a house and garden for term of years covenanted with the lessor "not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the licence of the lessor," &c. and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises: Held, that the assignment was a breach of this covenant, and the lessor entitled to re-enter under a proviso for non-performance of covenants. *Doe d. Bish v. Keeling.*

1 M. & S. 95

- 8 Where a lease contained a proviso for re-entry, in case the tenant should demise, lease, grant, or let the demised premises, or any part or parcel thereof,

or convey, &c. to any person whomsoever, for all, or any part of the term, without the licence of the lessor in writing; and the defendant, without such licence, agreed with a person to enter into partnership with him, and that he should have the use of the back chamber, and some other parts of the premises *exclusively*, and of the rest jointly with the defendant, and accordingly let him into possession: Held, that the lessee was entitled to re-enter. *Roe d. Dingley v. Sales.*

1 M. & S. 297

- 9 If a covenant not to assign, contain an exception in favour of assignment by will: *Semble*, that executors claiming under the will are not within the exception, so as to be at liberty to sell for payment of debts, without licence of the lessor. *Per Mansfield, C. J.*

Lloyd v. Crispe. 5 Taunt. 249

- 10 If the vendor of a lease, in which is a covenant not to assign, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment. *Lloyd v. Crispe.* 5 Taunt. 249

(d) Rent and Repairs.

N. B. For Covenants relative to Taxes, see *tit. TAXES, post.*

- 1 A lessee, who covenants to pay rent and to repair, with an express exception of casualties by fire, is liable upon the covenant for rent, though the premises are burnt down, and not rebuilt by the lessor after notice. *Belfour v. Weston.* 1 T. R. 310

- 2 Reservation of 5*l.* per acre during the last 20 years of a term for every acre of meadow thereby demised which the tenant should plough, dig, ear, break up, or convert into tillage during the said last 20 years of the term, and so after that rate for any greater or less quantity than an acre, or less time than a year. The rent is due in the last 20 years if the land is then ploughed, whether it was first ploughed within the last 20 years or before; and the rent continues payable during the 20 years, though the land be again laid down to permanent grass. *Birch v. Stephenson.* 3 Taunt. 469

- 3 When the law creates a duty, and the party is disabled to perform it without any default in him, the law will excuse him: but when the party by his own

contract creates a duty or charge upon himself, he is bound to make it good, notwithstanding any accident by inevitable necessity. Therefore on a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken down by an extraordinary flood. *Brecknock, &c. Navigation Co. v. Pritchard.* 6 T. R. 750

- 4 *Quare.* If a lessee covenants that if the rent be in arrear for 28 days, the lessor may re-enter, whether a demand of rent be first necessary? *Smith v. Spooner.* 3 Taunt. 251

And see LANDLORD AND TENANT, post.

- 5 A lessee of a house, who covenants generally to repair, is bound to rebuild it if it be burned by an accidental fire. *Bullock v. Dommett.* 6 T. R. 650

And see *Doed. Ellis v. Sandham, ante*, 233

- 6 Upon a lease reserving rent payable quarterly, with a proviso, that if the rent be in arrear 21 days next after day of payment, being lawfully demanded, the lessor may re-enter: Held, that five quarters being in arrear, and no sufficient distress on the premises, lessor might re-enter without a demand. *Dissentient. Lord Ellenborough, C. J. Doe d. Scholefield v. Alexander.* 2 M. & S. 525

- 7 The lessee covenanted to repair, &c. "casualties by fire and tempest excepted:" *quare*, if the landlord be bound to repair in either of the excepted cases? *Weigull v. Waters.*

6 T. R. 488

- 8 A trustee, to whom two leases were assigned in trust for securing an annuity, having said to the occupier of one of the demised houses, "You must pay the rent to me; I am become landlord for my client who has the annuity, and you must pay the ground-rents for me:" Held, that the trustee was liable in covenant to the lessor, as assignee of both trustees, for non-payment of rent and not repairing. *Gretton v. Diggle.* 4 Taunt. 766

(c) *Quiet Enjoyment and Title.*

And see Pleading, post, page 239.

- 1 A covenant in a conveyance of lands in America, during the time of the rebellion in that country, that the grantor had a legal title, and that the grantee might peaceably enjoy, &c. without the let, interruption, &c. of

the grantor and his heirs, or of any other person whomsoever, is not broken by the States of America seizing the lands as forfeited for an act done previous to the conveyance; notwithstanding the subsequent acknowledgment of their independence by this country. *Dudley v. Folliot.* 3 T. R. 584

- 2 Such a covenant does not extend to the acts of wrong-doers, but only to persons claiming by a legal title: for, "let, interruption," &c. means "lawful let and interruption." *ibid.*

- 3 Releasors covenanted that, for and notwithstanding any act, &c. by them, or any or either of them done to the contrary, they had good title to convey certain lands in fee: and also that they or some or one of them, for and notwithstanding any such matter or thing as aforesaid, had good right and full power to grant, &c.; and likewise that the releasee should peaceably and quietly enter, hold, and enjoy the premises granted without the lawful let or disturbance of the releasors or their heirs or assigns, or for or by any other person or persons whatsoever; and that the releasee should be kept harmless and indemnified by the releasors and their heirs against all other titles, charges, &c. save and except the chief rent issuing and payable out of the premises to the lord of the fee. The Court held that the generality of the covenant for quiet enjoyment against the releasors and their heirs, and any other person or persons whatsoever, was not restrained by the qualified covenants for good title and right to convey for and notwithstanding any act done by the releasors to the contrary. *Howell v. Richards.* 11 E. R. 633

- 4 An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity. *Morris v. Edgington.* 3 Taunt. 24

- 5 If a lease contain a covenant for quiet enjoyment against the lessor and those who claim under him, the lessee cannot upon an eviction by a paramount title recover under the implied covenant for general title implied in the word demise. *Morrill v. Frame.*

4 Taunt. 329

- 6 The assignor in a deed of assignment of a lease, after reciting the original lease granted to another for the term of ten years, which by mesne assignments had vested in him, and that the

plaintiff had contracted for the absolute purchase of the premises, bargained, sold, assigned, transferred, and set over the same to the plaintiff, *for and during all the rest, &c. of the said term of ten years*, in as ample manner as the assignor might have held the same; subject to the payment of rent and performance of covenants; and then covenanted that it was a *good and subsisting lease, valid in law, in and for the said premises thereby assigned*, and not forfeited, &c. or otherwise determined, or become void or voidable: Held, that the generality of this covenant for title, which was supported by the recital of the bargain for an absolute term of ten years, was not restrained by other covenants which went only to provide for or against the acts of the assignor himself, or of those who claimed under him; such as 1st, a covenant against incumbrances, except an under-lease of part by the assignor for three years; 2dly, for quiet enjoyment; 3dly, for further assurance: and therefore, where it appeared that the original lease was for ten years, determinable on a life in being, which dropped before the ten years expired, though not till after the covenant of the assignor: Held, that the assignee might assign a breach upon the absolute covenant for title. *Larton v. Fitzgerald.* 5 E. R. 530

(f) *Renewal.*

- 1 A. and B. covenant in a lease for 61 years, "that at any time within one year after the expiration of 20 years of the said term of 61 years, upon the request of the lessee, and his paying 6*l.* to the lessors, they would execute another lease of the said premises unto the lessee, *for and during the further term of 20 years, to commence from and after the expiration of the said term of 61 years, &c. And so in like manner, at the end and expiration of every 20 years, during the said term of 61 years, for the like consideration, and upon the like request, would execute another lease for the further term of 20 years, to commence at and from the expiration of the term then last before granted,*" &c.: under this covenant the lessee cannot claim a further term of 20 years at the expiration of the last term of 20 years in the lease; if he has omitted

to claim a further term at the end of the first and second 20 years in the lease. *Rubery v. Jervoise.* 1 T. R. 229

- 2 If a lease for 99 years determinable on three lives be conveyed in trust for A. for life; and A. covenant to use his utmost endeavours as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail; it is no breach of the covenant, if, upon one of the lives failing, he procure a renewal upon his own life. *Scudamore v. Stratton.* 1 B. & P. 455
- 3 One in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 5*s.* 9*d.* demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days, and the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, with ALL covenants, grants, and articles, as in that indenture were contained": Held, that this covenant was satisfied by the tender of a new lease for 21 years, containing all the former covenants except the covenant for future renewal. And held that an averment, that the covenant for renewal in the indenture declared on, corresponded with various other leases, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet *non constat* from this averment, that all the former leases contained the same covenant for renewal. *Iggulden v. May.* 7 E. R. 237

And see 2 N. R. 449, where upon a writ of error, this judgment was affirmed.

IV. PLEADINGS.

- (a) *Declaration, and herein of concurrent or independent Covenants.*

N. B. For pleadings by and against executors, see *tit. EXECUTORS, post.*

- 1 The plaintiffs having by indenture (to which they, and L. and B., and the defendant, together with others, were

parties,) covenanted to indemnify the Bank of England against the advance of 100,000*l.* to *L.* and *B.* for nine months, upon certain bills of exchange, to which the plaintiffs, as original guarantees to the Bank, had agreed to become parties by drawing, accepting, or indorsing the same; which bills were stipulated to be drawn, accepted, and indorsed for certain proportional sums, by certain of the parties (plaintiffs), in manner and form as agreed upon; and which were stated as intended to be drawn *at 65 days after date, or in such other manner as should be agreed upon*; and which bills might be renewed, not exceeding three renewals within the nine months; and the defendant, as a sub-guarantee (with many others, whose names were set down in a schedule, each for a certain sum,) having agreed to indemnify the plaintiffs to the extent of 2000*l.* against any loss on such bills: Held, that the plaintiffs having, on the failure of *L.* and *B.*, been obliged to pay the whole 100,000*l.*, with interest, to the Bank for its advances on all the bills, it was not necessary for them, in declaring on the covenant against the defendant, a sub-guarantee, for the amount of his particular stipulated indemnity, to specify the several dates and times of payment, &c. of the different bills which were drawn, accepted, or indorsed by them; such discriminating particulars of the mass of bills drawn having become unnecessary in the event, inasmuch as the plaintiffs, the primary guarantees of the Bank, had been obliged to pay the whole sum for which all the bills were drawn; and consequently each sub-guarantee had become liable for the whole amount of his separate sub-indemnity. But it is sufficient to allege, generally, that the Bank had advanced and lent to *L.* and *B.* the whole sum of 100,000*l.* by way of discount, *on certain bills of exchange drawn, accepted, and indorsed in manner and to the respective amounts mentioned in the indenture*; that *L.* and *B.* had drawn *certain bills of exchange according to the form and effect, true intent and meaning of the indenture, to the amount of 100,000*l.* for the purpose of being discounted by the Bank, for the use of *L.* and *B.* in the several*

and respective amounts mentioned in the deed, viz. (stating the amount of the several bills for the proportional sums, and the names of the primary guarantees by whom they were to be drawn, accepted, or indorsed, as agreed upon;) and that before the said bills became due, *L.* and *B.* became unable to pay them, and did not at any time pay them; by reason of which the plaintiffs were obliged to pay to the Bank 100,000*l.* on account of such bills, &c.; and that the defendant (and the other sub-guarantees) had not indemnified the plaintiffs.

But as the facts of such bills having been drawn and become due, (out of which arose the obligation of the plaintiffs to pay the Bank the amount of such bills, and the obligation of the defendant to indemnify the plaintiffs for his proportion of such payment,) and the fact of such payment by the plaintiffs, constitute the *gist* of such an action, they must be alleged with *time and place*; and therefore where it was only alleged that the Bank (after the deed of covenant,) to wit, *on the 28th of August, 1810, at Westminster, &c.* advanced and lent to *L.* and *B.* 100,000*l.* by way of discount on certain bills of exchange, &c.: (as before:) that *L.* and *B.* drew *certain bills of exchange, &c.* to the amount of 100,000*l.* &c., which said bills were accepted, &c.: that before the said bills became due, *L.* and *B.* became unable to pay, &c.: by reason of which said premises the plaintiffs became damaged and were forced and obliged to pay, and did then and there necessarily pay the Bank 100,000*l.* on account of such bills, &c.: the time was held to be insufficiently laid, for the word *then* must refer to the 28th of August, the very day of the advance by the Bank upon the bills, which could not have become due till a subsequent day; and then it would negative the allegation that the plaintiffs were forced and obliged to pay the Bank on the same day, and make the whole repugnant and senseless: and advantage may be taken of this on special demurrer. *Denison v. Richardson.* 14 E. R. 291

2 The plaintiff declared in covenant, and set out first an indenture, whereby the defendant, the original proprietor of a medicine, bargained, sold, and

assigned all his right, interest, and property in it to a third person, subject to a covenant by the assignee to pay him one third of the profits during his and his wife's lives: and also covenanted with the assignee that he would thereafter, by himself or jointly with another, prepare or sell or engage with any other person in preparing or selling the said medicine, &c: and then the plaintiff set out a second indenture, whereby the first assignee assigned all his right, interest, and property in the medicine to the plaintiff, subject to the covenant of reservation. And then the plaintiff set out a third indenture between him and the defendant (reciting the two former), and that he had agreed with the defendant for the absolute purchase of all his rights, shares, and interests, as well in the said medicine, as in the one third share so reserved to the defendant: by which indenture the defendant bargained, sold, and assigned to the plaintiff all that third share, and all other share or proportions, right, title, interest, claim, or demand whatsoever of the defendant to the said medicine, or to the profits, &c. *habendum* to the plaintiff in like manner as the defendant might have done if those presents had not been made: with a covenant that the plaintiff might at all times thereafter prepare and sell the medicine in the name of the defendant, and receive the profits thereof to his own use: and another covenant for further assurances, for the more perfect and absolute assigning and assuring to the plaintiff the said medicine and all the profits arising from the sale thereof. And then the plaintiff proceeded to assign breaches in the words of the first indenture between the defendant and the first assignee: that the defendant prepared and sold the medicine, and also engaged with others in preparing and selling it for his own profit, &c. and charged some of these breaches to be contrary to the first indenture, and to the defendant's covenants therein with the first assignee: but the second breach was charged to be contrary to the last indenture, and to his covenant with the plaintiff:

Held, that the last indenture alone (without the confirmation, which however the construction of it re-

ceived from the two former, recited therein) shewed an intention in the defendant, and the words of it were large enough to assign to the plaintiff, not only the one third share of the profits reserved by the first indenture, but all the defendant's right, title, and interest in the medicine, and all the future profits arising from the sale thereof, and that such assignment of his interest and property in the medicine, raised an implied covenant that he would not prepare or sell the medicine, or engage with others in so doing for his own profit: such preparation and sale being a retention and exercise of the right of preparing and vending the medicine of which he was once the proprietor in derogation of his deed, whereby he had conveyed such right to the plaintiff. And held that the second breach was well assigned, which was charged to be against his covenant in the last deed with the plaintiff. *Seddon v. Senate.*

13 E. R. 63

3 *A.* agreed to sell *B.* his estate for a certain sum before a particular day, in consideration whereof *B.* agreed to pay that sum on the day, and on failure to pay 21*l.*; it was held that they were dependent covenants, and that *A.* could not recover the 21*l.* without shewing a conveyance on his part, or a tender of one. *Goodisson v. Nunn.*

4 T. R. 761

4 Plaintiff covenanted to sell to the defendant a school-house, &c., and to convey the same to him on or before the 1st of *August*, 1797, and to deliver up the possession to him on 24th *June*, 1796; and in consideration thereof the defendant covenanted to pay the plaintiff 120*l.* on or before the said 1st *August*, 1797: Held, that the covenant to convey, and that for the payment of the money were dependent covenants; and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed, or tendered a conveyance to the defendant. *Glasebrook, Clerk, v. Woodrow, Clerk.*

8 T. R. 366

5 Whether covenants be or be not independent on each other, depends on the reason of the case. *Campbell v. Jones.*

6 T. R. 571

6 Where any thing is to be done by a plaintiff before his right of action accrues on the defendant's covenant, it

must be averred in the declaration that that thing was done. 6 T. R. 571

- 7 But where *A.*, in consideration of 250*l.* paid by *B.*, and of the further sum of 250*l.* to be paid, &c. covenanted that he would, with all possible expedition, instruct *B.* in a certain mode of bleaching linen (for which he had obtained a patent), and *B.* covenanted that he would on or before 25th February 1794, or sooner, if *A.* should before that time have instructed him, &c. pay the further sum of 250*l.*; it was held that the covenants of *A.* and *B.* were independent covenants, and that *A.* might sue *B.* for the 250*l.*, without averring that he had taught *B.* the mode of bleaching linen, &c.

ibid.

- 8 *A.* covenants that he will, on or before a certain day, convey to *B.*, by such conveyance as *B.*'s counsel should advise, all the ground before conveyed to him by *C.*; in consideration of which *B.* covenants to pay a certain sum, and reserve certain rents, &c. to *A.*, and to lay out a certain sum on the premises: Held, that *A.* cannot maintain covenant against *B.*, without averring such a conveyance, or a readiness to convey to *B.* on or before the day all the land, but that *B.* prevented him by some act or neglect of his. And it is not sufficient to maintain covenant to shew that after the day *B.* accepted a conveyance of ground rents in lieu of part of the land, and accepted that and the conveyance of the other part in lieu of the conveyance covenanted to be made by *A.*; for this is a substitution of a different agreement by parol, to which the covenant does not apply. *Heard v. Wadham.*

1 E. R. 619

- 9 In covenant on an indenture of demise of a coal-mine, made on the 8th of July, 1805, reserving one fourth of the coal raised, or the value in money at the election of the lessor; and if the one fourth fell short of 400*l. per ann.* then reserving such additional rent as would make up that annual sum, to be rendered monthly in equal portions: the Court held that the lessee having elected to take the whole in money may declare for two years and three months' rent in arrear. But even if the money-rent were reserved annually, the plaintiff may renit his claim as to the three months' rent, and

enter up judgment for the two years' rent only. And having first well assigned a breach of the covenant, that the lessees had not yielded monthly the one fourth, or the value in money, &c. but had refused, &c.: Held, that it would not hurt on general demurrer, that the count went on to allege, that before the exhibiting of the plaintiff's bill, viz. on the 1st of November, 1797, 900*l.* of the rent reserved for two years and three months was due and in arrear; for that date being before the lease made, and therefore impossible in respect to the subject-matter, must be rejected; and the general allegation, that before the exhibiting of the plaintiff's bill, 900*l.* of the rent reserved, &c. was due, is sufficient. *Buckley v. Kenyon.* 10 E. R. 139

- 10 One may declare in covenant that the deed was indented, made, and concluded on a day subsequent to the day on which the deed itself is stated on the face of it to have been indented, made, and concluded. *Hall v. Cuznove.* 4 E. R. 477

- 11 If a lessor covenant for quiet enjoyment against the lawful let, suit, entry, &c. of himself, his heirs, and assigns, the declaration for a breach of the covenant need not expressly allege that he entered claiming title, if the disturbance complained of, be such as clearly appears to be an assertion of right. *Lloyd v. Tomkies.* 1 T. R. 671
- 12 In assigning a breach of covenant for quiet enjoyment, it is sufficient to allege that at the time of the demise to the plaintiff, *A. B.* had lawful right and title to the premises, and having such lawful right and title, entered, &c. and evicted him, &c.; without shewing what title *A. B.* had, or that he evicted the plaintiff by legal process, &c. *Foster v. Pierson.*

4 T. R. 617

- 13 Alleging that "the party having a lawful right and title entered," is equivalent to saying, "he entered by lawful right and title." *ibid.*

- 14 In covenant for quiet enjoyment, the declaration stated, that before the demise to the plaintiff, the defendant had made a demise to *A.*, which was then subsisting; that in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he had never been in possession;

plea that for the first half year of the plaintiff's lease the plaintiff might have enjoyed, &c. but that for non-payment of the rent for 21 days after that half year, the defendant had a right to re-enter, according to a proviso in the lease, and that he did re-enter, &c.; it was held on demurrer, that this was no answer to the plaintiff's demand. *Ludwell v. Newman*.

6 T. R. 458

15 In an action of covenant for quiet enjoyment the plaintiff may state generally that *A. B.* lawfully claiming title under the defendant, entered by virtue of such title on the plaintiff, without setting forth the particulars of *A. B.*'s title. *Hodgson v. East India Company*.

8 T. R. 278

16 The seller covenants to the purchaser of an estate that he shall enjoy and receive the rents, &c. without any action, &c. or interruption by the seller or those claiming from him, *or by, through, or with his or their acts, means, default, &c.*: Held, that a breach was well assigned in respect of certain quit-rents in arrear before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises. *Howes v. Brushfield*.

3 E. R. 491

17 *A.* having covenanted to make a good title to *B.* at his expense, *quare*, whether it be a good averment, that *A.* was *capable, ready, and willing*, to make a good title, if *B.* would have prepared the conveyance? *The Duke of St. Alban's v. Shore*.

1 H. B. 270

18 *Quare* also, whether a breach be well assigned, stating that *B.* did not nor would accept the title; whether it ought not to be shewn, that *A.* tendered a good title to him, which he refused? *ibid.*

(b) *Pleas in discharge and denial.*

1 The bankruptcy of the lessee is no bar to an action of covenant (made before the bankruptcy) brought against him, for rent due since. *Mills v. Auriol*. 1 H. B. 433, affirmed in *K. B. Auriol v. Mills (in error.)*

4 T. R. 94

2 Neither is a seizure and sale of the lease under a writ of *feri facias*, or *elegit*, against the lessee. 4 T. R. 99

3 Nor a forfeiture by his attainer. *ibid.*

4 To an action on a covenant in a deed (made for the performance of several matters) the defendant cannot plead

that in the deed there is a covenant, that in case any difference should arise between the parties respecting any part of the agreement, it should be settled by three arbitrators, and that he offered to refer the matter in dispute, but that the plaintiff refused, &c. *Thompson v. Charnock*. 8 T. R. 139

5 Performance of a covenant pleaded otherwise than in the terms of the covenant itself is bad, even on general demurrer. *Scudamore v. Stratton*.

1 B. & P. 458

6 If the plaintiff in covenant assigns as a breach that the defendant did not repair, a plea that the defendant did not break his covenant is bad, on special demurrer, although the declaration concludes by averring that so the defendant hath broken his covenant; but it would be good after verdict. *Taylor v. Needham*.

2 Taunt. 278

7 If an estate be created by deed-poll; *ne lessa, ne granta, ne chargea, ne concessa, ne dona*, &c. are good pleas, for a stranger to the deed. *ibid.*

8 *Non infregit conventionem* cannot be pleaded where the plaintiff assigns a breach without setting forth the particulars of plaintiff's title, adding, "and so the defendant did not keep his covenant," &c. *Hodgson v. The E. I. Company*.

8 T. R. 278

9 To an action by a lessor for a breach of covenant, on an indenture of lease in not repairing, &c. the lessee cannot plead in bar that the lessor had only an equitable estate in the premises; for that is tantamount to a plea of *nil habuit in tenementis*. But *semble*, the lessee is not stopped from shewing that the lessor was only seised in right of his wife for her life, and that she died before the covenant broken; because an interest passed by the lease. *Blake v. Foster*.

8 T. R. 487

10 In an action of covenant for rent on an indenture brought by the assignees of the lessor (a bankrupt), the lessee cannot plead that the lessor *nil habuit in tenementis*. *Parker v. Manning*.

7 T. R. 517

And see *Wilkins v. Wingate*. 6 T. R. 62

11 A lessee cannot plead to covenant for rent, an assignment and tender by the assignee. *Orgill v. Kemshead*.

4 Taunt. 642

12 In covenant for seven quarters' rent, a plea shewing a surrender before the last four of the seven quarters' rent

accrued, is bad on demurrer, because it does not go to the whole breach, and the breach is not entire, but part of it may be proved. *Barnard v. Duthey*.

5 Taunt. 27

- 13 In covenant for rent, the defendant pleaded that he was under-tenant of parcel of certain premises, for the whole of which the plaintiff, his lessor, had covenanted to pay rent to the landlord paramount, and shewed that he, the defendant, paid to the landlord paramount, under threat of distress, more rent than he owed to the plaintiff; the plaintiff traversed that any rent was due from himself to the landlord paramount: Held, that this replication was not supported, by proving that the plaintiff had assigned his term in the residue of the premises to K., who assigned them to the defendant, who covenanted to pay in discharge of the plaintiff the whole rent reserved to the landlord paramount. *Sturges v. Farrington*. 4 Taunt. 614

V. EVIDENCE.

- 1 In covenant (which runs with the land), evidence that the defendant is in as *heir* will support a declaration charging him as *assignee*. *Derisley v. Custance*. 4 T. R. 75
- 2 Evidence of the lessee's having accounted with the lessor, and paid him a share of money produced by the sale of coal elsewhere, is not admissible to explain the intention of the parties. *Clifton v. Walmsley*. 5 T. R. 567
- 3 If the breach of a covenant, being assigned thus, "that the defendant had not used a farm in a husbandlike manner, but on the contrary had committed waste;" it was held that the plaintiff could not give evidence of the defendant's using the farm in an unhusbandlike manner; it not amounting to waste. *Harris v. Mantle*. 3 T. R. 307
- 4 Plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred in an action of covenant for the money, that the houses were built in the time; evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time, cannot be received. *Little v. Holland*. 3 T. R. 590
- 5 The same in case of a bond. *ibid.*
- 5 Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by A. B. declared on, were known by a certain other name, by which name A. B. granted to them a certain watercourse, and covenanted for quiet enjoyment: the Court held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *Carlisle (Mayor, &c.) v. Blamire*. 8 E. R. 487
- 6 If a lease describe the demised land as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term. *Birch v. Stevenson*. 3 Taunt. 469

COUNTY RATE.

- 1 Where before the stat. 12 G. 2. c. 29. the county rates had been assessed upon the entire district or place of *Hartishead* with *Clifton*; but the two townships of H. and C. separately maintained their own poor, and were used to contribute towards the county rates in certain fixed proportions between themselves; yet, as that statute only establishes the accustomed proportion of contribution to the county rates as between the entire districts which were before assessed to such rates within the limits of the respective counties, &c. and does not meddle with

the proportions which had used to be observed as between the subdivisions of those districts; this case was by the Court held to fall within the 3d section, which provides that where there is no poor's rate in the *parish, township* or place assessed to the county rates, (by which must be understood no entire poor's rate co-extensive with the place or district assessed to the county rates), the county rates shall be raised by the petty constables in such manner as by law the poor's rate is to be assessed and levied: that is, by an equal rate on all the inhabi-

tants, &c. *Rex v. The Justices of the West Riding of Yorkshire.*

12 E. R. 117

And see post. tit. DIVISION.

- 2 A high constable may be appointed, and a county rate levied *de novo*, for a town erected into a county of itself by charter many years before, although no such officer had been appointed or such rate levied before; the corporation of the town having defrayed the expenses out of their own funds. *James v. Green.* 6 T. R. 228
- 3 And the like point was determined in the case of a town corporate having an exclusive commission of the peace, although not a county in itself. *Weatherhead v. Drewry.* 11 E. R. 168
And see tit. OFFICER, post.
- 4 A building given by a corporation for the purpose of a house of correction about 70 years ago, and maintained by them to the present time, is not a house of correction within the excep-

tion of stat. 17 G. 2. c. 5. s. 31. liable to be maintained by the corporation; but the public may be called upon to support it by a county rate.

James v. Green.

6 T. R. 228

- 5 If a fine be imposed on a county, which the justices at the sessions think illegal, they may order the treasurer to defray the expense of litigating the question out of the county stock. *Rex v. The Inhabitants of Essex.*

4 T. R. 591

- 6 So they may the expense of litigating any question respecting the repairs of the highways or county bridges, or the purchase of land adjoining to such bridges. 4 T. R. 594, 595, 596
- 7 But they have no authority to order the costs of a prosecution for a misdemeanor carried on under their direction, to be allowed out of the county rates. *Rex v. The Inhabitants of the West Riding of Yorkshire.*

7 T. R. 377

CUSTOMS.

See COPYHOLD, ante page 195, and MANOR, post.

- 1 A rectory in *Kent* formerly belonging to one of the dissolved monasteries having been granted by *Henry VIII.* to a layman to be holden in fee by knights service *in capite*: the Court of C. P. held that the lands were descendable according to the custom of *gavel-kind*, but the tithes according to the common law. *Doe d. Lushington v. The Bishop of Landaff.* 2 N. R. 491
- 2 A custom for *poor and indigent householders* living in *A.* to cut and carry away the rotten boughs and branches in a chase in *A.* cannot be supported; the description of the persons entitled being too vague. *Selby v. Robinson.*
2 T. R. 758
- 3 And where the defendant justified, in trespass, under such a custom, which was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff, with nominal damages. *ibid.*
- 4 Where beech admitted to be *timber* by the custom of the county of *Bucks*; the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of *timber* at 20 years' growth: and therefore upon an issue whether

certain beech-trees in that county were or were not *timber*, according to the custom of the county, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; and no evidence can be received to qualify its character of *timber*, by shewing that it was not deemed to be such in the county, unless the tree contained ten feet of solid wood. *Aubrey v. Fisher.* 10 E. R. 446

- 5 After two solemn arguments, it was held by the Court of C. P. that a right to glean in the harvest field cannot be claimed by any person at common law; neither have the *poor* of a parish legally settled, such right within the parish. *Steel v. Houghton & Ux.*

1 H. B. 51:

Worlledge v. Manning.

1 H. B. 53, n.

- 6 A custom that a tenant may leave his away-going crop in the barns of a farm after he has quitted the premises, is good. *Bevan v. Delahoy.* 1 H. B. 5
- 7 A custom to take a profit in *alieno solo*, is bad; such a right can only be claimed by *prescription*. *Grimstead v. Marlowe.* 4 T. R. 717
And Hardy v. Holliday. 4 T. R. 718, *nota.*
- 8 A custom that every *pound* of butter sold in a particular market-town shall

- weigh 18 ounces, is bad. *Noble v. Durrell*. 3 T. R. 271
- 9 *Quare*, Whether a custom that butter shall be sold in *lumps* of a certain weight, may not be supported? *ibid*.
- 10 A custom for *all the inhabitants* of a parish to play "at all kinds of lawful

games, sports, and pastimes in the close of *A.*, at all seasonable times of the year at their free will and pleasure," is good. But a similar custom "for *all persons*, for the time being, being in the said parish," is bad. *Fitch v. Rawling*. 2 H. B. 393

DEBT.

I. BY WHOM MAINTAINABLE.

II. PLEADINGS IN.

I. BY WHOM MAINTAINABLE.

1. *A.* covenants to build a house for *B.*, and finish it on or before a certain day, in consideration of a sum of money, which *B.* covenants to pay *A.* by instalments, as the building shall proceed. The finishing the house is not a condition precedent to the payment of the money, but the covenants are independent. *A.* therefore may maintain an action of debt against *B.* for the whole sum, though the building be not finished at the time appointed. *Terry v. Dunize*, (*Bart.*) 2 H. B. 389
- 2 After a landlord has recovered in ejectment against his tenant, he may maintain debt upon the stat. 4 G. 2. c. 28. for double the yearly value of the premises, during the time the tenant held over after the expiration of the landlord's notice to quit. *Soulsby v. Neving*. 9 E. R. 310

II. PLEADINGS IN.

- 1 If a contract of freight and demurrage be entered into by deed, the plaintiff cannot declare in debt generally, and give the deed in evidence, but ought to declare upon the deed. *Atty v. Parish*. 1 N. R. 104
- 2 In debt for goods sold and delivered, the plaintiff declared that the defendant at *Westminster in the county of Middlesex* was indebted to him in a certain sum for goods sold and delivered, without alleging an express contract and place where such contract was made: upon special demurrer for these causes, the Court held the contract and venue well laid. *Emery v. Fell*. 2 T. R. 28
- 3 In debt, by bill, the declaration is good, though the sums demanded in

the several counts amount altogether to more than the sum at first demanded in the *queritur*; for that is superfluous and may be rejected. *Lord v. Houstoun*. 11 E. R. 62

- 4 In debt for double the yearly value under 4 G. 2. c. 28. the plaintiff, after stating a demise to the defendant's wife, and her subsequent intermarriage with the defendant, alleged in the first count a notice to quit, and demand of possession delivered to the defendant and his wife; and in the second count alleged a notice to quit, and demand of possession delivered to the wife previous to her intermarriage with the defendant: Held, that to support the second count the husband need not be joined for conformity, and that to sustain the action it was not necessary to have given a notice to the husband subsequent to the intermarriage. *Lake v. Smith*. 1 N. R. 174
- 5 A landlord declared in debt, 1st, for the double value; 2dly, for use and occupation. The tenant pleaded *nū debet* to the first, and a tender of the single rent before the action brought to the second count, and paid the money into Court; which the plaintiff took out before trial, and still proceeded; and the Court held that this was no cause of nonsuit, as upon the ground of such acceptance of the single rent being a waiver of the plaintiff's right to proceed for the double value; but that the case ought to have gone to the jury: and that the plaintiff's going on with the action after taking the single rent out of Court, was evidence to shew that he did not mean to waive his claim for the double value, but to make it *pro tanto*. And it seems, that though the single rent were paid into Court on the second count, yet if the plaintiff had not accepted it, but had recovered on the first count, the defendant would have been entitled to have the money so

paid in deducted out of the larger sum recovered. *Ryal v. Rich.*

10 E. R. 48

- 6 *Quære*, Whether not guilty may be pleaded to an action of debt on a penal statute? *Coppin q. t. v. Carter.*

1 T. R. 462

And see PENAL ACTION.

- 7 If both lessee and lessor sign a lease, the former is estopped to plead *nil habuit in tenementis* to an action of debt for rent by the lessor. *Wilkins v. Wingate.* 6 T. R. 63; and see *Parker v. Manning.*

7 T. R. 537

- 8 Where in articles of agreement under a penalty, there are mutual covenants between A. and B. to do certain acts, and also a covenant which goes to the whole consideration on each side; to an action of debt for the penalty brought by A. against B. on account of the non-performance of his part, B. may plead in bar a breach by A. of the covenant which goes to the whole consideration. *The Duke of St. Alban's v. Shore.*

1 H. B. 270

- 9 Therefore where in articles of agreement for the sale of lands, it was agreed that A. the seller should take, in part of payment, a conveyance of other lands belonging to B. the buyer,

and it was also agreed "that all timber trees, which were upon any of the estates, should be valued by appraisers, and paid for by the respective purchasers at a given time;" to an action of debt brought by A. against B. for the penalty, on his refusal to complete the purchase, B. may plead that A., before the time, cut down a certain number of trees, and thereby rendered himself unable to perform, and it was impossible for him to perform the agreement; for which reason B. declined, and refused to carry the agreement into execution on his part. 1 H. B. 270

- 10 But where there are mutual covenants which do not go to the whole consideration, the breach of one cannot be pleaded in bar to an action for the breach of the other. *Boone v. Eyre.*

1 H. B. 276, n.

- 11 A plea of *nil tiel record*, pleaded to an action of debt on an Irish judgment recovered, must conclude to the country; for though, since the Union, such judgment be a record, yet it is only proveable by an examined copy on oath, the veracity of which is only triable by a jury. *Collins v. Lord Viscount Mathew.* 5 E. R. 473

DEED.

I. HOW EXECUTED.

II. CONSTRUCTION AND OPERATION.

III. FRAUDULENT OR VOID.

I. HOW EXECUTED.

See *post. tit.* EVIDENCE.

- 1 If A. execute a deed for himself and his partner, by the authority of his partner and in his presence, it is a good execution, though only sealed once.

Ball v. Dunsterville. 4 T. R. 313

- 2 One who executes a deed for another under a power of attorney must execute it in the name of his principal; but if that be done, it matters not in what form of words such execution is denoted by the signature of the names; as if opposite the seal be written "for J. B." (the principal) "M. W." (the attorney), ("L. S.")

Wilks v. Buck. 2 E. R. 142

And see *White v. Cuyler.* 6 T. R. 176: *Weeks v. Maillardet*, next page.

II. CONSTRUCTION AND OPERATION.

- 1 No precise technical words are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend upon its being prior or posterior in the deed. But it must depend on the nature of the contract, and the acts to be performed by the contracting parties. *Hotham v. The East India Company.*

1 T. R. 638

- 2 If the defendants prevent the performance of a condition precedent by their neglect and default, it is equal to performance by the plaintiffs. *Per Cur.*

1 T. R. 645

- 3 The deed of a surety does not extinguish the simple contract debt of the principal. *White v. Cuyler.*

6 T. R. 176

- 4 The cancelling of a deed, or the loss or destruction of it, will not divest

property which has once vested by transmutation of possession under the deed. *Read v. Brookman*. 3 T. R. 156

5 There being a proviso in a deed, that an annuity which was granted by another deed should cease if a lady should associate, continue to keep company with, or cohabit, or criminally correspond with *J. F.* The Court of C. P. held that all intercourse whatever, though the most innocent, was within the terms of the deed. *Dormer (Ld.) v. Knight*. 1 Taunt. 417

6 A conveyance by lease and release, the release containing the words "all land, &c. belonging, used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof, &c." will pass leasehold lands held for a long term of years, and occupied for many years as part of the estate, as well as freehold; especially against the releasor. *Doe d. Davies v. Williams*. 1 H. B. 25

7 A lease for a year being made between *A.* and *B.*, the release, stating *B.* to be a trustee for *C.*, granted the premises unto *C.* in his possession being by virtue of an indenture of lease, bearing date the day before the release, and to his heirs, *habendum* to *B.* and his heirs, to such uses as *C.* should appoint: Held, the release sufficient to convey the premises to *B.*, and the words in the granting part "unto *C.*" &c. may be rejected as surplusage. *Spyve v. Topham*. 3 E. R. 115

8 *A.* the mother of *B.* having entered into a bond on his behalf for 1000*l.* *B.* executed an indemnity bond of the same date, *viz.* 26th April 1800, in the sum of 2000*l.* conditioned for the payment of 1000*l.* three months after her decease. After this *A.* made a codicil to her will, by which she relinquished two debts due from *B.*, and desired him to be punctual in indemnifying her estate against the said 1000*l.* bond; three days after the execution of this codicil, *A.* executed a release to *B.* in which after mentioning specifically three debts due to her from *B.* on certain securities, expressed that she had agreed to release *B.* from those sums, "and of and from all or any other sum or sums of money, claims and demands, thereby secured or intended to be secured, and all other sum or sums of money, claims and demands whatsoever;" and released him accordingly from those sums,

"and all claim on account of those sums, or for or on account of any other matter, cause, or thing whatsoever:" Held, 1st, that this release did not extend to the indemnity bond; and 2dly, that no extrinsic evidence could be admitted to explain the intentions of *A.* as to the release. *Butcher v. Butcher*. 1 N. R. 113

And see tit. POWER, post.

9 Where by articles under seal the defendant bound himself under a penalty to deliver to the plaintiff by a certain day "the whole of his mechanical pieces *as per schedule annexed*;" the schedule forms part of the deed, which without it would be insensible: and therefore in covenant for the breach of the contract in not delivering the pieces; in which the plaintiff, after setting out the articles executed by the defendant, averred that to the said articles there was *then and there annexed* and subscribed a certain schedule of the said several pieces of mechanism agreed to be delivered, &c. upon *non est factum* pleaded, it is competent to the defendant to shew in his defence, that at the time of the execution of the articles, the schedule was *not annexed*; but that in fact it was afterwards subscribed and annexed by the witness to the articles, who was the agent of both parties, immediately after the execution of the articles, and after one of the parties had left the room: though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles. *Weeks v. Maillardet*. 14 E. R. 568

10 A lady having actually married with the consent of guardians named by her deceased supposed putative father, and confirmed by the Court of Chancery, she suffered a recovery; and declared the uses to the joint appointment of herself and her husband, with remainder in strict settlement. It being discovered that her supposed marriage was void, because at the time thereof her legal father was alive, and did not consent to the marriage, the parties conceived that the settlement and recovery were void, and executed a deed of revocation, and suffered another recovery, after which the lady made a new settlement: Held, that the recovery and first settlement were valid, although made under a mistake of the

situation in which the parties stood.

Boughton v. Sandilands. 3 Taunt. 342

- 11 A deed which may take effect as a covenant to stand seised, is good, though the use is to arise after the decease of the covenantor, and though he does not affect thereby to dispose of the freehold in the mean time. *Doe d. Dyke v. Whittingham.* 4 Taunt. 20
- And although the use is to arise at a period which may not happen till long after the covenantor's death, the use resulting in the mean time. *ibid.*

III. FRAUDULENT OR VOID.

- 1 A deed of trust conveyed the lease of a farm, and all the grantor's effects and all debts due to him, to trustees in consideration of a certain sum to be paid to him by one of the trustees; in trust, to dispose of all the property, and out of the produce to reimburse the trustee the sum advanced by him to the grantor, and all other the trustees' demands upon him; and then to pay all such debts as were justly due from the grantor, as the trustees in their discretion should think proper; the surplus to be holden for the benefit of the grantor's wife, (whose property the bulk of it originally was) as a separate maintenance for her, in consequence of a separation between them on account of her husband's ill usage: Held, that such deed was not fraudulent or void, as against creditors, it appearing to have been made *bona fide* at the time, and that all the creditors of the grantor known at the time, had, upon application to the trustees, received payment of their debts: Held, also that the wife was not liable, as executrix *de son tort*, after the death of her husband intestate, on account of her possession of this property under the deed of trust. *Nunn v. Wilsmore.*

8 T. R. 521

- 2 If a person, having several creditors, convey by deed the legal interest in part of his real and personal property to a trustee, in trust (after deducting the expenses respecting the trust), out of the rents and profits, to pay half the surplus to the grantor for his own use, and the residue among certain creditors named in a schedule, without any intention of fraudulently delaying the creditors not named in the schedule in obtaining their demands, the deed is

good in law. *Estwick v. Caillaud.*

5 T. R. 420

(See *Anst.* 381.)

- 3 A voluntary settlement of lands made in consideration of natural love and affection, is void as against a subsequent purchaser for a valuable consideration, though with notice of the prior settlement before all the purchase-money was paid, or the deeds executed; and though the settlor had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all causes the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the construction of the stat. 27 *Eliz.* c. 4. *Doe d. Otley v. Manning.* 9 E. R. 59
- 4 There is no fraud in the assignee of a term assigning over his interest to whom he pleases, with a view to get rid of a lease, although such person neither takes actual possession nor receives the lease. The replication *per fraudem* by the lessor, to a plea of assignment in such a case, cannot be good where the party assigning receives no benefit from the premises. *Taylor v. Shum.* 1 B. & P. 21
- 5 The release of an adverse claim to a litigated estate, is a good and valuable consideration in a deed to avoid a former voluntary grant by virtue of stat. 27 *Eliz.* c. 4. although the releasee was not party to the original suit, but came in by consent, and entered into an order of reference; and although he could not have been bound by the judgment in the original suit. *Hill (Clk.) v. Exeter (Bp.).* 2 Taunt. 69
- 6 A conveyance of chattels unaccompanied with possession is void: although in the same instrument be contained a valid mortgage of leasehold buildings, in which the chattels are situated. *Reid v. Blades.* 5 Taunt. 212
- 7 One who had a life-interest in a settled estate of his wife (both of them being aged) of at least 3000*l.* a year; whereof the ultimate reversion on failure of issue male (of which there was none) was in her, and having furniture and pictures, &c. in his mansion of not less than 8000*l.* value, being pressed by his creditors, conveys in pursuance of an agreement with his wife, all that his property to trustees, who had married

his two daughters, for the benefit of his wife and daughters, and subject to his wife's future appointment; in consideration whereof the wife discharged him of above 3000*l.* before raised on the estate, principally for his use, and enabled the trustees to raise, out of her estate, 12,000*l.* more for the benefit of her husband's creditors, *but subject to the appointment of him, his executors, &c.*: and also covenanted to levy a fine, which was levied a year afterwards, and the husband covenanted to deliver an inventory of the goods to the trustees, within six months, which was not done; and after the conveyance the husband continued to use the furniture, &c. in the house, as before: and was soon afterwards sued by several of the creditors, whose executions against such goods were satisfied by him without setting up the trust deed, or resorting to the trust fund, but money was raised on it afterwards for other creditors; and above two years after the deed, the husband being sued by the plaintiff (a creditor before that time) the trust deed was set up in bar of the levy upon the goods in the house; and the sheriff returned *nulla bona*. And upon an action brought for a false return: Held, that in consideration of the question,

whether this were a *bond fide* transaction, or a contrivance to defeat the creditors, and therefore void at common law, or by the stat. 13th *Eliz. c. 5.* it is material to submit to the jury 'the relative value of the property withdrawn from the reach of the creditors, in proportion to the amount of their demands at the time, and the value and tangibility of that substituted in its place, in aid of the conclusion that the deed was covenous against them, and therefore a verdict for the plaintiff (founded principally on these concurrent circumstances, 1. The previous embarrassment of the husband; 2. The want of notoriety of the conveyance at the time; 3. The want of an inventory; 4. The continuance of the husband's possession, though consistent with the deed, yet without notice of the change of property; and 5. The appropriation of the husband of a part of the money raised by the trustees to his own use, without objection;) was set aside, and a new trial granted to bring the question more fully before the Court and jury, as to the good faith of the transaction, and the value of the consideration, and its availability to the creditors. *Dewey v. Baynton (Bart.)*

6 E. R. 257

DEMURRAGE.

1 A general ship took brandies on board, under bills of lading, which allowed 20 lay days for delivery of the goods in *London*, and stipulated for 4*l.* per day demurrage. Afterwards, certain of the consignees chusing to have their goods bonded, the vessel could not make her delivery at the *London* docks until 46 days after the 20 days: some of the goods, which were undermost, could not, though demanded, be taken out till the upper tiers were cleared: Held, that each of these consignees was liable, on a general count for demurrage, to pay the 4*l.* per day for the 46 days. *Leer v. Yates.* 3 Taunt. 387

2 The master of a ship cannot maintain *assumpsit* in his own name upon an implied promise to pay demurrage. *Brouncker v. Scott.* 4 Taunt. 1

3 If a consignee accept goods under a bill of lading, at the bottom of which is a memorandum that the ship is to be cleared in 16 days, and 8*l.* per day demurrage to be paid after that time, the master upon delivery of the goods may recover demurrage against the consignee. *Jesson v. Solly.*

4 Taunt. 52

N. B. When demurrage is payable on a particular contract, see *Harper v. McCarty.* 2 N. R. 258. *ante*, AGREEMENT 16, page 36,

DEMURRER TO EVIDENCE.

- 1 On a demurrer to circumstantial evidence, the party offering the evidence is not obliged to join in demurrer, unless the party demurring will distinctly admit upon the record, every fact and every conclusion, which the evidence offered conduces to prove. *Gibson v. Hunter.* (in *Dom. Proc.*) 3 H. B. 187

DESCENT.

- 1 One seised in fee of a copyhold of inheritance by descent *ex parte maternâ*, surrendered the same to the use of himself for life, remainder to such persons and for such estates as he should by deed or will, attested by three witnesses, appoint, remainder in default of appointment to himself in fee; after which he made a mortgage, and surrendered to the use of the mortgagee in fee, who, upon re-payment of the principal and interest, surrendered again to the mortgagor: Held, that the line of descent was thereby broken, and that the estate descended to the paternal heir. *Doe d. Harman v. Morgan.* 7 T. R. 103
- 2 A feoffment and refoffment break the line of descent. 7 T. R. 105
- 3 The rule of *possessio fratris* does not apply to estates-tail; nor even to inheritances in fee-simple, without an actual possession of the brother of the whole blood. *Doe d. Gregory v. Wichelo.* 8 T. R. 211
- 4 *J. A.* devised all his lands to *S. A.* (his son by the first *venter*) when he should come to the age of 21 years, but if he should die before 21 years, and *D. A.* (the testator's daughter by the second *venter*) should be then living, he gave the same to her when she should attain 21 years. Testator died, and then *S. A.* died under age and without issue: Held, that on the death of *S. A.* the inheritance vested in *D. A.* his sister of the half blood, in preference to his uncle of the whole blood. *Doe d. Andrew v. Hutton.* 3 B. & P. 643
- And see *Doe d. Barnett v. Keen.* 7 T. R. 386
- 5 Devise of all the testator's real and personal estate and effects to *B. V.* his wife, in trust for the education of his daughter *M. V.* till 21, and in case of the death of his daughter before 21, the whole of his said estate and effects to his wife; Testator died leaving *B. V.* his wife and *M. V.* his only child. *B. V.* died, leaving *M. V.* also her only child, and then *M. V.* died under age, and without issue; the Court of C. P. held that the heir of *M. V.* *ex parte maternâ* was entitled to succeed. *Goodtitle d. Castle v. White.* 2 N. R. 383
- And see *Goodtitle d. Vincent v. White.* 15 E. R. 174, *post*, page 254.

DETINUE.

- 1 In *detinue*, when the goods are alleged to have come to defendant, by finding, it is sufficient for the plaintiff to prove that the goods came to the defendant by wrong: At least unless the finding be traversed. *Mills v. Graham.* 1 N. R. 140

DEVISE.

I. WHAT MAY OR MAY NOT BE DEVISED.

II. WHO ARE CAPABLE TO TAKE AS DEVISEES, AND WHAT ESTATE OR INTEREST VESTS IN THEM, AND HEREIN OF DEVISEES IN TRUST.

III. WHAT WORDS DESCRIBE THE DEVISEES AND THINGS DEVISED, AND WHAT ESTATES PASS, EITHER BY RULES OF LAW OR APPARENT INTENT OF DEVISOR.

IV. OF VOID OR LAPSED DEVISES.

V. WHAT WORDS PASS AN ESTATE IN FEE.

VI. ——— ESTATE TAIL.

VII. ——— ESTATE FOR LIFE.

VIII. WHAT WORDS CREATE A JOINT-TENANCY, OR TENANCY IN COMMON.

IX. OF DEVISES BY IMPLICATION.

X. CONDITIONAL OR CONTINGENT, WITH REMAINDERS OVER, AND HEREIN OF VESTED REMAINDERS.

XI. CROSS REMAINDERS.

XII. REVERSION—HOW IT WILL PASS.

XIII. LIMITATION OVER—HOW CONSTRUED.

XIV. EXECUTORY DEVISE.

I. WHAT MAY BE DEVISED.

- 1 An executory devise is transmissible, assignable, descendible, and *devisable*. *Jones v. Roe d. Perry*, (*in error*).

3 T. R. 88. 94, 95

- 2 A possibility coupled with an interest, *e. g.* the interest which a person takes by virtue of an executory devise is *devisable*. *Roe d. Perry v. Jones*.

1 H. B. 30

[Affirmed in K. B. 3 T. R. 88.]

- 3 A mere right of entry, (the estate of the remainder-man having been divested by the fine of tenant for life) is not devisable. *Goodright d. Fowler v. Forrester*.

8 E. R. 552

II. WHO ARE CAPABLE TO TAKE AS DEVISEES, AND WHAT ESTATE OR INTEREST VESTS IN THEM.

- 1 Lands, &c. are devised to *B.* for life, and after his decease *to all and every such child and children of B. as shall be living at the time of his decease*. A posthumous child of *B.* shall share equally with those who were born in his lifetime. *Doe d. Clarke v. Clarke*.

2 H. B. 399

- 2 An infant in *ventre sa mere*, is considered as born, for all purposes which are for his benefit. *ibid.*

- 3 Where the person to whose right heirs an estate is limited, takes no estate himself, there his right heirs shall take as purchasers. 1 T. R. 634

- 4 A devise to the right heirs of husband and wife is a devise to such person as answers the description of heir to both, namely, *a child of both*; and if no preceding estate be given to the father and mother, such child shall take as a purchaser. *Roe d. Nightingale v. Quartley*.

1 T. R. 630

- 5 *A.* having three daughters, *B.*, *C.*, and *D.*, by will gave a small legacy to *B.* and *C.*, and then gave a leasehold estate to *D.*; “but if she died *without having child or children*,” then “to *B.*, and after her, to her child or children;” *D.* had a child who died in her lifetime: Held, that *D.* took the absolute interest in the term, and consequently that she might dispose of it by will. *Weakly d. Knight v. Rugg*.

7 T. R. 322

- 6 Under a devise of freehold property to the relations on my side, all those shall take who would be entitled to personal estate under the statute of distributions: as well in the maternal, as in the paternal line: and the devise speaks at the time of the testator’s death, not at the time of framing the devise. Therefore one who was related in equal degree at the time of making the will, having died before the testator, leaving a son: the son was held not entitled to a share, as a relation. *Doe d. Thwaites v. Over*.

1 Taunt. 263

- 7 One devises to his natural son, and in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease, then for and amongst such person and persons, his and their heirs, &c. as shall appear and can be proved to be his next of kin, in such proportions as they would, by virtue of the statute of distributions, have been entitled to his personal estate if he had died intestate : Held, that the distribution was to be made amongst those who were the testator's next of kin at the time of his death, though the nephew, to whom a prior life-estate was given, were one of them. *Doe d. Garner v. Lawson.* 3 E. R. 278
- 8 A. devised a reversionary estate to S. T. and A. L. as tenants in common in fee; and in case both or either of them should happen to die in the lifetime of T. H. (who had an estate for life), then the shares of the party so dying to go "unto all and every such child and children, grandchild and grandchildren, of the said S. T. and A. L. respectively, as should be living at the time of her or their decease, and to the issue of such of them as should be then dead, and have left issue, and to his, her, and their respective heirs, as tenants in common : yet, nevertheless, so as all the descendants of the said S. T. should together be entitled only to one moiety of the said premises, and all the descendants of the said A. L. should together be entitled to no more than the other moiety thereof; and that none of such descendants, either of S. T. or A. L. should be entitled to any greater or other share of the said respective moieties of the said respective premises, than his, her, or their father or mother would have been entitled to, if living;" under this devise the grandchildren of S. T. and A. L., though *in esse* at the date of the will, can only take *per stirpes*, and not *per capita*, in substitution of such of their parents respectively as were dead at the determination of T. H.'s life estate. *Legard v. Haworth.* 1 E. R. 120
- 9 The devisor, after these introductory words, "as touching such worldly and personal estate wherewith it has pleased God to bless me," gave an estate for life to his wife in his estates in A. and B., and then devised to J. W. "all his lands, freehold, copyhold, and leasehold, in A."—Also he devised to J. W. all his estate freehold and copyhold in B. : Held, that J. W. only took an estate for life in remainder in the estate in A. *Doe d. Child & Ur. v. Wright.* 8 T. R. 64
Doe v. Child. 1 N. R. 335
- 10 Where a mortgagee of a copyhold estate in possession under a forfeited mortgage, and considered as irredeemable, devised it as land as husband and wife in fee, it was held the conveyance of the husband alone, without the concurrence of his wife, passed no interest against the wife surviving. *Doe d. Freestone v. Parratt.* 5 T. R. 652
- 11 An estate was devised to trustees and their heirs till A., a female infant, should attain 21 or marry; and upon her attaining 21 or marrying, to A. and her heirs; and in case she should die under 21, without leaving issue, remainder over. A. married and had a child, which child died, and then A. died under 21: Held, that her husband was entitled to be tenant by the curtesy. *Buckworth v. Thirkell.* 5 B. & P. 652, n.
- 12 J. P. devised real and personal estate to trustees, to pay thereout an annuity to his wife for life, and out of the residue to pay sufficient for the maintenance, education, and support of his only daughter, until she should attain the age of 21 years, or marry; and when she should attain 21, or marry, then to her in fee: but in case his daughter should die under age and unmarried, then the estates to go to his wife for life; and, after her decease, to the two children of his nephew, as tenants in common in fee: with a proviso, that if either his wife or daughter should marry a Scotchman, then his wife or daughter so marrying should forfeit all benefit under his will, and the estates given to such his wife or daughter as should so marry should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or daughter were dead: Held, that such partial restraint of marriage was legal; and that the daughter having while under age married a Scotchman and died, leaving a son, such son could not inherit, nor her husband be tenant by the curtesy; but that the limitation over (the testator's wife being also dead) to the

two children of the testator's nephew (which nephew was still living), took effect immediately on such marriage; they being the persons designated by the will to take in the event which had happened; the testator having considered such prohibited marriage the same as the death of the daughter under age, unmarried. *Perryn v. Lyon*, and *Lyon v. Geddes*. 9 E. R. 170

13 Devise to *Margaret* (an only child) for life, remainder to the first son of her body, "if living at the time of her death," and the heirs male of such son, and for default of such issue to the second son of her body, "if living at the time of her death," and the heirs male of such second son, &c. and for default of such issue male, remainder to *A.*; *Margaret* had one son, who died in her life-time, leaving a son: Held, that *Margaret* took only an estate for life, and that neither her son nor grandson took any estate. *Doe d. Radclyffe v. Bagshaw*. 6 T. R. 512

14 *A.* having no issue, and being tenant in tail under the will of Dr. *G.*, with remainder to *B.* and *C.* for life, remainder to the heirs of their bodies, for such estates and in such proportions as they or the survivor should appoint, and in default of such appointment, remainder to the heirs of the body of *B.*, with remainders over; made his will, whereby, after devising certain estates to trustees to sell and apply the purchase-money amongst different relations, and directing them to sell all other his real estates, and apply the money to some of those relations; he gave 5*l.* a-piece to *C.* (who survived *B.*) and to *D.* the only child of *B.* and *C.*, "in consideration of the ample provision made for them after my decease by Dr. *G.*, who has by his will devised to them certain estates in *R.*, now in my possession, which, though I could now legally dispose of, I mean fully to confirm to them: according to the intent of the said will." After this *A.* suffered a recovery, and declared the uses to himself for life, remainder to such persons and for such uses as he, by deed, will, or codicil to be properly attested, should appoint; and for default of such appointment to *C.* for life, remainder to *D.* for life, with remainder over in fee. After this he made a codicil, duly executed, whereby he confirmed his said will in

all respects not thereby altered; and after making some alterations in respect of other property, he declared such codicil to be part of his said will: Held, that *C.* and *D.* took nothing under the will and codicil of *A.* in the property which had belonged to Dr. *G.*: for it did not appear that *A.* intended by his will to devise the property in question, but rather to let it pass as it was devised by the will of Dr. *G.*: and his confirmation of his will by his codicil could not carry it further. *Lane v. Wilkins*.

10 E. R. 241

15 But even if he had intended to exercise a devising power by the will, according to the estates carved out by Dr. *G.*'s will for *C.* and *D.* yet he afterwards altered that intent, and took a new estate in the premises, by suffering a recovery, the uses of which were different from those of Dr. *G.*'s will, reserving to himself a power of appointment by deed, will, or codicil: and when he executed a codicil afterwards, confirming his will in all respects, except where altered or revoked by his codicil, and then made specific alterations as to other parts of his property, without reference to his power, or to the property in question (though such reference be not essentially necessary to the execution of a power, if it plainly appear that the party means to execute it) nothing appeared to shew that he meant to execute the power by his codicil confirming his will generally, supposing it could take effect through the medium of such a will. *ibid.*

16 Devise to *A.* for life, remainder to testator's children as *B.* shall appoint. The fee-simple becomes vested on the testator's death in all his children then living, subject to be divested by the appointment. *Morgan d. Surman v. Surman*. 1 Taunt. 289

17 Testator devised "all his freehold, leasehold, &c. estates" to *A.* in fee; provided that if *B.* should have "any son or sons," then "to such male issue as *B.* shall have when *A.* attains 21," but *A.* to have the rents and profits of the estates till he attains 21; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever, not before disposed of, to *A.* his heirs, &c. for ever;" *B.* had one son, who died before *A.* attained 21

- and a second who was born three weeks after that period: Held, that the first son took nothing, but that the second took an estate in tail male. *Whitelock v. Heddon*. 1 B. & P. 243
- 18 Under a devise, to the son of the testator, of the residue of the testator's estates, &c.; but in case he should die under 21, or (which is to be read *and*) should leave no issue male or female, then to the testator's daughter surviving, and her heirs male or female; but in case his son and daughter should both die, leaving no issue, then to his cousin and his heirs; the son takes a fee with an executory devise to the daughter, upon the event of his dying under 21, and without leaving issue; with another executory devise over. *Right d. Day v. Day*. 16 E. R. 67
- 19 Devise of a tenement, of which testator was possessed for the remainder of a term of years, to his daughter S. K.'s children, to be equally divided between them, share and share alike, *and to the survivor of them and their children*: Held, that the children of S. K. took an absolute interest in the premises, share and share alike, subject to a survivorship between them for life. *Doe d. Gigg v. Bradley*. 16 E. R. 399
- 20 One, having entered into articles of agreement for the purchase of certain premises, devised the same to a trustee to pay the rents and profits to her three daughters (one of them being covert) and the survivor of them, for their lives, share and share alike; and, after their decease, in trust for all and every the *child and children* of her three daughters who should be living at the death of the survivor of them, as tenants in common: but if all her daughters should die without leaving any issue, then, after the decease of the survivor, in trust for her grandson, in fee, who was her *heir at law*: the residue of her real and personal estate to her three daughters. Upon a bill filed by the grandson, in the life-time of the surviving daughter, to restrain the tenant from cutting timber, &c.; and after a conveyance of the premises to the uses of the will: the Court held, that under the will and deeds of lease and release the three daughters took no legal estates, but that the releasee took an estate for the lives of the daughters; and that such of their children as should be living at the death of the survivor of the daughters would take estates *in fee*, as tenants in common. *Robinson v. Grey*. 9 E. R. 1
- 21 Under a devise to E. F. of "all my estate and effects whatsoever and wheresoever," in trust, to pay funeral expenses and debts; and then "subjecting my said effects bequeathed to E. F. to the following legacies," enumerating amongst these a gift to W. S. of "the house his father now dwells in, at the decease of his said father;" and giving to the father an annuity, and to the son a sum of money, and giving other pecuniary legacies; and then, after desiring all the above legacies to be "paid out of my effects by the said E. F.," giving "all the rest and remainder of my said effects to the said E. F. her heirs and assigns for ever:" Held, that E. F. took the remainder in fee in the house (which was the only real property possessed by the testatrix) after an estate for life by implication in the father, and a remainder for life only to the son; though the personal estate was sufficient to pay all the personal charges. *Doe v. Trout*. 15 E. R. 394
- 22 Devise to the use of A. *only surviving son* of J. S., for life, and to his first and other sons, &c., and for default of such issue to the use of the first, second, and of all and every other son and sons of J. S. lawfully to be begotten, and the heirs male of the body of such first and other sons, with proviso that the said A. and his first and other sons, and also the first and other sons *hereafter to be born* of the said J. S. should reside at the family house, &c.: Held, that the second son of J. S. born before the date of the will, should take upon the death of A. without issue. *Doe d. James, otherwise Morgan v. Hallett*. 1 M. & S. 124
- 23 A. devised lands in trust to pay the rents and profits to his daughter, (whose husband was then living) for her life, notwithstanding her coverture, and *not to be subject to any control, &c. of her husband*, nor liable to any debts which he had or should contract; afterwards the deviser made a codicil, taking notice of the death of his daughter's husband, wherein he ratified and confirmed his said will: the daughter is entitled under this devise to the rents and profits, &c. *free from*

the control of any future husband.
Beahle v. Dodd. 1 T. R. 193

24 A. bequeathed money to trustees in trust for B. till she should attain 21, and then to pay the same to her, and if B. should die under 21, leaving a child or children, then in trust for such child or children; but if B. should die under 21, without leaving any child or children, then in trust for C.'s three nieces; B. attained 21, married, had two children, and died in the life-time of the testatrix; B.'s children took nothing by the will. *Doo v. Brabant.*

4 T. R. 706

25 A devise to trustees till A. shall attain the age of 24, and when he shall attain that age to him in fee, gives him a vested interest, which will descend to his heirs though he die before 24. *Doe v. Lea.* 3 T. R. 41

26 Where an estate in fee is devised to trustees in trust for A. B. without any limitation of the estate to the *cestuique trust*, the latter takes the beneficial interest in fee. *Challenger v. Shephard.*

8 T. R. 597

27 A devise in trust to pay unto gives the legal estate to the trustee. *Doe d. Leicester v. Briggs.* 2 Taunt. 109

28 A devise to trustees in trust to receive rents and profits during the life of A. and that such rents and profits shall be applied for the subsistence and maintenance of the said A. during his life, is not an use executed in A. and cannot unite with a subsequent legal limitation to the heirs of the body of A. *Silvester v. Wilson.* 2 T. R. 444

29 A devise of lands to trustees and their heirs upon trust to permit a *feme covert* to receive and take the rents and profits during her life, for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common, with other like limitations to other *femes coverts*, vests the legal estate in the trustees. *Horton v. Horton.* 7 T. R. 652

30 A. devised thus: "As to my real and personal estate, subject to my debts and funeral expenses, I give and devise as follows, viz. my real estate and all my personal estate unto J. M. and O. W. and their heirs on the following trusts, viz. to the intent that they dispose of my personal estate in discharge of my debts, funeral expenses, and such legacies as I may direct; and as

to my real estates, subject to my debts, and such charges as I may make, I give and devise the same to R. P. for life: Held, that under this devise the legal estate in the reality vested in R. P. for his life, and J. M. and O. W. took no estate therein. *Kenrick v. Lord W. Beauchlerk.* 3 B. & P. 175

31 Devise to a trustee to receive and pay the rents and profits for the maintenance of S. a *feme covert*, and the issue of her body, during her life, and after her decease, upon trust for the use of the heirs of the body of S., their heirs and assigns for ever, without regard to seniority of age or priority of birth: and in default of such issue, to the use of the right heirs of the testatrix: Held, that S. took only an estate for life, and that the heirs of her body took as purchasers and as joint tenants; and therefore that the eldest son of S. dying in her life-time, his eldest son could not take either the whole as heir of the body of S.: or a part as heir to his father. *Doe d. Hallen v. Ironmonger.* 3 E. R. 533

32 One devised a rent-charge to his wife for life, together with the interest of 1200*l.* and after her decease devised the rent-charge to trustees and their heirs, to sell and dispose of the same and distribute the purchase-money amongst certain persons: and after giving a few small legacies, he directed his household goods, &c. to be sold; and the money arising from the sale of the rent-charge, and from his household goods, &c. and from all other his estate and effects of what nature or kind soever and wheresoever, he directed should be first liable to the payment of legacies, and the residue to be divided into certain parts, which he bequeathed to certain persons; with a proviso that the receipt of the trustees to a purchaser of the rent-charge should be sufficient without seeing to the application of the purchase-money; and then he appointed the said trustees and his wife his executors: Held, that the trustees did not take the legal estate in the real property of the devisor. *Hilton v. Kewworthy.*

3 E. R. 553

33 Under a devise of lands, arrears of rent, and a bond and judgment, to trustees and the survivor, and the executors, &c. of such survivor, in trust, out of the rents and profits of the said

estates and arrears, &c. to pay certain annuities for lives, and a sum in gross; and from and after payment of the said annuities and money, the testator devised successive estates for lives, remainder to *C. W.* in tail, remainder to his own right heirs; and he also gave a general power of leasing to the trustees for the best rent, with an allowance of 10*l.* a year to each for their trouble: Held, that the purposes of the trust being all answered by the death of the annuitants, and the raising of the money for legacies, the remainderman in tail (the life estate being spent), took the legal estate in the premises. *Doe d. White v. Simpson.* 5 E. R. 162

34 *A.* by will gave to his wife an annuity of 200*l.* for her life, in addition to her jointure (which was secured upon an estate in the *West Indies*), and 6,000*l.* to his two younger children, to be paid at 21, and appointed *B. C.* and *D.* as trustees of inheritance for the execution thereof: Held, that no interest passed to *B. C.* and *D.* in the testator's real estates. *Trent v. Hunning.* 1 N. R. 116

35 Upon a devise to the testator's wife *B.* of all his real and personal estate, &c. in trust for the education and maintenance of his only daughter *M.* till she arrives at the age of 21; and in case of *M.*'s death before she arrives at 21, then a devise of the whole of his said estates and effects to *B.* his wife. Held, that *M.* the daughter took a present limited fee, either by descent or by implication under the will, upon the contingency of her dying under 21; and that *B.* the mother took an executory devise in fee, which, upon her death before the daughter attained 21, descended to the daughter; and that the daughter afterwards dying before she attained 21, such executory interest, which did not unite with nor was merged or extinguished in the fee which she had *ex parte paternâ* during her life, descended to her heirs *ex parte maternâ*. *Goodtitle d. Vincent v. White.*

15 E. R. 174

And see *tit. DESCENT, ante, page 248.*

36 Devise in trust to pay unto, or else to permit and suffer the testator's niece, a *feme covert*, to receive the rents: the Court of C. P. held that the legal estate was executed in the niece, because the words "to permit"

came last; and in a deed the first, in a will the last, words prevail. *Doe d. Leicester v. Biggs.* 2 Taunt. 109

37 Devise to *A.* in trust to permit and suffer the testator's widow to enjoy, hold, use, occupy, possess, and have the full, free, and uninterrupted possession, and use of all interests of monies in the funds, and rents and profits arising from the testator's houses, for her natural life, if she should remain unmarried; and that her receipts for all rents, &c., with the approbation of any one of his trustees, should be good and valid, she providing for and educating properly the testator's children, and also paying two annuities thereby bequeathed to *M. D.* and *M. I.* of 20*l.* for their lives, besides board and lodging to *M. I.*, and that his children should be solely under their mother's direction until marriage, or properly provided for: Held, that the use was executed in the devisees in trust. *Gregory v. Henderson.* 4 Taunt. 772

38 Devise of a copyhold to two and their heirs, in trust to permit *M. A. S.* to enjoy the same, or to pay to, or permit and suffer her to receive the rents, during her life, for her separate use; and, subject to such estate of *M. A. S.*, to such persons, &c. as *M. A. S.* should by her will appoint, and in default of appointment, to the right heirs of *M. A. S.*: the appointee by will of *M. A. S.*, takes a legal estate, although the trustees had never surrendered to the use of the will of *M. A. S.*, nor had *M. A. S.* been admitted tenant. *Doe d. Woodcock v. Barthrop.* 5 Taunt. 382

S. C. 1 Marsh. 90.

III. WHAT WORDS DESCRIBE THE DEVISEES AND THINGS DEVISED, AND WHAT ESTATES PASS, EITHER BY RULES OF LAW, OR APPARENT INTENT OF DEVISOR.

N. B. When *parol evidence* is admissible to explain a devise, see *post. tit. EVIDENCE.*

1 Under a devise to *A.* for life, remainder to *B.* and her heirs, but if *B.* died before *A.* or if she died without heirs of her body, then to *C.* and his heirs, &c. The Court held that the devise over to *C.* after *B.* could only take effect if *B.* died before *A.* and without issue, for that unless, or was read as *and*, the devisee over would

take if *B.* died before *A.* although *B.* left issue; which would clearly be against the apparent intent of the deviser, which was to prefer the issue of *B.* to *C.* *Denn d. Wilkins v. Kemeys.* 9 E. R. 366

[See the next two cases.]

- 2 Under a devise to *A.* a natural son then under age, and the heirs of his body, and if he die before 21, and without issue, then over to other relations and ultimately to the testator's right heirs, the Court held that *A.* having attained 21, the limitations over did not take effect as by the natural sense of the word 'and,' they were made to depend on the happening of both events, and this construction was not varied by a codicil made after the son attained 21, confirming every part of the will so far as the testator's affairs were consistent. *Doe d. Usher v. Jessep.* 12 E. R. 288
- 3 *A.* being seised of lands, holden upon leases for lives, devised to *B.*, his brother, all his real and freehold estates, subject to an annuity to his mother for her life, "but in case *B.* should die before he attained the age of 21 years, or without issue living at his death," to his mother for ever. *A.* died; *B.* attained the age of 21 years, and then died without issue. The Court of C. P. held that the word "or" in the devise over must be construed as "and;" and that the mother took nothing upon the death of *B.* *Fairfield d. Hawkesworth v. Morgan.* *Dogn Proc. in error.* 2 N. R. 38
And see *Eastman v. Baker.* 1 Taunt. 174.
- 4 The words *heirs male of the body* may be construed to be words of purchase, if they are clearly so intended to be. *Goodtitle v. Herring.* 1 E. R. 264
- 5 Issue is either a word of purchase or limitation, as will best effectuate the deviser's intention. *Doe v. Collis.* 4 T. R. 294
- 6 The words "*first and every other son,*" may be taken as words of limitation, where it manifestly appears that the deviser intended to use them in that sense; but, generally speaking, they are words of purchase. *Doe v. Lord Mulgrave.* 5 T. R. 320
- 7 There seems no difference in the construction of the words "*dying without issue,*" or words to that effect,

when applied to *real or personal property.* *Porter v. Bradley.* 3 T. R. 146

- 8 Words may be supplied in a will to render a sentence complete and intelligible, in aid of the apparent intent to be collected from the whole context: As where a testator having two sisters, *H.* and *J.*, and also two infant consins, *T.* and *G.*, the maintenance and education of which latter he recommended to his executrix and residuary legatee, devised his estate at *A.* to his sister *H.* for life, remainder to his sister *J.* for life, remainder to *T.* in tail, remainder to *G.* in tail, &c. remainder to his own right heirs. And then devised another estate at *B.* to his sister *J.* for life, or if she should survive his sister *H.*, so that she should come into possession of the estate at *A.* "then to *L. J.* (whom he made executrix and residuary legatee) for life, towards the support, &c. of his cousins *T.* and *G.* remainder to the said *G.* in fee: Held, that as the word "or" so placed was unintelligible, being referable to no other alternative to give it effect, and it was apparent from the whole context that the testator had in contemplation another alternative, namely the death of his sister *J.*, and meant to make a provision after the death of his sisters for his cousin *G.* as well as his cousin *T.*, the will should be read as if he had devised his estate at *B.* to "his sister *J.* for life, and after her death, or if she should survive his sister *H.* so that, &c. then, &c.;" and consequently *G.* took a vested remainder in the estate at *B.*, to which he became entitled in possession after the death of the testator's sister's sisters, and *L. J.* his executrix although his sister *J.* did not survive his sister *H.* *Doe d. Leach v. Mackeen.* 6 E. R. 486
- 9 A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good, if the jury find from the circumstances that she was the person meant to be designated. *Doe d. Cook v. Danvers.* 7 E. R. 299
- 10 Under a devise of the residue of real and personal estate (subject to the payment of debts and legacies) to the testator's son and daughter, *their heirs and assigns for ever, as tenants in common, and not as joint tenants;* but in case of the death of either,

leaving child or children, the share of him or her so dying to go to his or her child or children; or if all should die before 21, such share to go to the survivor of the son or daughter for ever: but in case his son and daughter should be both dead at the time of the testator's death, without child or children; or leaving child or children, all of them should die under 21 and unmarried, and without child or children; then he gave the whole of his real and personal estate to his executors, upon certain trusts for other branches of his family; and then the will proceeded, as to the rest and residue of his estate and effects, in case of the death of his son and daughter at the time before-mentioned, and without child or children, and other the events aforesaid, he gave the same to his brother in fee: the Court held that the limitation to the children of the deceased son or daughter, or to the survivor of the two, was only a substitution in case of a lapse by the death of the testator's son or daughter in his life-time; so that if both son and daughter survived him, he intended them to take the fee as tenants in common; if one died in his life-time and left issue, such issue was to take the parent's share; or if there should be no such issue which should attain 21, the survivor of the son and daughter should take the whole; or if both died in his life-time, and either left issue, such issue was to take; but if both died without issue in his life-time, then the executors were to take on the trusts mentioned; remainder to his brother in fee. *Doe, d. Lifford & nr. v. Sparrow.* 13 E. R. 359

- 11 Where there is no connexion by grammatical construction or direct words of reference, or by the declaration of some common purpose, between distinct devises in a will, the special terms of one devise cannot be drawn in aid of the construction of another, although in its general terms and import similar, and applicable to persons standing in the same degree of relationship; there being no apparent reason, other than the different wording of the clauses, to presume that the testator had a different purpose in view. *Right d. Compton v. Compton.* 9 E. R. 267

12 General introductory words in a will, as "touching all my temporal estate," &c. though they have some effect in the construction of the will, are not of themselves sufficient to extend a devise for life to a fee. *Goodright v. Stocker.* 5 T. R. 13: *Doe d. Spearling v. Bucknor.* 6 T. R. 612

13 Under a devise to *H.* of certain tenements by name for her life; provided that if *S.* and *A.* (to whom and to whose children the reversion and inheritance of the premises were intended if *H.* should die without issue) should give *H.* 1000*l.* for her life estate, then the testator devised all and singular the said estate and premises called, &c. to *S.* and *A.* for their lives, share and share alike; and on the death of either, their moiety unto and among the children of the survivor and their heirs, share and share alike, &c. as tenants in common, &c. provided that if *H.* should die in possession of the premises single and without issue, then he gave the said estate and premises to *S.* and *A.*, and to the issue of their bodies lawfully begotten, or to be begotten, and their heirs, as tenants in common, as aforesaid: Held, that the words as aforesaid drew down to the second clause the limitations of the first, and shewed that the testator meant that *S.* and *A.* and their children should take the same estates as *H.* dying in possession without issue as they would have done if the 1000*l.* had been paid. And held also, that a younger child of *A.* born after the death of the testator, and before the death of *H.* or of *S.* (who died without issue) was entitled to share in the moieties both of *S.* and of *A.* and that the eldest son of *A.* was also entitled to share in both moieties, though he died before *A.*; and on his death the share in *S.*'s moiety descended immediately to his next brother and heir at law, as did also his share in *A.*'s moiety, on her death after him. *Meredith v. Meredith.*

10 E. R. 503

- 14 One devises all his freehold estate to his wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleases:" Held, that this only gave her a power to leave it by will; and therefore that a disposition of it by feoffment in her life-time

was void. *Doe d. Thorley v. Thorley.*

10 E. R. 438

- 15 The word "*legacy*" may be applied to a real estate, if the context of the will shew that such was the devisor's intention. *Hardacre v. Nash.*

5 T. R. 716

- 16 *E. C.* by his will, after making several pecuniary bequests, devised to *A. W.* the income of a certain cottage, and her living in it if she thought proper; and to *E. W.* the half of a certain estate: and all the rest and residue of his goods, &c. and also his lands, &c. he gave to his wife for life, with power "to give what she thought proper of her said effects" to her sisters the said *A. and E. W.* for their lives; and after the death of his wife and her two sisters he gave all his lands, &c. to his heir at law: Held, that the widow had power to devise to her sisters the real as well as personal estate before bequeathed to her by her husband; and *A. W.* having died before the widow, that the latter might among the rest bequeath the cottage, in which *A. W.* had a life interest, to her other sister *E. W.* *Doe d. Chilcot v. White.*

1 E. R. 33

- 17 The word *share* may carry a leasehold estate. As where a testator, having three sons and one daughter, and leasehold estates and personal funds; devised one leasehold estate to his eldest son, and other leaseholds to his second son, directing his executors to receive and apply the rents until they came of age; and then directed a certain sum to be put out at interest for the benefit of his widow, *durante viduitate*, and that on her death or marriage, it should be divided equally between his three sons, *share and share alike*; and then he gave his daughter 600*l.* to be paid to her when of age; and then gave the residue of his worldly effects to be divided equally amongst his three sons, *share and share alike*; and lastly directed, that "if any of his said children died under age and without lawful issue, the *share of him or her* deceased should go equally amongst his surviving sons:" Held, that the word *share* in the last clause; referring as it must do to the *whole share* or portion of the daughter, must have the same meaning as to the sons, and must comprise the leasehold as well as personal funds before given to them;

and that upon the death of the eldest son under 21, and without issue, the leasehold estate devised to him went equally between the two surviving sons. *Doe d. Stopford v. Stopford.*

5 E. R. 501

- 18 Under a devise of land to certain persons described generally, as "*the sisters*" of *J. H.* generally, their heirs, &c. as *tenants in common*, and not as joint tenants: it was held by the Court that one of three sisters of *J. H.* who alone survived at the time of the devise made, and who also survived the testator, was entitled to take the whole. But even if she had been only entitled to a part, (whether a moiety or a third,) the residue would not have gone to the heir at law of the testator as in case of a lapsed devise, which supposes the deceased sisters to have been once capable of taking under the will; but to the residuary legatee, to whom was devised certain other lands, "and also all other the testator's lands, &c. not hereinbefore disposed of, &c. and all other his real and personal estate whatsoever which he might be possessed of, or entitled to, &c." *Doe d. Stewart v. Sheffield.*

13 E. R. 526

- 19 Where, after a devise to one for life, the devisor limited the estate to trustees and their heirs, in trust to preserve contingent remainders, and to permit the tenant for life to take the profits, with remainder over on his decease; and he afterwards gave other estates for lives, with several remainders over, and after each estate for life he interposed the same estate to trustees and their heirs: Held, that this shewed his intent to be, that the estates to the trustees should be confined to the lives of the several tenants for lives, and consequently that those in remainder took legal estates, there being no other circumstance in the will to shew a contrary intent. *Doe d. Comper v. Hicks.*

7 T. R. 433

- 20 *A.* by will bequeathed to his wife: (besides some other legacies) a leasehold estate at *N.* for her life, and a leasehold estate at *W.* to *B.*; and by his codicil he directed that the bequests to his wife in his will should be in full of all claims she should be entitled to on his real or personal estate, except the estate for life of his wife in

the premises at *W.* : Held, that the wife was not thereby entitled to the estate at *W.*, it being clear that *W.* was put by mistake for *B.* *Skerratt v. Oakley.* 7 T. R. 492

21 These words in a will, "I give and bequeath all that I shall die possessed of, real and personal, of what nature and kind soever, after my just debts paid. I appoint *P.* my *residuary legatee* and executor;" followed by certain annuities and legacies; with a desire to his legatee and executor to let his sister be interred in his (the testator's) vault, and with a recommendation to him to be kind to another relation, and to do something handsome for him at his death, &c., shew the testator's intention to make *P.* the residuary legatee of his real estate in fee. *Pitman v. Stevens.* 15 E. R. 505

22 Where one devised a farm in his own occupation to his mother for life, remainder to *G.* in tail, and also devised to his mother "all his goods and chattels, stock of his farm, bonds, &c. and all other his moveables whatsoever," and made her executrix: Held, that growing corn, which was not reaped till after the death of the testator and of his mother, who died soon after him, passed to her representative, and not to *G.* the devisee of the land. *Cox v. Godsalve.*

6 E. R. 604, *n.*

23 The devisor having devised certain estates to *A.* in fee; "and to his executors "all his money," &c. *stock upon his farm*, with the implements of husbandry, and *all other his personal estate* of what nature or kind soever, in trust to pay debts and legacies, &c.: Held, that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death, from the devisee of the land, to the executors; although there were *assets*, sufficient to pay all the debts and legacies without that aid. *West v. Moore.*

8 E. R. 339

24 *A.* being tenant for years of an house, gardens, stables, and coal-pen, bequeathed in the following words: "I give the house I live in and garden to *B.*." it was held that the stables and coal-pen occupied by *A.*, together with the house, passed, without being expressly named, though the testator used them for purposes of trade, as

well as for the convenience of his house. *Doe v. Collins.* 2 T. R. 498

25 A mis-recital or mis-description in a will, may be remedied by the intent of the devisor apparent on the will. Thus, where *A.* having an estate in the county of *Monmouth*, of which he was seised *in fee, in possession*; and another estate in the county of *Radnor*, of which he was also seised in fee, subject to the uses of his marriage settlement (by which he covenanted to convey to the use of himself and his wife for life, remainder to his first and other sons in tail), which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will, mis-reciting the estate of which he was seised in fee in possession to be in the county of *Radnor*, instead of *Monmouth*; and mis-reciting his disposable reversion to be in the county of *Monmouth* instead of *Radnor*; devised *his estate*, so mis-described to be in *Radnor*, which was in truth the reversionary estate, to his wife for life, remainder to his only son for life, remainder to his sons and daughters in tail, in strict settlement; remainder to his own daughter, &c.; and devised the reversion only of *his estate*, so mis-described to be in *Monmouth*, of which, in truth, he was seised in fee absolute, after the death of his wife and only son without issue, to his daughter, &c.; yet the Court held, that enough appeared on the face of the will, which also described these estates as *formerly belonging to his uncle*, to shew that the devisor's intent was to pass the present interest of his estate in fee absolute, which was in the county of *M.*, and the reversion of his settled estate in the county of *R.*; although he had respectively mis-described their local situations. *Mosley v. Massey.*

8 E. R. 149

26 The testator, having given 4000*l.* to *A.* and *B.* in trust for certain persons, by a residuary clause gave "all the rest of his estate and effects of what nature soever to *A.* and *B.* their executors and administrators, in trust to add the interest to the principal so as to accumulate the same, it being his will that the residue should not pass

but at the time and manner as the principal sum of 4000*l.* was directed to be paid:" it was held that a house, the only freehold of which the testator was seised, did not pass by the will, notwithstanding there were general words in the introductory clause, "as to all his *estate* and effects both *real* and *personal*." *Doe d. Spearing v. Buckner*. 6 T. R. 610

27 Real property may pass under the description of "*personal estates*" in a will; it being manifest from the whole of the instrument, as by terms of direct reference to that description in ulterior dispositions of the same real property, that such was the devisor's intention. *Doe d. Tofteld v. Tofteld*. 11 E. R. 246

28 A devise of "*all the rest and residue of my estate, of what nature or kind soever*," was held by the Court of C. P. to include real as well as personal property, though accompanied with limitations peculiarly applicable, and usually applied to personal property alone. *Doe d. Burkitt & Ux. v. Chapman*. 1 H. B. 223

29 Where a testator, after directing his debts and funeral expenses to be paid by his executors, and making several bequests of annuities and money, gave to his five grandchildren, whom he appointed executors, "all the remainder of my property whatsoever and wheresoever, to be divided equally, share and share alike, after their paying and discharging the before-mentioned annuities, legacies, and demands, or any I may hereafter make by codicil to this my will; all my goods, stocks, bills, bonds, book-debts, and securities in the *Witham* drainage in *Lincolnshire*, and funded property: the Court of C. P. held that his real estate did not pass under the residuary clause. *Roe d. Helling v. Yeud*. 2 N. R. 214

30 A devise of all the residue of the testator's "*money, stock, property and effects, of what nature or kind soever*," to A. and B., "to be divided equally between them, share and share alike," will pass *real* as well as *personal* estate, where from other parts of the will it appeared that the testator had applied the words *property* and *effects* to real estate. As where he began his will by stating, "as to my money and

effects, I dispose thereof as follows," &c.; and then proceeded to dispose of parts of his *real* estate. And again, having lands interlying with another's lands, he directed the purchase of the latter, if offered for sale, to be added to his other adjoining property. *Doe d. Andrew v. Lainchbury*. 11 E. R. 290

31 A general residuary clause will carry estates not in the contemplation of the testator; unless the will contains special indications of a contrary intention. *Morgan d. Surman v. Surman*. 1 Taunt. 289

32 Under a general devise of all manors, messuages, lands, tenements, and hereditaments; leasehold messuages will not pass, unless it appear to have been the evident intent of the devisor that they should pass. *Thompson v. Lawley*. 2 B. & P. 303

33 A. devised to his wife his house and goods, with all his lands, goods, and chattels, whatsoever and wheresoever, for her life; and after her death to two younger sons till they should attain the age of 15, for their education. He then devised his aforesaid house, goods, and chattels, equally to be divided between all his sons and daughters, share and share alike: Held, that under the last clause of the devise the lands did not pass. *Roe d. Walker v. Walker*. 3 B. & P. 375

34 By a bequest of an *house*, it is in general to be presumed that the testator meant to pass every thing which was occupied by him with it, as proper and convenient for the occupation of the house, though the word *appurtenances* be not added. *Doe d. Clements v. Collins*. 2 T. R. 502

35 Land usually occupied with a house, will not pass under a devise of a "*messuage with the appurtenances*," unless it clearly appears that the testator meant to extend the word "*appurtenances*" beyond its technical sense. *Buck v. Nurton*. 1 B. & P. 53

36 The word *farm*, in a will, is sufficient to pass a leasehold estate, if it appear to have been the testator's intention that it should so pass. *Lane v. Earl Stanhope*. 6 T. R. 345

37 Under a devise of "*a messuage or tenement, buildings, lands, or premises, now in my own possession; and all other my real estate whatsoever in M. or in any other place*," &c. to A. for life; and after her decease a devise

of "the said message or tenement, buildings, lands, and premises," to B. in fee: Held, that the word *premises*, used in the devise to B., carried all that was before given to A., and was not confined to the premises in the testator's own possession; and consequently that a reversion in fee of another message, to which the testator was entitled after the determination of a life in being, in whose possession it was outstanding during his lifetime, passed to the devisee in remainder.
Doe v. Meakin. 1 E. R. 456

- 38 Where a description of an estate is certainly expressed at first in a devise, the addition of another certain description may be rejected as surplusage; but is otherwise where the estate first described is uncertain. One having purchased of A. the manor and certain lands of and in *Hampreston*, in the counties of *Dorset* and *Hants*, and having settled a rent-charge on his wife, out of his manor of *Hampreston*, in the county of *Dorset*, and all other his lands, &c. in *Hampreston* aforesaid, which he bought of A.; and having afterwards purchased of other persons other lands in *Hampreston*, in the county of *Hants*, which were near another estate of his called *Uddens*, in the county of *Dorset*; by his will, reciting and confirming the settlement, devised to trustees "the said manor, &c. and other hereditaments of and in *Hampreston* aforesaid, and all other the manors, lands, farms, &c. and other hereditaments in or near *Uddens* aforesaid, or elsewhere in the said county of *Dorset*," to trustees for different uses; amongst others, giving his wife an additional rent-charge, payable out of the manors and hereditaments in the said county of *Dorset*; and as to all and singular the said manors and other hereditaments, in the said county of *Dorset*, with their appurtenances, &c. charged as aforesaid, he devised the same to the first and other sons of his body, remainder to his daughters, in strict settlement; and if all but one of his daughters died without issue, "then as to the entirety of the said manors and other hereditaments," to the daughters of his remaining daughter in tail, &c.; remainder to the lessor of the plaintiff, his nephew, and heir at law; remainder to his sons and daughters in strict settlement; remainders over to other junior

nephews in like manner; with power to the trustees to raise money on the security "of the manors and other hereditaments in the said county of *Dorset*," and also to sell the devised lands, except such as were situate at *Uddens* or *Hampreston* aforesaid, and to purchase other lands in fee within the said "manor of *Hampreston*, in the said county of *Dorset*," &c. The devisor, by a subsequent codicil, in which he speaks of the prior devise of his estate, in the county of *Dorset*, revoked the devise to the lessor of the plaintiff: Held by the Court that the *Hampreston* lands lying in the county of *Hants*, and not purchased of A., though situated within and surrounded by the general ambit of the county of *Dorset*, and also near *Uddens*, and holden together with and as part of, a farm in the county of *Dorset*, did not pass by the will, which was confined in express terms to the manor and lands in *Hampreston*, purchased of A., or which lay in the county of *Dorset*. *Doe d. Harris v. Greathead.*

8 E. R. 91

- 39 A. being seised in fee of several freehold estates, and also possessed of a leasehold rectory for lives, devised "all his manors, messuages, lands, tenelements, tithes, and hereditaments, and all his real estate whatsoever (except what is therein after mentioned and devised), to trustees," in strict settlement; he charged his leasehold with rent-charges to two of his younger children; and directed that when any of the lives dropped, the lease should be renewed, and the names of those two children put in, of whom a son was to have the preference: it was held, that the rectory did not pass by the general words of the devise, but that A.'s eldest son and heir took, as special occupant, on the death of A. *Sheffield, Bart. v. Lord Mulgrave.*

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5 T. R. 571

(See tit. SPECIAL OCCUPANT) *Post.*

- 40 The general words above used would have been sufficient to have passed the rectory, if the devisor had so intended: but the limitations shewed that such was not his intention. *ibid.*
- 41 Devise of all the rest, residue, and remainder of the testator's estate to trustees and their heirs for a term of ten years. *Quare*, Whether they are restricted to personal estate by directions applicable to personalty only, to lay it

out at interest, and charge the securities? *Newland v. Majorbanks*.

5 Taunt. 268

S. C. 1 Marsh. 44

- 42 Devise of all my messuages in *T.*, and now in my occupation. The testator had two messuages in *T.*, of which he occupied only one: Held, that only that one passed by the devise. *Doe, d. Parkin, v. Parkin*.

5 Taunt. 321

S. C. 1 Marsh. 61

- 43 A testator, possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue of the *property*, goods, and chattels to be divided equally between *A.* and *B.*, share and share alike, after all my debts paid:" and in fact the personalty was not quite sufficient to pay all the debts and legacies: but held, that the word *property*, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty. *Doe v. Langlands*.

14 E. R. 370

- 44 Devise of "all and singular my effects of what nature or kind soever," will not pass the real estate where it cannot be collected from the will itself, that such was the testator's intention. *Doe d. Hickv. Dring*. 2 M. & S. 448

- 45 A testator being seized by the same title of a messuage and 19 acres of land, including *Floodgate Meadow*, in the parish of *Mavesyn Ridware*, which parish consists of three townships, *Mavesyn Ridware*, *Blythbury*, and *Hill Ridware*; and having other property in *Hill Ridware*, and no where else; and the messuage in *Blythbury*, with two of the 19 acres there, being in the occupation of *T. W.*, and the rest of the 19 acres being partly in the occupation of other tenants, and partly in his own; devised "all his messuage, with all lands, hereditaments, and appurtenances thereto belonging, situate in *Blythbury*, in the parish of *M. R.* now in the occupation of *T. W.*, except *Floodgate Meadow*:" Held, that the devise was not confined to the lands in *Blythbury* then occupied by *T. W.*, but extended to all the lands in *Blythbury*, held under the same title with the messuage; and that the words "now in the occupation of *T. W.*" were to be transposed and applied to the messuage then occupied by *T. W.*; according to the fact; which transpo-

sition would render the whole consistent: whereas without it, the exception of the *Floodgate Meadow* was nugatory, as that never had been in the occupation of *T. W.* And it was no objection to this construction that a residuary clause, giving all other the testator's real estate in *Mavesyn Ridware*, would have nothing to operate upon; the *Floodgate Meadow*, &c. and the property in the township of *Hill Ridware* being specifically devised in the same clause. *Marshall v. Hopkins*.

15 E. R. 309

- 46 *A.* having an estate of his own in the county of *B.*, and another in *C.*, and having also the legal but no beneficial interest in an estate in *D.* with power of appointing it to either of his sons; by will devised "all his estates, of what nature or kind soever, as well copyhold as all other in the county of *B.*, and all in the county of *C.*, or elsewhere in the kingdom of *England*, after payment of his debts, &c." to a younger son. The Court held that the trust estate, which he had the power of appointing, did not pass by this general devise; it appearing by the words of the devise to be the intent of the testator to give such estates only as were entirely at his own disposal, and which he could charge with his debt. *Roe d. Reade v. Reade*.

8 T. R. 118

- 47 One having a freehold manor of *Sutton*, and freehold lands there, and having also copyhold within the township of *Sutton*, and within the local ambit of the manor, but held of another manor, and having surrendered his copyhold to the use of his will, devised all his manor of *S.*, and all his messuages, farms, lands, tenements, and hereditaments whatsoever, within the precincts and territories of *S.* in the county of *Chester*, with their rights, members, and appurtenances, in trust for his daughter, *L.*, (having devised other estates in other counties to two other daughters) and to her children in strict settlement: the Court held: 1st. That farms, lands, &c. within the township, though not within the manor of *Sutton*, passed by the description of farms, &c. within the precincts and territories of *S.* 2dly. That the general words "messuages, farms, lands," &c. and particularly the word farms, were sufficient to carry copyhold as

well as *freehold* in the place described, if such appeared to be the intent of the testator upon the whole will; 3dly. That such intent was evinced in this case by the word *farms*, where it appeared that the testator had a farm composed of copyhold and freehold, which he had let as one entire subject, and which must otherwise be divided: and also by this, that he had charged the property devised beyond the annual income of it, unless the *copyhold* were included; 4thly. That a small copyhold distant eight miles, and a small freehold 20 miles from *Sutton*, but within the county of *Chesster*, did not pass by that devise, but did pass under a general residuary clause to another daughter. *Doe d. Belasye v. Lucan*, (Earl.) 9 E. R. 448

48 An heir at law is not to be disinherited but by express words: The Court will, if possible, give effect to all the words of a will: on the ground of these two rules, the Court determined that by a devise of "all my copyhold estates situate in *A.*, and which I became entitled to on the decease of my father;" copyhold estates do not pass, which the deviser's father had surrendered to him in his life-time, though the father retained the possession of them to the time of his death, which happened prior to the will made by the son, there being other copyholds of the son answering the description in the will. *Doe d. Ryall v. Bell*. 8 T. R. 579

49 Under a devise of a manor, copyhold premises, parcel thereof, which were purchased by and surrendered to the lord subsequent to the time of making his will, will pass; and this, notwithstanding a subsequent demise of the premises by the lord from year to year. *Roe d. Hale v. Wegg*. 6 T. R. 708

50 An estate, whether strictly copyhold to all purposes, or customary estate, the freehold of which is in the lord, may well pass under the description of copyhold in a will; the intention to pass it under that description being apparent. *Doe d. Cooke & Ur. v. Danvers*. 7 E. R. 299

51 *A.* by will devised "all his freehold and copyhold lands, tenements and hereditaments," in trust for certain purposes, and afterwards purchased new lands; he then made a codicil whereby, after reciting that he had devised "all his freehold and copyhold lands, tene-

ments, and hereditaments" to the trustees named in the will, he revoked the devise so far as it related to two of the trustees, and devised "his said lands, tenements, and hereditaments" to the other trustees upon the same trust, and concluded with declaring the codicil to be part of his will: Held that the after-purchased lands did not pass. *Bowes v. Bowes*, (In Dom. Proc.)

2 B. & P. 500

52 Copyhold lands purchased after a will, disposing of all the testator's lands, do not pass by the will. *Spring d. Titcher v. Biles*. 1 T. R. 435, n.

53 *A.*, being seised of several freehold estates, and possessed of a part of a farm held by a church lease renewable (the other part of the farm being freehold, and the whole having been always let together as one entire farm, at one rent), devised "all his manors, messuages, houses, farms, lands, woodlands, hereditaments, and real estates whatsoever, to *B.*:" and gave "all the rest and residue of his ready money, rents in arrear, stock in the public funds, jewels, and personal estate whatsoever," to *C.*: it was held that the leasehold part of the farm passed under the first devise. *Lane v. Earl Stanhope*. 6 T. R. 345

N. B. See post. tit. WILL, Attestation and Revocation.

IV. VOID OR LAPSED.

1 A devise to trustees of a reversion in land (after payment of debts, &c. which were found to be paid) to be applied by them and their successors, and the officiating ministers for the time being of a methodist congregation, as they should from time to time think fit to apply the same, is not a devise to charitable uses within the stat. 9 G. 2. c. 36; and therefore held, that the trustees were entitled to recover at law, however the Court of Chancery might afterwards direct the application of the trust fund. *Doe d. Toone v. Copestake*. 6 E. R. 328 And see *Doe d. Phillips v. Aldridge*, post. page 268.

2 *A.* devised "to *B.* and the heirs of her body, and for default of such issue," then over; *B.* died in the life-time of *A.*, and then *A.* by a codicil confirmed his will: Held, that the heir of *B.* took nothing, though it appeared that *A.* knew of the death of *B.* and of the

birth of her son before he made the codicil. *Doe d. Turner v. Kest.* 4 T. R. 601

- 3 Under a devise to *A.* for life; remainder to trustees to preserve contingent remainders; remainder to the first and other sons of *A.* successively in tail male; with like remainders to *B.* and his sons; with remainder to *the right heirs male of A. for ever*; these last words are words of limitation, and not of purchase, notwithstanding the prior estates given to the sons of *A.* and their issue male, which are not of themselves sufficient to indicate an intention in the testator to use those words differently from their legal signification; particularly as such words might, in certain events, operate to advance the general intent of the testator, and let into the succession some male descendants of *A.*, who might be excluded from taking under the prior limitations to his first and other sons in tail male. And such ultimate limitation to the heirs male of *A.*, to whom a precedent estate for life was given, operating to give him an estate in tail male in remainder, such devise lapses by his death before the testator. *Doe d. The Earl of Albemarle v. Colyear.* 11 E. R. 548

- 4 A devise of all the rest and residue of the testator's estate in the manor and lands of *B.*, &c. not already settled on his eldest son *S.*'s marriage, (except those parts of it before devised to his second son *H.*), together with all remainders and reversions of the said lands settled on the said marriage, to his eldest son *S.*, and the heirs of his body; and for default of issue of *S.*, then he devised his said *entire* estate of *B.* to his son *H.* in tail, with remainders over; lapses by the death of *S.* in the lifetime of the testator, and the residue passes to *H.* immediately on the death of the testator, though *S.* left issue. *White d. White v. Warner.* 11 E. R. 551, n.

- 5 Where by the dubious use of the word *family* (viz. "brother and sister's family") in a will, the testator having had two sisters, one of whom was dead, leaving children, it could not certainly be collected to what persons he meant to apply it; the devise is void for uncertainty, and the heir at law is entitled to take. *Doe d. Hayter v. Joinville.* 3 E. R. 172

- 6 *A.* gave by will his tenant-right which

he held by lease to *A. I.*, but not to dispose of or sell it; and if he refuse to dwell there, or keep it in his own possession, then that *J. I.* should have his tenant-right of the farm. *A. I.* having borrowed money, left the title-deeds with his creditor as a security, and confessed a judgment to secure the money; and having also given a judgment to another creditor who issued an execution against him, the sheriff sold the lease to the creditor with whom the deeds were deposited, he paying the debt of the plaintiff in the execution; and *A. I.* having left the premises and ceased to dwell there on the day of the execution, before the sheriff entered: Held, that *J. I.* the remainderman was entitled to enter, the estate of *A. I.* having determined by such his acts. *Doe d. Ibbotson v. Hawke.*

2 E. R. 481

- 7 *A.* devises an advowson to the first or other son of *B.* that should be bred a clergyman and be in holy orders, in fee, but in case *B.* should have no such son, then to *C.* in fee. The first devise is void, as depending on too remote a contingency; and the latter limitation cannot, in such case, be let in to take effect; therefore, though *B.* dies without having had a son, the heir at law of the devisor, and not *C.* is entitled. *Proctor v. The Bishop of Bath & Wells.* 2 H. B. 358

V. WHAT WORDS PASS AN ESTATE IN FEE.

- 1 Where the testator "gave and bequeathed to *A.* his estate at *B.*, and the rest of his effects, furniture, estates real and personal, to *C.*;" *A.* took the estate at *B.* in fee. *Holdfast d. Couper v. Martin.* 1 T. R. 411
- 2 The word "estates" is equivalent to "estate," and will carry the fee, unless coupled with other words which shew a different intention. *Fletcher v. Smiton.* 2 T. R. 656
- 3 A devise of all the rest, residue, and remainder of the devisor's lands, hereditaments, goods, chattels, and personal estate, "his legacies and funeral expenses being thereout paid," conveys the fee of all the devisor's real estate. *Doe d. Palmer v. Richards.*

3 T. R. 356

But see *Denn d. Moor v. Mellor*, post, page 299.

- 4 A devise of a house to *A.* "paying yearly, and every year out of the said

- house the sum of 15*s.* to *B.* will carry a fee. *Goodright d. Baker v. Stocker.* 5 T. R. 13
- 5 A devise of testator's lands at *W.*, and all his interest in the estate of *J. C.* deceased, to *L. A.* for life, and after *L. A.*'s decease to *E. S.*, charged with an annuity for *J. T.* for life, gives a remainder in fee to *E. S.* *Andrew v. Southouse.* 5 T. R. 292
- 6 Under this devise "I give my freehold house and furniture to *A.*, whom I make executrix, she paying all my debts and legacies; I likewise leave to *A.* all the rest of my personal estate;" *A.* takes a fee in the freehold. *Doe d. Willey v. Holmes.* 8 T. R. 1
- 7 The word estate will carry a fee in a will, if not restrained by other words: and held that it was not restrained in a devise of all lands, &c. known and called by the name of the *Coal Yard*, in the parish of *St. Giles's, London*. The Court held that the fee passed. *Roe d. Child et Ur. v. Wright.* 7 E. R. 259
- 8 *A.* by his will, reciting "as to such worldly estate as God has pleased to bless me with," made a provision for his heir at law, and devised "all the rest and residue of his goods and chattels, rights, credits, personal and testamentary estate whatsoever to *B.* for his own use, benefit, and disposal;" under this clause *B.* was held by the Court of C. P. to take an estate in fee in the lands of the testator. *Smith v. Coffin & Ur.* 2 H. B. 444
- 9 Under a devise of land to the two children of the testator's brother *W.*, when they attained the age of 21 years; but the executor to account to them for the profits until the age of 21, or day of marriage: but if either should die before 21, the survivor to be heir to the other: the Court held that the fee passed, which would go over to the survivor in case one died under 21, and would descend or be disposable if he died after attaining 21; and that a devise of other land to the two children of another brother *R.* on the same condition as *W.*'s children, was governed by the same construction. *Doe d. Wight v. Cundall.* 9 E. R. 400
- 10 Two being seised of undivided moieties, as tenants in common, in fee, *quare*, whether a devise by the one of his half part to the other will carry the fee? But, at any rate, the fee did not pass by a residuary clause, whereby the testator, after several pecuniary bequests, ordered the lease of his house with his furniture, to be sold, and all the rest and residue to be divided amongst other persons; and appointed executors: for such division of the rest and residue must be intended to be made by the executors as such, and therefore confined to personal property. *Bebb v. Penoyre.* 11 E. R. 160
- 11 After introductory words, "as touching" the testator's "worldly estate," &c. he devised a cottage house, &c. to *A.* and his heirs, and also gave to *B.*, whom he made his executrix, "all and singular his lands, messuages, and tenements, by her freely to be possessed and enjoyed;" the Court held that the latter words, being ambiguous, did not pass the fee against the heir; but might mean free of incumbrances, or dispensable of waste; and that the word estate, in the introductory clause, could not be brought down into the latter distinct clause. *Goodright d. Drewry, v. Barron.* 11 E. R. 220
- 12 A devise to the testator's wife, of "all his property both personal and real for ever," passes the fee in the real estate: and the deviser's intent to use the words in a more restricted sense is not shewn by a subsequent clause of the will, whereby, after her decease, he gave an additional annuity to a person to whom he had before given a smaller annuity preceding the devise to the wife. *Doe d. Dacre (Lady) v. Roper.* 11 E. R. 518
- 13 *A.* devised a house to his mother for life, and after her death "to the eldest son of *E. K.*, and if *E. K.* should have no male heir, then to the eldest son of *I. K.*" He also devised copyhold lands "to the eldest son of *E. K.*, but if the said *E. K.* should have no male heir, then my will is that the aforesaid lands and tenements I bequeath to the aforesaid son of *I. K.*, to him and his heirs for ever." But if the said eldest son should offer to sell or mortgage such copyhold lands and tenements aforesaid, then he gave the aforesaid lands and tenements to *T. C.* in fee. He then gave his personal estate to *T. C.*, directing him "to be at the charges of taking up and admitting the said eldest son as aforementioned to the said copyholds out of the said personal estate, and in

the name of the said K." He then gave the rents and profits of the copyholds to T. C. for seven years, and then "to the aforementioned eldest son. But if the said T. C. should die before the end of the seven years, then the aforesaid eldest son of the K.'s to take and enjoy the said estate forthwith to them and their heirs for ever." The Court of C. P. held, that the eldest son of E. K. took an estate in fee under this will in the copyhold premises. *Wright v. Bond*. 2 N.R. 125

14 A. devised his real and personal estates to his wife for life, and directed part of the personality to be sold after his wife's death by the executor, and divided between C., D., E., F., and G.; he then gave two annuities to H. and J. to be paid by his executor out of his whole estate, and to commence after his wife's death, and he then devised the remainder of the profits after the yearly payments to the annuitants out of his whole estate to B., C., and D., equally share and share alike: Held, that the executor took a fee. *Doe d. Beezley v. Woodhouse*. 4 T. R. 89

15 A devise of "all the rest I have in the world, both, houses, lands, goods, and chattels, &c. to my wife, my executrix; so that she shall sell my stock in trade and household goods, and if these will not pay the debts, she shall sell next the house in fee in Penzance, &c.; so that my executrix shall pay in good time all lawful debts," &c.: Held, to carry the fee of the house in P. to the executrix; she being charged personally with the payment of debts, in respect of the real as well as personal estate devised. And the postponement of the sale of the realty till after the personal estate was exhausted, being merely recommendatory to her. *Goodtitle d. Paddy v. Maddern*. 4 E. R. 496

16 N. B. The distinction turns, in respect to carrying the fee, on this, whether the debts, &c. are merely a charge on the estate devised, or a charge on the devisee himself in respect of such estate in his hands. *ibid.*

17 One devised thus; "Concerning my worldly estate, I give and bequeath to M. M. 1s. Also I give and bequeath to A. M. 2s." (with pecuniary bequests to several others in the same form of words); "Also I give and bequeath to G. S. my message and lands, &c. in W. also I give and bequeath

to the said G. S. and his wife all my lands, &c. in B., also all my messuages, &c. in W. Also all my goods, chattels, &c. and personal estate, after having thereout first paid and discharged all my debts and funeral expenses: also subject to the payment thereout all the aforesaid legacies. And I nominate the said G. S. to be sole executor, whom I charge with the payment of my debts, legacies, and funeral expenses," &c.: Held, that G. S. and his wife took a fee in the estate devised to them, by reason of the words "having thereout first paid all my debts," &c. which was a personal charge on them in respect of the realty as well as personality, all devised in one entire sentence, together with such charge. *Doe d. Stevens v. Snelling*. 5 E. R. 87

18 One seised in fee, having only one daughter A. married to N. B. and two grandsons, W. T. B. and M. B. devised, "as for my worldly and temporal estates, &c.; I give to N. B. 1s." and devised that he shall not come upon my premises or hereditaments on any account whatsoever. Then after giving a legacy to his grandson M. B. he devised to his daughter 20l. a year out of the profits of his estate or lands at Eton; and then devised to his grandson W. T. B. "all his messuage and dwelling-house situate at Eton aforesaid, with all hereditaments, &c. there unto belonging, &c.; and that W. T. B. when 21, shall enter upon and enjoy the above mentioned estates, situate at Eton aforesaid." Held, that in order to effectuate the intention of the devise to exclude, at all events, his son-in-law N. B. from coming upon his premises, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son W. T. B. died before his mother); W. T. B. took a fee. But held that the annuity devised to his daughter A. out of the profits of the estate, being no charge upon the devisee or upon the estate given to him, could not have passed the fee to W. T. B. *Doe d. Bates v. Clayton*. 8 E. R. 141

19 Under a devise to one and her heirs (she having two children before and a third born after making the will) during their lives: Held, that these latter words were repugnant to the others, and that she took an estate of inheritance. *Doe d. Cotton v. Staplake*. 12 E. R. 55

20 Where the testator, after several bequests of stock in the 4 *per cents*, devised all the remainder in the above stocks *with my freehold property to M. S.*: Held, that *M. S.* took a fee in the real estate. *Roe d. Shell v. Pattison.* 16 E. R. 221

21 A devise of all my estate of *Ashton*, passes a fee-simple, as descriptive of the interest devised, not merely of the situation of the land. *Chichester v. Chichester.* 4 Taunt. 176

22 Under a devise to the testator's widow of "200*l.* per annum for life in addition to her jointure (which jointure it appeared was secured by a term out of his real estates), his debts being previously paid; and to his younger children 600*l.*, each to be paid respectively at 21," after which the testator "appointed *A. B.* and *C.* as trustees of inheritance for the execution thereof:" Held, by three judges, that the trustees thereby took a fee in the testator's lands; against one judge, who thought the meaning of those words too uncertain to disinherit the heir at law. *Trent v. Hanning.* 7 E. R. 97

23 Qu.—Whether the word "*hereditaments*" be sufficient to carry a fee? 5 T. R. 558

24 Qu.—Whether in a devise the words "*estate of what kind soever*," immediately preceded and followed by particular descriptions of personal property, will pass a remainder in fee in lands vested in the testator? *Dally v. King.* 1 H. B. 1

VI. ESTATE TAIL.

Under a devise "to *A.* for life, and after his decease to and amongst his issue, and in default of issue," then over, *A.* takes an estate-tail. *Doe d. Blandford v. Applin.* 4 T. R. 82

25 Under a devise "to *A.* and *B.* and heir heirs, and in case they agreed to sell the estate, that they should have heir equal shares of the money arising herefrom, but if they agreed to keep the estate whole together, then that the rents should be equally paid and divided between them, and to the several and respective heirs of their bodies:" *A.* and *B.* took only estates tail. *Roe d. James v. Avis.* 4 T. R. 605

By a devise to *A.* for life, without impeachment of waste, and after his de-

cease to the issue male of his body, and the heirs and assigns of such issue male for ever, and for default of such issue male to *B.*, &c.; *A.* takes an estate tail. *Denn d. Webb v. Puckey.* 5 T. R. 299

4 But if *A.* had taken only an estate for life, yet as the remainder to his issue and the subsequent remainders were contingent, *A.* might have barred them by suffering a recovery before issue born. *ibid.*

5 Under a devise to *A.* for life, *without impeachment of waste and with a power of jointuring*; remainder to the issue male of *A.*'s body and their heirs; and in default of such issue to *B.* for life, without impeachment of waste and with power of jointuring; remainder to the issue male of *B.*'s body and their heirs for ever: with a proviso, that in case *A.* or *B.* should become possessed of any other estate, and be obliged to change his name, that he should have the option which to take, but not to take both estates, but that one of his estates should go to the other of his nephews; remainder and residue of the testator's estate to *A.* in fee: Held, *A.* who had no child till after the death of the testator, took an estate tail under the first devise, and that a recovery suffered by him after the birth of a son, was good. *Frank v. Stovin.* 3 E. R. 548

6 *A.* devised to his nephew *B.*, but if he died without male heir, then to another nephew *C.* and his heirs; and charged the estate with an annuity to *D.*, and several legacies to other persons to be paid at a future time: Held, that *B.* took an estate tail. *Denn d. Slater v. Slater.* 5 T. R. 335

7 *A.* after giving different annuities to an only son, increasing at different ages till 30, and to be paid to him until he married, devised thus: "in case my son shall happen to marry before he attains the age of thirty, then I give and devise to him and the heirs of his body all my real and personal estates, &c. and if my son shall happen to die without leaving issue of his body, then I give and devise the same to my brother *B.*:" Held, that the son took an estate tail in the real estates, and the personal estate absolutely. *Daintry v. Daintry.* 6 T. R. 307

8 Devise to *A.* and her heirs, and if she died without issue, then she was ena-

bled to dispose of the estate by will or deed, and for want of such issue and direction, &c. then to the deviser's right heirs: Held, that *A.*, who had issue, took an estate tail. *Doe d. Neville v. Rivers.*

7 T. R. 276

- 9 Under a devise to *A.* and the heirs of her body for ever, as tenants in common and not as joint tenants; and in case *A.* died before *B.*, or without leaving issue of her body, then to *B.*: Held, that *A.* took an estate tail. *Doe d. Chandler v. Smith.*

7 T. R. 531

- 10 Devise "to *A.* and *B.* and their heirs for ever, provided that if both have issue then both their dividends to go to the issue of their own bodies; but if only one have issue, then the premises to go to that issue; and for default of such issue in both, to the right heir at law:" Held, that *A.* and *B.* took estates tail. *Doe d. Gregory & Geere v. Wichelo.*

8 T. R. 211

- 11 A devise of a messuage and land to *R. C.* for the term only of his natural life, and after his decease to the issue of the said *R. C.* as tenants in common; but in case the said *R. C.* shall die without leaving issue, then a devise of the same to *E. H.* in fee; gives to *R. C.* an estate tail in order to effectuate the general intent. And cross remainders cannot be implied between the issue of *R. C.* *Doe d. Cock v. Cooper.*

1 E. R. 229

- 12 Under a devise to *A.* of all the testator's whole estate and effects, real and personal, &c. "who shall hold and enjoy the same as a place of inheritance to her and her children, or her issue for ever. And if it should happen that *A.* should die, leaving no child or children, or *A.*'s children should die without issue," then over: Held, that *A.* took an estate tail. *Wood & Ur. v. Baron.*

1 E. R. 259

- 13 Under a devise of all freehold and copyhold estates whatsoever situate at *B.* with their appurtenances, to *A.* and the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common; and in default of such issue, then over: Held, that *A.* took an estate tail. *Pierson v. Vickers.*

5 E. R. 548

- 14 Under a devise of land to the testator's son *Joseph*, his heirs and assigns for ever; but in case his son should

die without issue, then, to go to the child of which his second wife was ensient: Held, that *Joseph* took an estate-tail. *Doe d. Ellis v. Ellis.*

9 E. R. 382

- 15 *A.* devised all his estates in the county of *D.* to a trustee for 200 years, to the use of the trustee during the life of his son *J. S.* to preserve contingent remainders, nevertheless to permit *J. S.* to receive the rents and profits; and after his decease to the use of the first son of the said *J. S.* to be begotten on the body of the woman he should happen to marry, and the heirs male of such first son, and for want of such issue to the use of the second, third, fourth, and every other son of *J. S.* and the heirs male of their bodies in succession; and for want of such issue male, then to the use of his daughter *E. S.* her heirs and assigns for ever, with a residuary clause in favour of *J. S.* The testator afterwards made a codicil whereby he devised all his estates to his son *J. S.* and his children lawfully to be begotten, with power for him to settle the same by will or otherwise on such of them as he should think proper, and for default of such issue, then to his daughter *E. S.* and her children lawfully to be begotten with a similar power, and in default of such issue to *J. S.* and *E. S.* equally between them; and he further provided that a settlement of 200*l.* per annum should be made on any woman whom his son should happen to marry, and that his estates should be chargeable therewith. At the time of making the codicil, *J. S.* was married, but had no child: Held, that the codicil was to be construed independent of the will; and that under the codicil *J. S.* took an estate tail, with a power to settle the estates on all or any of his issue in such way as he should appoint, and thereby determine the estate tail so far as it should be consistent with such settlement. *Seale v. Barter.*

2 B. & P. 485

- 16 Under a devise to *D. O.* the testator's eldest son, for life, remainder to trustees, &c. remainder to the first and other sons of his said eldest son and their heirs, and for want of such issue to the testator's second son *J. O.*, &c. with like remainders to his first and other sons, and for want of such issue to the testator's own right heirs: Held,

that the first and other sons of *D. O.* the eldest son took estates *tail in succession*, and consequently the remainders over vested, and were not contingent and defeated upon the event of *D. O.* having a son, who died in the life-time of *D. O.*; and therefore that *D. O.* having died without any son living at his death, but leaving daughters, a son of *J. O.* was entitled to take in preference to such daughters of his elder brother. *Lewis d. Ormond v. Waters.* 6 E. R. 336

17 Devise to testator's first son by his wife begotten or to be begotten, for life, remainder to trustees to preserve contingent remainders; remainder to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all and every other son and sons, for their several and respective lives; remainder to trustees, and to preserve, &c.; remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons, and the heirs male of his body, should be always preferred and take before the younger of the same sons, and the heirs male of his and their body and bodies; remainder to the testator's first and other daughters for their lives; remainder to trustees, &c.; remainder to the several heirs of their several and respective bodies lawfully issuing, so as the elder of such daughters, and the heirs male of her body, should always be preferred and take before the younger of the same daughters, and the heirs male of her and their body and bodies. There were other clauses in the will, by which, after giving an estate for life to the first taker, the testator limited to trustees, &c. remainder to the first and other sons of such first taker, and the heirs of their body, so as the elder of such sons, and the heirs of their bodies, should always be preferred before the younger of the same sons, and the heirs male of their bodies: Held, that the first son of the testator took an estate tail. *Poole v. Poole.* 3 B. & P. 620

18 Devise of a reversionary estate in a messuage, &c. to the testator's wife

for the term of her natural life, and from and after her decease to the heirs of her body by the testator, lawfully begotten or to be begotten, and for want of such issue remainder over: the wife is tenant in tail after possibility after the period from her husband's death, when she might have had issue by him, though there never was any issue of the marriage. *Platt & Ur. v. Powles.* 2 M. & S. 65

VII. ESTATE FOR LIFE.

1 Where an estate was limited by will to *A.* for life, "remainder to his first and other sons in tail male, remainder to the use of all and every the daughters, &c. as tenants in common, and in default of such issue, to the use of the right heirs of the devisor," after the death of *A.* without any son, an only daughter took only an estate for life. *Hay v. The Earl of Coventry.* 3 T. R. 83

2 By a devise to *S. Nash*, son of *T.* and *M. Nash* for life, remainder to trustees &c. remainder to the first and other sons of *S. Nash*, and the heirs male of his and their bodies respectively, and for default of such issue, to the use of all and every the daughter and daughters of the said *T. Nash*, on the body of the said *M.* his wife begotten and to be begotten, and for default of such issue, to the use of the right heirs of the said *T. Nash* for ever; a daughter of *T. Nash* only took an estate for life. *Denn d. Briddon v. Page.* 3 T. R. 87

3 *A.* devised to *B.* preacher of the meeting-house of *C.* for life, on condition that he should convey the premises to trustees, to take place after *B.*'s death, for the use and support of the preaching the word of God at the meeting-house for ever, and in case the preaching there should be discontinued, then over to a charity school: Held, that *B.* took an estate for life, though the devise over after his death, would be void by stat. 9 G. 2. c. 36. *Doc d. Phillips v. Aldridge.* 4 T. R. 264

4 *A.* devised two houses to his wife for life, and willed that on payment of a sum of money to the wife by *B.* (one of his sons) *B.* should share equally alike with the rest of his brothers and sisters *C., D.,* and *E.*; and if any of his children should die, then the share of him or her should go amongst the

survivors: Held, that the children *B.*, *C.*, *D.*, and *E.* took only estates for life under the will. *Goodtitle d. Richardson v. Edmonds.* 7 T. R. 635

- 5 *J. S.* devised thus, "as to what real and personal estate it has pleased God to bless me with (all my debts, &c. being first paid out of my personal, and if that is not sufficient, out of my real estate), I give and dispose of the same as follows: I devise all my messuages, lands, tenements, and hereditaments in *S.*, &c. to *A.*:" the Court held, that *A.* took only a life estate. *Doe d. Small v. Allen.* 8 T. R. 497

- 6 Only an estate for life passed by these words: "all the rest of my lands, tenements, and hereditaments, either freehold or copyhold, and also all my goods, &c. after payment of my just debts and funeral expenses I give and bequeath the same to *A.*:" &c. *Denn d. Moor v. Mellor.* 5 T. R. 558

(The judgment of the Court in this case was reversed in *Cam. Scac.* on the ground that there was a clear intent to convey the fee. *Denn d. Mellor v. Moor, (in error).*

1 B. & P. 558

See 6 T. R. 175.—8 T. R. 503.

- 7 This judgment of reversal was however reversed in *Dom. Proc.* and the judgment of K. B. affirmed, 2 B. & P. 247. 7 Par. Ca. 8vo. tit. WILL.

- 8 *A.* devised his estates real and personal, "in trust to trustees for his brother *B.* and his first and every other son in tail male; failure of such issue to his brother *C.*, and his first and every other son in tail male, &c. &c. in all the foregoing cases without impeachment of waste, other than wilful;" and directed the renewals of a leasehold estate to be made "by the tenant for life:" Held, that *B.* took only a life estate, with remainder in tail to his children, and that the deviser intended to use the words "first and every other son" as words of purchase. *Doe d. Phipps v. Lord Mulgrave.* 5 T. R. 320

- 9 Under a devise to *A.* for her natural life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of *A.* to be begotten, severally, successively, and in remainder one after another, according to seniority, &c. the elder of such sons and the heirs male of his body being

always preferred before the younger of such son and sons, and the heirs male of their bodies; and in default of such issue, to the daughter and daughters of the body of *A.* as tenants in common in tail, remainder over: Held, *A.* only took an estate for life, and that the words heirs male of her body were explained by the subsequent words to mean first and other sons. *Goodtitle d. Sweet v. Herring.* 1 E. R. 264

- 10 Under a devise "to *A.* for life, and after him to his eldest or any other son after him for life, and after them to as many of his descendants issue male as shall be heirs of his or their bodies down to the tenth generation, during their natural lives:" Held, that *A.* took no more than a life estate; for here is no general intent to create an estate tail, as contra-distinguished from the particular intent to give an estate for life to the first taker; but a single intent to create a succession of life estates to persons not *in esse*, which the law will not allow. *Seaward v. Willock.* 5 E. R. 198

- 11 A testator devised one of three estates to trustees and their heirs, until his nephew *Thomas*, son of his brother *William*, should attain 21 or die; and on his attaining 21, to the said *Thomas* for life sans waste; and after the determination of that estate, to the trustees during *Thomas's* life to preserve contingent remainders, &c.; and after the decease of *Thomas*, to all and every the son and sons of the body of *Thomas*, severally and successively one after another, in priority of birth, &c.; and for default of such issue, to the trustees until his nephew *John*, son of his brother *Samuel*, should attain 21 or die; and in case *John* attained 21, then to him for life, sans waste; and after the determination of that estate, to the trustees, during *John's* life, to preserve contingent remainders; and after his decease, to all and every the son and sons of the body of *John*, severally and successively one after another, in priority of birth, &c.; and after the determination of that estate, (or, as it stood here in the limitation of one of the other estates, "and for default of such issue,") to the trustees, until his nephew *S. W.* should attain 21 or die, &c.; and so repeating all the former limitations as to *S. W.* and his sons; and the like with respect to a fourth

nephew, *F. W.* and his sons; concluding—and for default of such issue, to the testator's brother *Joseph* for life, and waste; and after his death, to his son *Joseph* and his heirs. The testator repeated the same set of limitations twice more, with respect to the two other estates, only varying the priority of his four first-named nephews in the disposition of them; but concluding after each set of limitations to those four nephews, with the same devise to his brother *Joseph* for life, and to *Joseph's* son in fee.

The nephew, *Thomas* (the heir at law) and *S. W.* had issue male after the testator's death, but none of the nephews had any son born during the testator's lifetime: the Court held, that the four first-mentioned nephews and their sons only took estates for life respectively; the words, "for default of such issue," meaning for default of son or sons, &c. *Foster v. Romney* (Lord). 11 E. R. 594

12 A testator devised one estate to his wife for life, and after her decease to his daughter *Mary* and the heirs of her body begotten or to be begotten, as tenants in common, and not as joint tenants; but if such issue should die before he, she, or they, attained 21, then to his son *Joseph* in fee: and then he devised another estate to his wife for life, remainder to his son *Joseph* and to the heirs of his body begotten or to be begotten; but if he died without issue, or such issue all died before attaining 21, then to his daughter *Mary* and the heirs of her body begotten or to be begotten; such issue, if more than one, to take as tenants in common: the Court held, that the daughter *Mary* only took an estate for life in the first estate, with remainder to all her children equally as purchasers. *Doe d. Strong v. Gaff*. 11 E. R. 668

13 A devise to *S. N.* the son of *T. N.* for life, remainder to trustees, &c. remainder to the first and other sons of the body of *S. N.* and the heirs male of their respective bodies; and for default of such issue, to the use of all and every the daughters of the body of *T. N.* begotten or to be begotten; and for default of such issue to the right heirs of *T. N.* for ever. *T. N.* died, leaving issue *S. N.* and two daughters: Held, that the daughters took estates for their

lives. *Denn d. Briddon & Ur. v. Page*. 11 E. R. 603, n.

14 Testator, after a general introductory clause "as to his worldly estate," devised to his wife during her natural life all his houses in *Swan Lane*; he then devised several houses, without words of inheritance, to his sons *T. B.* and *S. B.*, and after the death of his wife he gave to his son *W. B.* all those his three houses or tenements in *Swan Lane*, in the tenure or occupation of *A., B.* and *C.*; he likewise gave several legacies to be paid within six months after his death, and concluded thus: "and I charge all my estates both real and personal with the payment of the above or afore mentioned legacies, and I appoint my beloved wife and my son *T. B.*, my son *S. B.*, and my son *W. B.*, executors of this my will, and after my just debts and funeral expenses are paid, then the surplus of my effects, both real and personal, to be equally divided to my executors which shall be then living. The Court of C. P. held, that *W. B.* only took an estate for life under the devise of the three houses in *Swan Lane* after the death of his mother, notwithstanding the words of charge, &c.; but that he took a fee in one-fourth part under the residuary clause. *Doe d. Briscoe v. Clarke*.

2 N. R. 543

15 Devise of all and singular other his freehold, copyhold, and leasehold messuages, farms, lands, tenements, and hereditaments whatsoever and where-soever, not before devised, equally between *W.* and *T.* for their joint lives, remainder to the children of *M.*, and their heirs male and female, was held to pass a life estate to *W.* and *T.* in the after purchased lands, notwithstanding a subsequent devise of all the rest and residue of all his real estate not before disposed of, and all other his estates and interests whatsoever, vested in him as mortgagee, or trustee under any deed, or will, or otherwise howsoever, and of all the rest and residue of his personal estate to his wife, her heirs, executors, &c. *Goodtitle d. Woodhouse v. Meredith*. 2 M. & S. 5

VIII. JOINT-TENANCY, OR TENANCY IN COMMON.

1 A devise to *A.* and *B.*, strangers to each other, creates a joint-tenancy, and

the conveyance by one severs the joint-tenancy and passes a moiety ; but if the devise be to husband and wife, they take by entireties and not by moieties, and the husband cannot by his own conveyance divest the estate of the wife. *Doe v. Parratt.*

5 T. R. 654

- 2 Devise to the use and behoof of the testator's niece S. C., and his two nieces E. G. and A. C., and the survivor and survivors of them, and the heirs of the body of such survivor and survivors as tenants in common, and not as joint tenants : Held, that under this devise S. C., E. G., and A. C. took as tenants in common. *Garland v. Thomas.*

1 N. R. 82

- 3 Devise to the three sisters of the testator for and during their joint natural lives, and the natural life of the survivor, to take as tenants in common and not as joint tenants ; remainder to trustees during the respective lives of the sisters, and the life of the survivor, to preserve contingent remainders ; and from and after their respective deceases and the decease of the survivor, remainder over : Held, that the sisters either took the estate as joint-tenants, to be regulated in its enjoyment as a tenancy in common, or as tenants in common with benefit of survivorship. *Doe d. Borwell v. Abey.*

1 M. & S. 428

- 4 Devise of all his real and personal estate, whosoever and whatsoever, equally to his sisters M. and E., or to the survivor of them, and to be disposed of by the survivor as she may by will devise : Held, that the sisters did not take as tenants in common in fee ; nor supposing them to be tenants in common for life, with a contingent remainder in fee to the survivor, or with a power to the survivor to dispose of the fee by will, was it such a contingent remainder as was devisable by a will made by one in the lifetime of both the sisters, or was the power well executed by such will. *Doe d. Calkin v. Tomkinson.*

2 M. & S. 165

copyholds in *Middlesex* for lives, and subject thereto, devised "all his freehold manors, lands, &c. in *Yorkshire* and other counties, and the reversion of the two copyholds to his son for life, with successive remainders in tail male to his first and other sons, with like remainders to other branches in the male line ;" and in default of such issue he devised all his "said (freehold) manors, land," &c. to his eldest daughter in tail male in strict settlement, with like remainders to his second and third daughter ; and by the residuary clause devised all other his manors, lands, &c. either freehold or copyhold, except those in the counties of *York*, &c. which he had before disposed of, subject to the said rent-charges in failure of issue male of his son and himself, to his three daughters, as tenants in common in fee : Held, that certain customary estates being generally reputed and called copyholds, and the testator having distinguished in other parts of his will between copyhold and freehold, must be presumed to have used the word freehold in its usual and popular signification. And it seems that as by such residuary clause the daughters would not take till failure of issue male of the son, and of the devisor ; the son (the heir at law) took an estate tail by implication in the customary estates not before devised. *Roe d. Conolly v. Vernon.*

- 5 E. R. 51
2 By a bequest of leasehold to R. until his (eldest) son T. shall attain 21, and no longer ; but in case T. shall die in minority, then to J. or O. (his younger brothers) or either surviving or attaining 21, as aforesaid ; with a desire that R. would quit and deliver up the premises as aforesaid, and confirming the bequest of them to R.'s family on his relinquishment of a certain claim, which he did relinquish : Held, that T., on his attaining 21, took the estate by necessary implication ; though there were a devise of the residue to N. the younger brother of R. *Goodright v. Hoskins.*

9 E. R. 306

IX. DEVISES BY IMPLICATION.

- 1 Where a testator had freehold, customary, and copyhold estates ; and after introductory words, as to all his worldly estate, devised two rent-charges out of all his real estate, and also two

X. CONDITIONAL OR CONTINGENT WITH REMAINDERS OVER ; AND HEREIN OF VESTED REMAINDERS.

And see executory devise, post. 281.

- 1 Where the testator had three sisters, (one of whom was married), and devised lands to trustees and their heirs,

"in trust that they and their heirs should, during the life of the married sister, receive the rents and profits, and pay the same to the two other sisters, their heirs and assigns: and from and after the decease of the husband, in case the married sister should be then living, to the use of the three sisters severally in thirds for life, with several remainders to their first and other sons in tail, remainder to the daughters as tenants in common, with cross remainders between the sisters on default of issue of their bodies respectively, remainder over in tail:" the condition of the married sister's surviving her husband, is not annexed to any of the limitations subsequent to the limitation of the life estate; and the remainder-man in tail can alone make a good tenant to the *præcipe* upon the death of the three sisters without issue, notwithstanding the husband be then living. *Horton v. Whittaker*.

1 T. R. 346

2 Under a devise to a wife for life, *provided she remains a widow*, but in case she marries a second husband, then to *J. S. when he shall attain his age of 23 years*, the wife has an absolute estate till *J. S.* is 23, though she marry before. *Doe d. Dean and Chapter of Westminster v. Freeman & Ur*.

1 T. R. 389

3 Where the testatrix, by virtue of a settlement, had an estate for life, with a power to dispose of 1000*l.* in case *J. W.* or any issue of his should be living at her death, out of a term of 500 years vested in trustees, with remainder to *J. W.* for life, and then to his sons and daughters in tail, with remainder to herself in fee, and reciting the settlement and power, devised the said sum of 1000*l.* to trustees for certain purposes, *if J. W. or any of his issue should be living at the time of her death*; and then devised that, *in case neither the said J. W. nor any issue of his body should happen to be living at the time of her decease, by which event the said manor, by virtue of and under the limitations in the said deed of settlement, &c. would devolve upon her and her heirs*, she gave the premises to the same trustees for 500 years, to raise the said 1000*l.* immediately after her decease, and within six months after to raise a further sum of 1000*l.*: and from and after the determination of

the said term, and subject thereto, devised the premises to her mother for life, remainder to her own daughter in fee, remainder over to *A. W.* in fee, in case her daughter should die before 21, or without issue; the contingency of *J. W.*, or any of his issue not being living at the time of the testatrix's death is annexed to all the subsequent limitations; and he having survived the testatrix, the heir at law of the testatrix, and her daughter, who died before 21 and unmarried, is entitled to the estate against *A. W.* the remainder-man in fee under the will. *Doe v. Wilkinson*. 2 T. R. 209

4 Where *A.* devised his estate to his two daughters, to be equally divided between them, one moiety to one and her heirs, and the other moiety to the other for life, and after her decease, *to the issue of her body and their heirs for ever*, and she had one child living at the time of the devise, the second took only an estate for life, with remainder to her children as purchasers. *Doe d. Cooper v. Collis*.

4 T. R. 294

5 *A.* devised to his son *B.* for life, remainder to trustees during *B.*'s life to preserve contingent remainders, nevertheless to permit *B.* to receive the rents and profits, remainder to the first and other sons of *B.* in tail male, remainder to *C.*; with a proviso that if *B.* should succeed to the estate of *D.* the limitation of *A.*'s estate to *B.* should cease, and the next in remainder should take as if *B.* were dead: *B.* succeeded to *D.*'s estate before he had a son: Held, that the limitation to the trustees continued during the whole of *B.*'s life, so as to support the contingent remainders. *Doe d. Heneage v. Heneage*.

4 T. R. 13

6 If an estate be devised to *B.* the wife of *A.* for life, remainder to trustees to preserve, &c. remainder to the children of *A.* and *B.* and their heirs for ever, to be divided among them equally, and if but one child, to such only child, and his or her heirs for ever; and for default of such issue, remainder over; and at the death of the devisor *A.* and *B.* have no child; the estate limited to their children is a contingent remainder in fee, which, on the birth of a child, will vest in that child, subject to open and let in those who may be born afterwards; and the

remainders over will be defeated by that estate becoming vested. In such a case the words "*for default of such issue*," mean "*for default of such children*." *Doe v. Perryn*. 3 T. R. 484

- 7 Under a devise to A. and his heirs, but if he die without settling or disposing of the same, or without issue, then over; A. may settle the estate in his life-time, and defeat the limitation over. *Beauchcroft v. Broome*.

4 T. R. 441

- 8 A. devised to B. his wife for life, and empowered her to devise the same to any one or more of his child or children in such manner, share, and proportion as she should appoint, "but so as the said estate should not be divided, but transmitted whole and entire to his heirs;" and in another part (after devising an adjoining estate in the same way) he added that his will was that "they should be considered as one estate, and be transmitted entire to his family;" and in default of appointment, to his own right heirs; B. by will devised and appointed to their son C. for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of C. in tail general, remainder to the daughters of C. in tail general, and with the like limitations to D. and E. two other children; all their children C. D. and E. were alive when A. devised; *Qu.* what estates did they severally take? *Per* Lord Kenyon, C. J. and *Grose*, J. they respectively took estates in tail general; *per Ashhurst* and *Buller Justices*, they respectively took life estates, with remainders in tail to their respective children. *Griffith v. Harrison*.

4 T. R. 737

- 9 Devise of testator's burgage house (being burgage held of a manor where there is no custom of entail) to his wife for life or until marriage, and after her decease or marriage to R. C. his younger son for and during the term of his natural life, and after the decease or marriage of his wife, and also after the decease of his son R. C. unto the heirs of the body of R. C. lawfully begotten or to be begotten, equally amongst them as shall then be living, share and share alike (there being not any child of R. C. then born), and in case R. C. die without issue lawfully begotten or to be begotten, after his decease, remainder over: Held, that R. C. took

either an estate of inheritance in the nature of an estate tail, or an estate for life with a contingent remainder to his children, depending on the event of there being a child born and living at the death of R. C.; and that in either case, the child of R. C. was barred by the freehold of the lord becoming united, by a deed of enfranchisement, in the owner of the customary estate, who derived title by conveyance from R. C. after his estate came into possession. *Roe d. Clemett v. Briggs*. 16 E. R. 406

- 10 Devise to two jointly to be divided between them for their natural lives, and after their decease, to such child and children of the two, of their bodies lawfully begotten, share and share alike; and in failure of such issue, to such child of W. C.: there being a child of one of the two living at the time of the devise, and death of the testator, this devise creates an estate for life in the two, and the same in the child; and the remainder over failing, the heir at law of the testator took the fee. *Doe v. Gunniss*.

4 Taunt. 313

- 11 Devise to the testator's seven sisters, share and share alike, on the death of any of them, her share to go to her first and other sons in tail, and in default of such sons, to her daughters as tenants in common, and in case of any of the seven sisters dying without leaving any issue of her body begotten, or such issue dying before 21, and without issue, then to and amongst the survivors of his said seven sisters and their issue, to descend in like manner as before mentioned; and in case all his said seven sisters should die without issue, or leaving issue, such issue should all die before he, she, or they should attain 21 years of age, and without issue" then over. The Court of C. P. held, that the words, in default of such sons, did not make the remainders to the daughters of any sister depend on the contingency of the sister's having no son born, but that on the death of the sons of any of the sisters without issue, the remainder to the daughters of such sister took effect. *Doe d. Ducre (Barss.) v. Ducre (Lady Dowager)*.

1 B. & P. 250

- 12 *Buller* J. dissented from the other three Judges of C. P. on the above

case, and cited. *Keen de Pinnock et Ur. v. Dixon.* 1 B. & P. 254, n. And *Denn d. Briddon & Ur. v. Page.* 1 B. & P. 261, n.

13 But the Court on a writ of error, unanimously affirmed the judgment of the Court of C. P. *Dacre (Lady Dow.) v. Doe, in error.* 8 T. R. 112

14 Devise of all the devisor's estates to *A.* and the issue of her body, as tenants in common: but in default of such issue, or being such, if they should all die under 21 and without leaving issue, then over: Held, that all the limitations subsequent to that to *A.* were contingent, and were consequently destroyed by a recovery suffered by *A.* *Doe d. Davy v. Burnsall.* 6 T. R. 30

15 If a freehold lease for lives be limited by will to *A.* and the heirs of his body, with remainders over: *A.* may dispose of the whole, and defeat the remainders by any conveyance during his life-time; or, *semble*, by his will only. *Doe d. Blake v. Lurton (Clerk).* 6 T. R. 289

16 Under a devise to *A.* for life without impeachment of waste, remainder to his eldest son lawfully to be begotten, and the heirs of such son, and *in default of issue male of A.* then to *B.*, &c. *A.* takes an estate for life; remainder to himself in tail: and though *A.* could not bar the estate tail to his eldest son, yet he may suffer a recovery, and by coming in as a vouchee under a double voucher, may bar all the remainders over. *Doe d. Bean v. Halley.* 8 T. R. 5

17 Under a devise to *A.*, and to the issue of his body, *his, her, or their heirs, equally to be divided* if more than one; and if *A.* have no issue of his body living at his decease, then over: Held, that *A.* took at least an estate for life, with a contingent remainder in fee to his issue, if any: in which case the remainder over was also contingent, being a contingency with a double aspect; and that whether *A.* took for life, with such contingent remainders, or whether he took an estate tail, the remainders over were equally destroyed by his having suffered a recovery before he had any issue born. *Doe d. Gilman v. Elvey.* 4 E. R. 313

18 *A.* devised all his freehold and leasehold estates to *B.*, and the issue of her body "as tenants in common, but in default of such issue, or being such, if they should all die under 21, and

without leaving issue," then over; the Court of C. P. held that all limitations subsequent to that to *B.*, being contingent, the remainders in the freehold were barred by fine and recovery levied and suffered by *B.*; but that the leasehold vested in the remainder-man on the death of *B.* without issue. *Burnsall v. Davy.* 1 B. & P. 215

19 Devise to *G. L.* the testator's heir at law for life, and from and after his death to *C. B.* her heirs and assigns, in case she shall survive and outlive the said *G. L.* but not otherwise; and in case she shall die in the lifetime of the said *G. L.* then to *G. L.* his heirs and assigns for ever: Held, that the devise to *C. B.* was a contingent remainder, and barred by a fine levied by *G. L.* *Doe d. Planner v. Scudamore.* 2 B. & P. 289

20 One devised lands to trustees in fee (subject to the uses of a certain term of 1000 years), to the use of *W. H.* for life, second son of the devisor's daughter *lady E.* subject to the proviso after mentioned; remainder to trustees to preserve contingent uses during *W. H.*'s life, but to permit him to take the rents, &c.: and after his decease to the use of his first and other sons successively in tail male, subject to the same proviso, &c. and in default of such issue, remainder to the use of the *third and other sons of lady E.* successively in tail male, subject to the same proviso, &c.; and in default of such issue, with like remainders to the second son of *lady E.*'s eldest son, &c.; and in default of such issue to the use of the devisor's granddaughter *C. H.* for life, subject to the proviso, &c.; remainder to trustees to preserve contingent uses, &c.; remainder to the use of her first son (the plaintiff) in tail male, with other remainders over, all subject to the same proviso; which was that if *W. H.*, or either of the persons to whom the estate was limited, should become Earl of *E.*, the use limited to such person and his issue male should cease and be void, as if such person were dead without issue of his body. The devisor's daughter *lady E.* at the time of his death had only two sons, her eldest (afterwards lord *E.*) and the said *W. H.*, but she had afterwards a third who died under age, and the said *W. H.* was let into possession at twenty-three, and had one son; and held, that on the death

of his eldest brother without issue, by which event *W. H.* became earl of *E.*, the plaintiff who was then next in remainder, supposing *W. H.* had in fact died without issue, was entitled under the will to take an estate in tail male in possession, subject to the trusts of the term of 1000 years. *Carr v. The Earl of Errol.*

6 E. R. 58

- 21 One having real and personal estates, gave by his will several legacies and annuities, which he directed to be paid by his executrixes out of his real and personal estates, which he charged therewith; and then devised certain lands in *Y.* to *A* and *H.* (two out of five daughters which he had), and *their heirs*, as tenants in common, on condition that, in case they or either of them should have no issue, they or she, having no issue, *should have no power to dispose of her share, except to her sister or sisters, or their children*) and he devised all the rest and residue of his real and personal estates to *A.* and to *H.* in fee; whom he made his executrixes. On his death *A.* and *H.* entered, and afterwards *A.* levied a fine of her moiety to the use of her husband in fee, and died: Held, that the condition against alienation, except to sisters or their children, annexed to the devise to *A.* and *H.* and *their heirs*, was good; and that for the breach of it by *A.* in levying such fine, the heirs of the devisor might enter on her moiety; it being a remainder undisposed of, by the residuary clause which was only intended to operate upon such things of which no disposition had been made by the will, and not contemplating the devise over of the respective moieties of the daughter's on non-performance of the condition: Held, that one of the several co-heirs of the devisor might enter for non-performance or breach of the condition, and recover her own share in ejectment. For that where the entry upon a claim by one of several coparceners, who make but one heir, is lawful, such entry made generally will vest the seisin in all, as the entry of all.

Doe d. Gill & Ur. v. Pearson. 6 E. R. 173

- 22 A devise to *T. C.* for life, with remainder to his child or children, by any woman whom he should marry, and his or their executors, &c. for ever, upon a condition that *in case the said T. C. should die an infant unmarried and*

without issue, the premises should go to his father, *W. C.* and his three other children share and share alike, and their heirs, &c., executors, &c., Held, that *T. C.* having attained 21 and married before his death, the devise over could not take effect, for that such devise over was upon condition that *T. C.* died in his minority leaving neither wife or child. *Doe d. Everett v. Cooke.*

7 E. R. 269

- 23 One having an only child *Rebecca*, who was married and had three children, *Thomas*, *Rebecca*, and *Ann*, devised his copyhold to *Rebecca* his daughter for life, remainder to his grand-daughter *Rebecca* for life, remainder to trustees to preserve contingent remainders, remainder to the use of the issue of the body of his grand-daughter *Rebecca*, in such parts, shares, and proportions, manner and form, as she should by will or deed appoint; and in default of appointment to the use of all and every the children of his said grand-daughter and *their heirs*, as tenants in common: and, in default of such issue, to the use of all and every the other children of his daughter *Rebecca* and their heirs, as tenants in common, &c.; and in default of such issue to his own right heirs. The Court held, that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitations in the other children of the testator's daughter *Rebecca* did not take effect. For the devise to the children of his grand-daughter *Rebecca* and *their heirs* *primâ facie* carries a fee; and the subsequent words "in default of such issue" refer to her children, and not to *their heirs*; though the limitation over in default of such issue be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the devisor that her children, if any, should take a fee is further evinced by this, that the limitation to them and their heirs is in default of appointment, under a power given her to appoint "to the use of the issue of her body in such manner and form, as well as in such parts, shares, and proportions, as she should direct;" under which

words "*manner and form*" she might have appointed to all or any of her children in fee, and was not restrained to appoint to them *in tail only*; which limitation, in default of appointment, is a substitution for the execution of the power. *Rex v. The Marquis of Stafford*. 7 E. R. 521

24 Where a testator devised all his real estate (except at S.) to the head of his family for life; and then to several of the junior branches in succession, to each for life; with remainder to his first and other sons in tail male; with the ultimate remainder to *his own right heirs*; and then devised his estate at S. to some by name of the junior branches, but not to all of those to whom he had devised the first estate, and varying the order of succession, to each for life, with remainder to his first and other sons in tail male; and then devised that "for default of such issue," the estate at S. should go "to such person and persons, and for such estate and estates, as should at that time, (i. e. on the death of the last tenant for life named, without issue male), and from time to time afterwards, be entitled to the rest of his real estate by virtue of and under his will." Held, that the ultimate remainder in fee of the estate at S. vested by descent in the person who was the testator's heir at the time of his death, and did not remain in contingency under the will till the death of the last tenant for life without issue male who was named in the devise of that estate. *Doe d. The Earl of Cholmondeley v. Moxey*. 12 E. R. 589

25 Under a devise of all the devisor's lands to his niece S. E. for life, and after that estate determined, the same to trustees to preserve contingent remainders, and after her decease then to remain to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail: and for default of such issue then to the issue of the devisor's four sisters in such manner as he had limited the same to his niece's issue; and for default of such issue of his sisters to his own right heirs: Held, that as by the limitation of all the devisor's lands, which description runs through the subsequent remainders, it was his apparent intent that his estate should go over altogether in default of issue of his niece, to the issue of his four sisters, and

again that no part should go over to his right heirs while there remained any issue of his sisters; therefore the devise is in effect to his niece S. E. for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common in tail with cross remainders (by implication) between those daughters; remainder to the issue of the four sisters of the devisor in tail; and one of the four sisters having issue a son and two daughters living at the death of the testator, at all events they took vested estates in remainder: and whether that son took conjointly with his two sisters in tail, or whether the son would have taken first in tail, with remainder to his two sisters in tail, made no difference in the event, as the son died without issue. And the three other sisters of the devisor, and his niece S. E. having all died without issue after the death of the devisor: Held, that the two surviving daughters of the fourth sister were entitled to all the estate against the devisee of the niece, who was the devisor's heir at law. *Roe d. Wren v. Clayton*. 6 E. R. 628

26 A devise to M. L. the testator's daughter for life, remainder to the children of her body begotten and their heirs, and in default thereof to W. L. the testator's son in fee: M. L. died without children after W. L.: Held, W. L. took a vested remainder, which was devisable in the life-time of M. L. *Ives v. Legge, in Chancery*, 1743. 3 T. R. 498, n.

27 Under a devise of real estate in fee to J. M. when he attains the age of 21; but in case he dies before 21, then to his brother when he attains 21; with like remainders over; J. M. the devisee, takes an immediate vested interest, liable to be divested upon his dying under 21. *Doe d. Hunt, v. Moore*. 14 E. R. 601

28 Testator devised to A. for life, and after her death to B. for life, and at the decease of A. and B. or the survivor, gave all his real estate to C., if he should live to attain 21, but in case he should die before that age, and D. should survive him, in that case to D. if he should live to attain 21, but not otherwise, but in case both C. and D. should die before either of them should attain 21, then to E. in fee: Held, that C. took a vested remainder. *Bromfield v. Crowder*. 1 N. R. 313

29 Devise of all the testatrix's real estate to her cousins *M. A.* and *A. I.* (who were females) their heirs and assigns for ever, subject to certain annuities (*inter alia*), one to her brother *A.* (her heir at law), and another to her sister *S.*, and their children for life; and the testatrix charged her real estate therewith, and directed that the surplus profits should go to *A.* for life, remainder to his children for life, remainder to *S.* for life, remainder to the surviving children of her brothers and sisters for life, *but gave no directions as to the remainder in fee*: Held, that *M. A.* and *A. I.* took the remainder to their own use, although they also took legacies under the will; and that there was no resulting use to the heir at law. *Smith d. Dennison v. King.* 16 E. R. 283

50 Devise of all the testator's freehold estates to *J. S.* for life, and on his decease to and among his children equally, at the age of 21, and their heirs, as tenants in common; but if only one child shall live to attain such age, to such child and his or her heirs, at his or her age of 21; and in case *J. S.* shall die without issue, or such issue shall die before 21, then over: Held, that the children of *J. S.* took a vested remainder. *Doe d. Roake v. Nowell.* 1 M. & S. 327

31 Devise of testator's leasehold houses, held for a term renewable, to *J. T. S.* to his own use and benefit on his attaining 21, upon trust that his (the testator's) trustees should pay and perform rents and covenants, and renew the same from time to time, and for that purpose to make surrender, &c., and also to permit the trustees to receive the rents during the minority, the maintenance of the infant to be paid thereout, with liberty to *M. P.* to keep the houses during the minority, paying rent to the trustees, &c: Held, that this was in effect a devise to the trustees during the minority, with a vested remainder to *J. T. S.* the infant; and that the interest of *M. P.* ceased on the decease of *J. T. S.* before 21. *Goodright d. Revell, v. Parker.* 1 M. & S. 692

32 Devise to the use of the testator's daughter for life, remainder to her first and other sons and daughters in tail, with like remainders to his niece, her sons and daughters severally and

successively, and for default of such issue to such of the uses, for such of the intents, and subject to such limitations declared by the will of *T. V.* as shall be then existing undetermined or capable of taking effect, 'or as near thereto as the deaths of parties and other intervening accidents and contingencies, and the rules of law and equity, will then permit: Held, that *T. S. V.* who would have taken a vested remainder in tail, and would have been tenant in tail in possession under the will of *T. V.* took no vested estate under the second will, during the life of the second testator's daughter. *Phillips v. Deakin.* 1 M. & S. 744

33 Devise to the use of *J. C.* his brother for life, and from and after his decease to his first and other sons, according to their seniority of age and priority of birth; and if *J. C.* should die without such issue, and before they arrived at 21, then to the use of *J. M.* (eldest son of *T. M.* his brother-in-law), and his son or sons limited as aforesaid, and if *J. M.* should die leaving no son or sons as aforesaid, then *J. M.* second son of *T. M.*, and his son or sons limited as aforesaid, and if the said *J. M.* should die, having no son or sons in the manner aforesaid, then to the use of his niece *A. M.* her heirs and assigns for ever: Held, that *J. C.* having died without issue, *J. M.* (the eldest son of *T. M.*) took an estate for life, and *W. C. M.* (his only son who had attained 21) took a vested indefeasible remainder in fee. *Marshall v. Hill.* 2 M. & S. 608

XI. CROSS REMAINDERS.

What words shall create cross remainders in a deed, see LIMITATIONS, post.

1 The rule is, that, as between two only, it shall be presumed that cross remainders were intended to be raised; but if there be more than two, it is necessary to resort to other words in the will to discover an intention to raise them. Therefore, where *A.* devised "to all and every the daughter and daughters of the body of *B.*, and heirs male of the body of such daughter or daughters equally between them, if more than one, as tenants in common; and for default of such issue, he devised all his said lands to *C.*: Held that the daughters of *B.* took cross remainders. *Atherton v. Pye.* 4 T. R. 710

- 2 Under a limitation (after estates for life to *A.* and *B.*) of "all and every the said premises to all and every the younger children of *B.* begotten or to be begotten, if more than one, equally to be divided amongst them, and to the heirs of their *respective* body and bodies as tenants in common, &c. and if only one child, then to such only child, and to the heirs of his or her body issuing; and for want of such issue," " (a devise of) the said premises to *C. N.*, &c. (with several limitations over);" "and for want of such issue," then the testator divided the said premises between several branches of his family: Held, that cross remainders were to be implied between the younger children of *B.* from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise. *Watson v. Foron.* 2 E. R. 36
- 3 A devise by *A.* (having three sons and seven daughters) to his sons in succession for life, remainder to the heirs male of their bodies, remainder to the heirs female of their bodies, remainder to all and every his daughter and daughters (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the deviser's brother; gives cross remainders to the daughters. Between more than two the presumption is against cross remainders; but this may be controlled by a plain intention to the contrary. *Doe d. Burden v. Burville.* 2 E. R. 47. *notd.*
- 4 Wherever it appears to be the intention of a testator that the whole of his estate shall go over together, upon the failure of issue of more than two tenants in common, cross remainders shall be implied between them in the mean time, in order to effectuate that intent. *Doe d. Gorges v. Webb.*

1 Taunt. 234

And see *Doe d. Cock v. Cooper*, ante 267

XII. REVERSION—HOW IT WILL PASS.

- 1 The testator being seised of one undivided moiety of three tenements in *A.*, and also of the reversion in fee, expectant on the death of *J. S.* of the other moiety thereof, and also seised of lands leased on lives in *B.*, and of other lands in possession in *B.*, and of several other lands in *C.*, by a devise to *N. P.*, "all that his part, purpart,

and portion of and in the tenement called *A.*, and also all his other lands in fee-simple, situate in *B.*, and the reversion and remainder thereof," the whole of the testator's estate in *A.*, whether in possession or reversion, passed to *N. P.* *Doe d. Phillips v. Phillips.* 1 T. R. 105

- 2 *A.* being seised in fee-tail of an undivided one-fourth part of an estate, and entitled to the reversion in fee of another one-fourth expectant on the determination of an estate-tail, recited that she was entitled to the first, and devised it to *B. C.* in fee; and then directed all the residue and remainder of her estate and effects to be sold as soon as might be after her death, and her funeral expenses to be paid thereout, and the overplus (if any) to be divided between *D.* and *E.*: it was held that the reversion did not pass by these general words. *Roe d. James v. Aris.* 4 T. R. 605

Jones v. Roe. 3 T. R. 88, 94, 95

- 3 *A.* by will gave two legacies of 150*l.* each to his son and daughter, to be paid at 21; then he gave all his realty and personalty to his wife for life; and after her death one freehold estate to the son, and another to the daughter; but if either or both of his children should die before the wife, then those legacies which were left to them should return to the wife:" it was held, that on the death of the son before the mother, the mother was entitled to the reversion of that freehold estate. *Hardacre v. Nash.*

5 T. R. 716

- 4 Where, one seised in fee of a real estate, by her will first made a disposition of her real estate to two persons for life, reserving a rent-charge out of the same, payable first to her uncle for life, and then to her heir at law for life, which, "together with the repairs during the term, should be considered as his rent for the said farm;" and afterwards she proceeded to make a disposition of her personal property, and then bequeathed and devised "all the rest, residue, and remainder of her effects wheresoever and whatsoever, and of what nature, kind, or quality soever (except her wearing apparel and plate) to certain nephews and nieces, to be equally divided between them by her executors:" Held, that the reversion in fee in the real estate did not pass by

the residuary clause, but descended to the heir at law; although he had a rent-charge devised to him for his life out of the same estate in the hands of the tenants for life. *Cumfield v. Gilbert*. 3 E. R. 516

- 5 *A.* being possessed of lands at *L.* which had been settled on his marriage on himself for life, remainder to his wife for life for her jointure, remainder to the heirs of their bodies, with reversion in fee to himself; and having other lands in *P.* and *Q.* settled to the same uses (except a coppice, part of *Q.*, of which coppice as well as of some other lands he was seised in fee), after the death of his wife, and having only two daughters living, devised to his daughter *J.* in tail, his unsettled estates by name, and all other his freehold, copyhold, and leasehold lands which he was possessed of or entitled to, and which were not settled in jointure on his late wife (except the coppice which he directed should always be held with his estate at *P.*), she, his said daughter, and the heirs of her body, paying out of all the aforesaid lands a certain annuity unto his other daughter, *A. M.* for life; and in case his said daughter *J.* should die and leave no issue, then to his other daughter *A. M.* for life, remainder to her children charged, &c. remainder to his nephew in fee: Held, that the reversion of the settled lands did not pass. *Goodtitle d. Daniel v. Miles*. 6 E. R. 494

- 6 *A.* devised certain estates to *B.* for life, remainder to his sons and daughters in strict settlement, remainder to *C.* for life, remainder to his sons and daughters in like manner, remainder to his own right heirs, and died; *B.* being seised of the above estates as tenant for life, and also entitled to one-sixth of the reversion as one of the right heirs of *A.* made his will, whereby he gave to his wife for life all such freehold and copyhold lands as he had purchased, or was seised of in fee-simple or in exchange for other lands in *Kent*; and then after reciting that he had granted a lease for years to *D.* of the lands whereof he was tenant for life under *A.*'s will, declared that in case such persons as should be tenants for life or otherwise of that estate, by virtue of *A.*'s will should not molest *D.* in the possession of the said lands as leased, and at the expiration of the

lease should grant a new lease to his (*B.*'s) wife for life, then he devised his lands purchased of *E.* and *F.*, and all lands that he then had or might have a right to, both freehold and copyhold, arising from exchange of land, Act of Parliament, or otherwise, in *Kent*, devised to his wife for her life, to go with and be subject to the same entail as the estates left by *A.* were or might be subject to by virtue of *A.*'s will, to take effect immediately after the decease of his wife, and in such case recommended his wife to give the furniture which belonged to the house on the estates left by *A.* to whomsoever might be living to enjoy it, but in case such persons as should be tenants for life or otherwise, by virtue of *A.*'s will, should refuse to grant such lease, or should disturb *D.*, then he gave to his said wife and her heirs all his freehold and copyhold lands and houses which he had before devised to her for life only, and all the rest and residue of his real estate whatsoever, and all the rest and residue of his personal estate of what nature or kind soever or wheresoever he gave to his said wife and her heirs, executors, administrators, and assigns, for ever; *D.* was not molested, and a new lease was granted to the wife of *B.* for her life: Held, that the wife of *B.* was entitled to the one-sixth of the reversion under the residuary clause in *B.*'s will. *Goodright d. Buckinghamshire (E.) v. Downshire (Marq.) et Ux.* 3 B. & P. 600

- 7 A remote reversion of a settled estate will pass by the general words of a residuary clause in a will, by which the testator, having before devised certain other real estates in strict settlement, and given annuities for life to *A. B.* and *C.*; which annuities he charged upon "all and singular his said manors, lands, tenements, and hereditaments, &c. not before disposed of:" devised "all and singular his said manors, lands, &c. and other his real estate so charged with and subject to the said three several annuities as aforesaid: although one of the annuitants had a prior life estate in the property, the reversion of which was in the testator. For general words in a residuary clause will carry every estate or interest which is not expressly or by necessary implication excluded from its operation; and no intention of the

testator to exclude the reversion is necessarily to be implied from the circumstance, that the charge of one of the annuities could not attach upon this reversion, as the other two might; and the clause will be construed *reddenda singula singulis*. *Doe d. Cholmondeley, (Earl) v. Weatherby*.

11 E. R. 322

- 8 After a devise to one, and her heirs, of certain lands in *A.* and other devises to the same person, her executors, administrators, and assigns, of leasehold interest in *B. C.* and *D.* a devise to the same devisee of all the residue of the testator's estate and effects, *real and personal*, whatsoever and wheresoever, not before disposed of after payment of debts, legacies, and funeral expenses, was held to carry a distant reversion in fee in the lands of *B.* the residuary clause being considered large enough to carry the fee as comprehending all the residue of the devisor's *real estate*, and giving it *absolutely* to the devisee; and the intent of the testator for that purpose not being acknowledged by the former devises to the same devisee. *William d. Hughes, et Ux. v. Thomas*. 12 E. R. 141

XIII. LIMITATIONS, HOW CONSTRUED.

And see *tit. POWER, post*.

- 1 Where there is an express limitation of a chattel by words, which, if applied to a freehold, would create an *express* estate-tail, the whole interest vests absolutely in the first taker; and a limitation over of such a chattel is too remote to take effect. *Doe d. Lyde v. Lyde*. 1 T. R. 596
- 2 But where there is no such express legal limitation, the Court will consider the meaning of the testator. *id.*
- 3 So that where a term was bequeathed "to *G. L.* for life, and after his decease to *Margaret* his wife for life, and after the decease of the survivor to the children of *G. L.* share and share alike, and if *G. L.* died without issue of his body, then to *R. L.* for life, and after his decease to *Mary* his wife for life, with remainders over," the limitation to *Mary* was held good, *G. L.* dying without leaving issue, and *R. L.* dying during his life. 1 T. R. 596
- 4 If a term be bequeathed to "*A.* and his lawful heirs, and if he die and leave no lawful heirs, then to *B.*" the limitation to *B.* is good. *Goodtitle d. Peake v. Pegden*. 2 T. R. 720
- 5 *A.* by will devised to trustees to the use of *B.* for life, remainder to trustees, &c. remainder to the first and other sons of *B.*, remainder to the daughters of *B.*, remainder to the use of such person as he shall appoint by deed; and afterwards by a deed, (in which he recited the will,) he appointed the same premises "after the death of *B.* and failure of her issue, to the use of the first and other sons of *C.*, &c." *B.* afterwards died without issue: Held, that the limitations created by the will and the deed could not be united; and that the limitation in the latter to the first and other sons of *C.*, &c. was too remote to take effect, being after a general failure of issue of *B.* *Habergham v. Vincent*. 5 T. R. 92
- 6 Under a devise of lands to trustees in fee in trust for *A.* (an infant) for ninety-nine years if he shall so long live, and after that term to his first, second, third, and fourth sons, and the issue male of their bodies, for the like term of 99 years, as they shall be in seniority of birth; and in default of such issue male in him or them, then to *B.* and the issue male of his body for the like term of 99 years; and in default of such issue male, then to the right heirs of the devisor. *A.* takes an estate for 99 years determinable with his life, and upon his death his first son takes a like estate; but the subsequent limitations to his other sons, and to *B.* are void. *Somerville v. Lethbridge*. 6 T. R. 213
- 7 After a devise to an infant *in ventre sa mere* for life in case it should be a son, remainder to such issue male or the descendants of such issue male of such child, as at the time of his death should be his heir at law, and in case at the time of the death of such child there should be no such issue male nor any descendants of such issue male then living, or in case such child should not be a son, then over; the limitation over is not too remote to take effect. *Long v. Bluckall*. 7 T. R. 100
- 8 Under a devise to the testatrix's daughter *E.* for life, remainder to her children and their heirs for ever; but in case *E.* die without leaving any issue of her body, then to certain other grandchildren, by other daughters, equally to be divided between them,

share and share alike, as tenants in common: but in case of the death of either of her grandchildren, *under age, and without leaving any issue*, the share of him or her so dying should be for the benefit of the survivors of the respective family, &c.: Held, that the grandchildren took a fee in their respective shares, by reason of the devise over on their dying *under age*; with an executory devise over, if any of them died under 21, and without leaving issue *at the time of their respective deaths*; and therefore the limitation over was not too remote. *Toovey v. Bassett.* 10 E. R. 460

XIV. EXECUTORY DEVISE.

- 1 It is a settled rule of law that where the Court can construe a devise to be a contingent remainder, they will never construe it to be an executory devise. *Per Rooke J.* 2 B. & P. 298
 - 2 A. devised to B. for life, remainder to C. for 99 years if he should so long live, remainder to the heirs of the body of C.; the remainder to the heirs of the body of C. was held a contingent remainder, and not an executory devise, and was defeated by C.'s surviving B.; there being no preceding estate of freehold to support it. *Doe d. Mussel v. Morgan.* 3 T. R. 763
 - 3 If land be devised to A. and his heirs and assigns for ever, and if he die *leaving no issue behind him*, then over: the limitation over is good by way of executory devise. *Porter v. Bradley.* 3 T. R. 143
 - 4 An executory devise is good, if it must necessarily happen within a life or lives in being, and 21 years and the fractions of another year, allowing for the time of gestation. *Long v. Blackall.* 7 T. R. 102
 - 5 Under a bequest of a term of years "to A. and the heirs of his body and to their heirs and assigns for ever, but in default of such issue, then after his decease to B. and his heirs," the limitation over to B. is good by way of executory devise. *Wilkinson v. South.* 7 T. R. 555
 - 6 Under a devise to T. F. and his heirs for ever, and in case he should depart this life, *and leave no issue*, then to E., M. and S., or the survivor or survivors of them, share and share alike; the devise to E., M., and S., is a good ex-
- ecutory devise. *Roe d. Sheers v. Jeffery.* 7 T. R. 589
- 7 Devise "to S. S. her heirs and assigns for ever, but if she shall happen to die leaving no child or children lawful issue of her body living at the time of her death, then to F. B. and his heirs;" held the devise in fee to S. S. was not restrained by the subsequent words to an estate tail, and that the devise over to F. B. was a good executory devise. *Doe d. Barnfield v. Wetton.* 2 B. & P. 324
- 8 Devise of real and personal estate to trustees, their heirs, executors, and administrators in trust, to lay out the personalty in land, and during the lives of the testator's sons, A., B., and C., and of his grandson D. the son of A. and of such other sons as A. then had or might have, and of such issue as D. might have, and of such issue as any other sons of A. might have, and of such sons as B. and C. might have, and of such issue as such sons might have, as should be living at the time of the testator's decease, or born in due time afterwards, and during the lives and life of the survivor, or survivors, to receive the rents and profits of the real estate devised, and to be purchased, and lay out the same, from time to time as they should arise, in land; and after the death of the survivor of such persons, to divide the whole into three lots, and to convey one to the eldest male lineal descendant of each of his three sons in tail male, with remainders to the second and third, and every other male lineal descendant, with cross remainder in tail male; remainder to the trustees in fee, upon trust to sell and pay the produce to the King, to be applied to the use of the Sinking Fund, as should be directed by Parliament. This is a good devise at law, and equity will enforce the trusts. *Thelluson v. Woodford.* 1 N. R. 357 [But see now statute 39 & 40 Geo. 3. c. 98.]
- 9 Under a devise of lands to the testator's son and his heirs for ever; as to part of the lands upon condition that he should pay to the testator's daughter 12*l.* a year till she came of age, and then pay her 300*l.*, and in default of payment that she should enter upon and enjoy the said part to her and her heirs for ever: and in case his son and daughter both died without leaving any

child or issue, he devised the reversion and inheritance of *all* the lands to another: the Court of C. P. held that the devise over was not an executory devise but a remainder limited after successive estates-tail of the son and also of the daughter by implication; the intent being apparent that the devise over should not take effect till after failure of the issue of the son and daughter, and that it should then take

effect: and this being the only construction which could give effect to such intent consistently with the whole of the will taken together. *Tenny d. Agar v. Agar*. 12 E. R. 253
 9 An executory devise over, contingent in case *J. B.* shall die and not attain the age of 21, or having no issue, is defeated either by *J. B.* attaining 21, or by his having issue. *Eastman v. Baker*. 1 Taunt. 174

DILAPIDATIONS.

- 1 An action on the case for dilapidations of a prebendal house may be maintained by a succeeding prebendary against his predecessor. *Radcliff v. D'Oyly*. 2 T. R. 630
- 2 The statutes of the Church of *Ely* provide that the receiver shall require the prebendaries to repair their houses when necessary, and upon their default to repair them at their costs, but the materials are to be supplied out of the funds belonging to the church, and the charges of the workmanship only are to be borne by the prebendaries; on a question whether a succeeding prebendary should recover against his predecessor the full estimate of repairs wanting, or the amount of the workmanship only: the Court thought it reasonable that he should recover the amount of the workmanship only; and held that the church were still bound to supply the materials. *ibid.*
- 3 Where successive rectors had been in

possession of land for above fifty years past; but in an action for dilapidations brought by the present against the late rector, it appearing that the absolute seisin in fee of the same land was in certain devisees, since the stat. 9 G. 2. c. 36. and that no conveyance was enrolled according to the first section of that Act, nor any disposition of it made to any college, &c. according to the 4th section: Held, that no presumption could be made of any such conveyance enrolled, (which if it existed the party might have shewn,) and consequently that the rector had no title to the land; as the statute avoids all other grants, &c. in trust for any charitable use made otherwise than is thereby directed; although in fact it appeared that one of those devisees was the then rector, and that the title to the rectory was in *Baliol College, Oxford*. *Wright v. Smythies*. 10 E. R. 409

DISCONTINUANCE.

I. OF ESTATE.

- 1 In order to discontinue an estate-tail, it is necessary that the party discontinuing should be actually seised by force of the entail. *Driver d. Burton v. Hussey*. 1 H. B. 269

II. IN PLEADING.

- 1 A discontinuance is cured by the appearance of the party by stat. 3 H. 8. c. 30., in penal as well as civil actions. *Humble v. Bland (in error)*. 6 T. R. 255
And see tit. PRACTICE, post.

- 2 *Assumpsit* against three; two pleaded a debt of record by way of set-off; the plaintiff replied *nul tiel record*, and gave a day to the two defendants, but entered no suggestion respecting the third: Held, on demurrer, that the action being discontinued, judgment must be given against the plaintiff, even though the defendant's plea were bad. *Tippet v. May*.

1 B. & P. 411

- 3 Leave given to discontinue a second

action on payment of costs. *Melhuish v. Maunder.* 2 N. R. 72
 4 If defendant demur in replevin, with-

out adding an avowry, and prayer of return, it is no discontinuance. *Serres & Ur. v. Dodd.* 2 N. R. 405

DISSENTERS.

1 Whether a person, *not having* "holy orders," (i. e. by episcopal ordination,) or "pretended holy orders," (i. e. conferred by some form other than episcopal ordination, acknowledged by Protestant dissenters,) but being a candidate only for holy orders of one or other description, be entitled to require of the sessions to have the oaths administered to him, and to be allowed to make and subscribe the declarations required by the 8th section of the Toleration Act, 1 W. & M. c. 18., within the further description in that section of a person "pretending to holy orders," to enable him to preach, &c. without incurring penalties; or whether these words are to be understood only of a person pretending actually to *have* some description of holy orders; at any rate it is not necessary that a person bringing himself within the true meaning of "pretending to holy orders," should also be the teacher or preacher of a separate congregation of Protestant dissenters; and the sessions having refused to admit a person to take the oaths, and make and subscribe the declarations, &c. because he had not the conjoint qualification, this Court granted a mandamus to them to administer to him the oaths, &c., or to enable them to make a special return of the grounds

of their refusal. *Rex v. The Justices of Gloucestershire.* 15 E. R. 577

2 Under the Toleration Act, 1 W. & M. c. 18. s. 8., the justices in sessions have no authority to require of a person claiming to take the oaths and to make and subscribe the declarations, &c. therein mentioned, as a teacher of a separate congregation of Protestant dissenters, and to verify the same claim upon oath, that he should produce a certificate from two of his congregation, authenticating such his appointment, in compliance with a general rule before made at the sessions for that purpose. *Rex v. The Justices of Suffolk.* 15 E. R. 590

3 A Protestant dissenter merely stating himself as one who "preaches to several congregations of Protestant dissenters," without shewing that he has any *separate* congregation attached to him, as such teacher or preacher, is not entitled to be admitted by the justices in sessions to take the oaths, and make and subscribe the declaration, as required by the Toleration Act, 1 W. & M. c. 18., in order to qualify himself, under the 8th clause of that statute, to officiate as such teacher or preacher. *Rex v. The Justices of Denbighshire.* 14 E. R. 285
 And see *Edgcombe v. Rodd.*

5 E. R. 294, ante 6

DISTRESS.

I. WHO MAY DISTRAIN.

II. WHAT MAY BE DISTRAINED.

III. TIME OF DISTRAINING.

IV. DISTRESS.

(a) *How made.*

(b) *How disposed of.*

I. WHO MAY DISTRAIN.

1 A landlord may distrain for the rent of ready furnished lodgings. *Newman v. Anderton.* 2 N. R. 224

2 A. demised to B. the milk of twenty-two cows to be provided by A., and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there: Held, that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there. *Burt v. More.*

5 T. R. 329

3 If two persons are possessed of adjoin-

ing closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other. But *quare*, if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, and by the fair enjoyment of his right, may happen to the other? *Churchill v. Evans.*

1 Taunt. 529

But clearly the one cannot distrain the cattle of the other damage feasant. *Per Cur.* *ibid.*

4 An agreement between the lessor and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the good-will already paid by such assignee," operates as a surrender of the whole term; and the sum reserved for good-will, is to be paid annually in gross, not as rent, and the assignee cannot distrain either for that, or the original rent; but he has a remedy by *assumpsit* for the sum reserved for the good-will. *Smith v. Maplebeck.*

1 T. R. 441

5 A *terre-tenant* holding under two tenants in common, cannot pay the whole rent to one after notice from the other not to pay it; and if he do, the other tenant in common may distrain for his share. *Harrison v. Burnby.*

5 T. R. 246

6 A tenant holding over after the expiration of his term cannot distrain the landlord's cattle which were put upon the premises by way of taking possession. *Taunton v. Costar.*

7 T. R. 431

7 A termor, who lets to an under-tenant, cannot, after his term expired, enforce the continuance of the under-tenancy by distress, if the under-tenant refuses to acknowledge him as landlord, or pays under threat of distress. *Burne v. Richardson.*

4 Taunt. 720

Although the under-tenant still retains the possession. 4 Taunt. 720

II. WHAT MAY BE DISTRAINED.

1 Implements of trade may be distrained for rent if they be not in actual use at the time, and if there be no other sufficient distress on the premises. *Gorton v. Falkner.*

4 T. R. 565

2 So may beasts of the plough under the same circumstances. 4 T. R. 566

3 But things affixed to the freehold, such as an anvil or mill-stone, cannot be distrained. 4 T. R. 566

4 Things delivered to persons exercising their trade, such as cloth in a tailor's shop, are not distrainable. *Simpson v. Harcourt.*

4 T. R. 568

5 A horse cannot be distrained damage feasant, if there be a rider upon him. *Storey v. Robinson.*

6 T. R. 138

6 The collector of the house and window tax under 43 G. 3. c. 161. may distrain, for arrears of those taxes, the goods of a third person found on the premises charged, though the goods are only borrowed, and the person in arrear has other goods of his own on the premises sufficient to satisfy the arrears. *Juson v. Dixon.*

1 M. & S. 601

7 If goods remain on demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained as before. *Smith v. Russell.*

3 Taunt. 400

III. TIME OF DISTRAINING.

N. B. See the case of *Coupland v. Maynard.*

12 E. R. 134

1 Though a bankrupt cannot give a lien on any particular goods, yet he may take a demise, and agree that the rents shall be payable on a particular day, in which case the law gives the landlord a power of distraining on that day. Therefore, if a trader, after committing an act of bankruptcy, take a shop, and agree to pay a year's rent in advance, where, by the custom of the country, half a year's rent becomes due on the day on which the tenant enters, the landlord, after an assignment under the commission, and before the year expires, may distrain the goods on the premises for half a year's rent; or if he buy the tenant's goods at the sale under the commission, he may retain the amount of the half year's rent. *Buckley v. Taylor.*

2 T. R. 600

2 If, under an agreement for a lease at a certain rent, the tenant is let into possession before the lease executed, the lessee cannot during the first year distrain for rent, for there is no demise expressed or implied. *Hegan v. Johnson.*

2 Taunt. 148

3 Where the lessee of lands dies before

the expiration of the term, and his administrator continues in possession during the remainder, and after the expiration of it, a distress may be taken for rent due for the whole term; under statutes 32 H. 8. c. 37. & 8 Ann. c. 14. *Braithwaite v. Cooksey*.

1 H. B. 465

- 4 A custom that a tenant may leave his away-going crop in the barns, &c. of the farm; for a certain time after the lease is expired, and he has quitted the premises, is good: and the landlord may distrain the corn so left, for rent arrear, after six months have expired from the determination of the term, notwithstanding the stat. 8 Ann. c. 14. s. 5. 6. 7. *Beavan v. Delahay*. 1 H. B. 5 And see *Lewis v. Harris*.

S. P. 1 H. B. 7, n.

IV. DISTRESS.

(a) How made.

N. B. For an order of distress made by a magistrate on 42 G. 3. c. 90, see JUSTICES OF THE PEACE, *post*.

- 1 One warrant of distress for the amount of several duties imposed by different Acts of Parliament, each giving a power of distress, is legal. *Patchett v. Bancroft*. 7 T. R. 367
- 2 The judgment of the commissioners of land-tax on appeal is conclusive in an action of trespass brought against the officer for levying under a warrant of distress. *ibid.*
- 3 Commissioners under an Act of Parliament, directing them yearly and every year, to rate, charge, tax, and assess certain lands for a certain number of years, having omitted to make any rate or assessment for several years, at length made an assessment for one year, and added to it the arrears of the past years, and levied for the assessment so made, including such arrears: Held, that no arrears could be due for the years respecting which no assessment had been made, and that the distress was therefore bad. *Newton v. Young*. 1 N. R. 187
- 4 Held, that trespass would not lie against a landlord who occupied an apartment over a mill demised to his tenant, from which it was divided only by a boarded floor without any ceiling, for taking up the floor of his own apartment, and entering through the

aperture to distrain for rent. *Gould v. Bradstock*. 4 Taunt. 562

- 5 Where a sheriff's officer executed a writ of *fi. fa.* by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table and saying, "I take this table," and then locked up his warrant in the table-drawer, took the key, and went away, without leaving any person in possession, and after the *fi. fa.* was returnable, but not continued, the landlord distrained the goods for rent: Held, that the sheriff could not maintain trespass against him. *Blades v. Arundale*. 1 M. & S. 711

(b) How disposed of.

- 1 The five days allowed before a distress can be sold, are *inclusive* of the day of sale. *Wallace v. King*. 1 H. B. 13
- 2 *Qu.* Whether goods distrained in the parish of A., can be appraised by appraisers, sworn before the constable of the parish of B.; each parish being in the same hundred, but in different divisions; and each having different constables. *Wallace v. King*. 1 H. B. 13
- 3 Where one who entered under a warrant of distress for rent in arrear continued in possession of the goods upon the premises for fifteen days, during the four last of which he was removing the goods, which were afterwards sold under the distress: Held, that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises, and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterborne v. Morgan*. 11 E. R. 395 And see *Wallace v. King*. 1 H. B. 13 And *Etherton v. Popplewell*. 1 E. R. 139
- 4 Where goods are distrained, and at the end of five days appraised, but not sold, the act of appraisal does not take away the plaintiff's right to replevy them. *Jacob v. King*. 1 Marsh. 135
- 5 No action lies against one who distrains cattle damage feasant for impounding them, instead of accepting a compensation for the damages, tendered before the cattle were impounded. *Anscomb v. Shore*. 1 Taunt. 261

DIVISION.

- 1 Where a moiety of a penalty is given by statute to the treasurer of a county, riding, or *division*: Held, that the word *division* does not apply to small districts, such as the Cinque Port of *Seaford* in *Sussex*; but must be construed with reference to *county and riding*, and means something analogous to them. *Evans, q. t. v. Stevens*. 4 T. R. 224
- 2 Neither can it be applied to the different parts of a county in which the magistrates act under one general commission, but for the convenience of the county adjourn the Quarter Sessions from one part of it to another, and appoint a separate treasurer for each. *Eans, q. t. v. Stevens*. 4 T. R. 459
- 3 It is only applicable to the legal divisions in *Lincolnshire*, where there are separate commissions of the peace, and separate sessions in the different divisions of the county. 4 T. R. 462
- 4 The stat. 18 G. 3. c. 19. which enables the Court in certain cases to make an order on the treasurer of the "county, riding, or division," where the offence was committed, to pay the prosecutor and his witnesses their expenses, extends to inferior districts having jurisdiction to try felons, and raising their own rates similar to the county rates. *Rex v. Myers*. 6 T. R. 237

DOCKS.

- 1 Under the Liverpool Dock Acts, 9 Ann. c. 12, and 2 G. 3. c. 86, certain tonnage duties are payable to the Dock Company on all vessels sailing *with cargoes outwards or inwards* according to several descriptions of voyages, one being to and from *America* generally, so as no ship shall be liable to pay more than once for the same voyage, *out and home*; a voyage out from *Liverpool* to *Halifax* in *North America*, where the ship delivered a cargo and took in another for *Demerara* in *South America*, and from thence returned with a new cargo to *Liverpool*: was held to be all the same voyage out and home, and chargeable only with one rate. *Gildart v. Gladstone (in error)*. 11 E. R. 675—2 Taunt. 97
Gladstone v. Gildart (in error). 12 E. R. 439
- 2 The compensation clause in the London Dock Act, reciting that divers tenements, &c. may become less valuable by the trade being diverted therefrom, provides that in case they do so, or the owners or occupiers suffer loss by the dock-works, the commissioners shall make them compensation, and no claim is to be made for compensation till three years after the opening of the docks; and then it is to be made within a given time: Held, that where the owner of the inheritance of a tenement which was in lease, died after the three years from the opening of the docks, without having made any claim, her devisee, and not her executor was entitled to claim within the time allowed, compensation for an injury done by the dock-works, to the inheritance in the time of his testatrix. *Rex v. The London Dock Company*. 12 E. R. 479
- 3 The owner of a homeward bound ship entering the *West India Docks* in so leaky a state as to require unloading and assistance without waiting her regular turn, is liable to pay all extra expenses. *Blackett v. Smith*. 12 E. R. 518
- 4 Where the private property of docks is by consent of the owners invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public. *Allnutt v. Inglis*. 12 E. R. 527
- 5 The compensation clause, s. 121. of the stat. 39, 40 G. 3. c. 69. directing that in case any warehouses, &c. (used for holding *West India* produce before that Act) should be rendered less valuable by reason of the *West India* trade being diverted therefrom by the then intended *West India* docks and works, than they were before the passing of the Act; or in case the yearly or other receipts of *Christ's Hospital* should be

thereby lessened; the owners of such warehouses, &c. and the governors of the hospital should be compensated (thereby putting such owners, and governors on the same footing), must be construed with reference to the yearly profits made of the premises antecedent to the passing of the Act; and the value of such warehouses cannot be evidenced by the yearly profits made between the passing of the Act, and the opening of the docks, by which latter the loss was occasioned. *Manning v. Commissioners of Compensation under the West India Dock Act.*

9 E. R. 165

- 6 The stat. 39, 40 G. 3. c. 69. s. 137. gives to the *West India Dock Company* certain rates and duties for all goods imported from the *West Indies* which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes, and other machines belonging thereto, and the land-waiters' fees on account of such goods after being unshipped, and all charges and expenses of wharfage, landing, housing, and weighing such goods, and of such cooerage as the same may want after being unshipped, and all rent for warehouse-room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the docks, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks, in order to carry them across the quay, and afterwards to crane them into the lighters. But it seems that if the owner require any work to be done upon the goods, *ultra* the mere *transitus* of them from the warehouse to the lighter, the Company are entitled to an extra compen-

sation, to be settled by convention between the parties, as in other cases out of the Act. *Harden v. Smith.*

8 E. R. 16

N. B. For the notice of action required by this statute, see *Wallace v. The West India Dock Company*, ante, page 11.

- 7 The Local Act 39 G. 3. c. 69. s. 137. giving to *West India* ships which have discharged their homeward bound cargoes in the docks of the *West India Company*, "the use of the light dock for a time not exceeding six months from the time of unloading," on payment of the tonnage duty of 6s 8d., payable on the entrance of such ships into the import dock, does not entitle the owners to ship stores intended for the use of such ships as part of their outfit, over the wharves of the light dock, without payment of wharfage and portorage, as in case of other goods shipped by way of merchandise on the outward bound voyage: *secus*, as to necessities intended for the immediate use of such ships while lying in the dock during the time allowed by the Act. *Blackett v. Smith.*

11 E. R. 533

- 8 Under the Bristol Dock Act, 43 G. 3. c. 140. s. 107. which gives compensation where, by means of the Dock works, damage may be done to any hereditaments, or in the progress or execution thereof, houses, lands, and tenements, or the same may be rendered less valuable thereby, no compensation is due to the owners of a brewery for a loss arising to them in their business from the deterioration of the water of the public river *Avon*, from which the brewery had been before supplied; the use of the water having been common to all the King's subjects, and not claimed as an easement to a particular tenement; the only remedy for such an injury is by indictment, which was taken away by the Act. *Rex v. The Bristol Dock Company.*

12 R. R. 429

DOMICILE.

- 1 Personal property follows the person of the owner, and in case of his decease must be distributed according to the law of the country in which he was domiciled at the time of his death,

without regard to the actual *situs* of the property. *Bruce v. Bruce*, (*In Dom. Proc.*) 2 B. & P. 229. n.

- 2 A person born in *Scotland* having gone out to *India* in the service of the

- East India Company*, and having died there, it was held, that *India* was the place of his domicile. 2 B. & P. 229 n.
- 3 For the place where a man is, shall *prima facie* be taken to be the place of his domicile. *ibid.*
- 4 But if such person had gone to *India* in the King's service, or for any temporary purpose, it seems that the domicile of his birth would not have been altered. *ibid.*
- 5 Mere intention to return to his native country at some future period, is not sufficient to prevent the change of domicile if the person die before such intention be put in execution. 2 B. & P. 229

DOWER.

- 1 A marriage, celebrated *bona fide* in Scotland, will undoubtedly entitle the woman to dower in England. *Ilderton v. Ilderton.* 2 H. B. 145
- 2 And the lawfulness of such a marriage may be tried by a jury in England. *ibid.*
- 3 Dower is due of mines wrought during the coverture, whether by the husband, or by lessees for years; whether paying pecuniary rents, or rents in kind; and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole *stratum* in the land of others. *Stoughton v. Leigh.* 1 Taunt. 402
- 4 If land assigned for dower contain an open mine, tenant in dower may work it for her own benefit. *ibid.*
- 5 Dower may be assigned of mines, either collectively with other lands, or separately of themselves. It shall be assigned by metes and bounds, if practicable; otherwise, either by a proportion of the profits, or separate alternate enjoyment of the whole for short proportionate periods. *ibid.*
- 6 If the heir being of full age assign excessive dower, he has no remedy at law; but if the sheriff assign excessive dower the heir may have a *scire facias* to obtain an assignment *de novo*; or if the heir under age assign excessive dower, he may have relief by writ of admeasurement of dower. 1 Taunt. 402
- 7 A. seised in fee, devised to B. his son for life, remainder to the heirs of his body in tail, remainder to his own three daughters and their heirs; on the death of A., B. entered and became seised of all A.'s lands, and by deed between himself and his mother, assigned to her the possession of a third part of all the premises, to hold to her and her assigns for her life, as if she had been in possession of the same by virtue of a writ of dower, and appointed C. and D. attorneys, to enter and give livery and seisin of one full third part; and the indorsement of the deed stated, that C. and D. delivered seisin of all the premises to the mother, to hold according to the uses and intentions of the deed. B.'s mother having become seised of an undivided third part of all the lands, and during her life, B. levied a fine *sur consauance de droit come ceo*, with proclamations of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of A. to a stranger: the Court of C. P. held, that the deed between B. and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by B., and non-claim within five years after the death of B., did not bar the remainder in fee to the daughters of A. in that one-third part which B.'s mother had in dowry at the time of such fine and recovery. *Rowe v. Power, in error.* 2 N. R. 1
- 8 A replication to a plea of "*ne unques accouple*" in dower, alleging a marriage in Scotland, may conclude to the country; and in such replication it is not necessary to state that the marriage was had at any place in England, by way of venue. *Ilderton v. Ilderton.* 2 H. B. 145

EAST INDIA COMPANY.

- N. B. See tit. CHARTER-PARTY, ante.
- 1 The exclusive right of trading to the East Indies granted to the East India Company by 9 & 10 W. 3. has never

been put an end to, and every infringement of it is a public wrong. *Camden v. Anderson, in error.* 1 B. & P. 272

- 2 The sales of the *East India Company*, being subject to a regulation, that any buyer not making good the remainder of his purchase-money on or before the day limited for such payment should forfeit the deposit, "and should be rendered incapable of buying again at any future sale, until he should have given satisfaction to the Court of Directors: Held, that the term satisfaction must be considered to mean pecuniary compensation for the non-performance of his agreement to pay on the appointed day, and that a buyer having made default on the day, but

afterwards, within a future time given to him by the Company, paid the remainder of the purchase-money with interest, might maintain an action against the Company for refusing to allow him to become a bidder at their sales; such sales, being by 9 & 10 W. 3. c. 44. s. 69. declared to be public and open sales. *Eagleton v. The East India Company.* 3 B. & P. 55

- 3 *Quare*, Whether since the passing of 18 G. 3. c. 26. which regulates the deposits, forfeitures, and incapacities of bidders at the tea sales of the *East India Company*, the Company can make or enforce any other regulations affecting those sales than such as the Act of Parliament has enacted? 3 B. & P. 55

EJECTMENT.

I. PREMISES, HOW DESCRIBED.

II. TITLE OF LESSOR.

III. OF ACTUAL ENTRY.

IV. ACTION OF, BETWEEN LANDLORD AND TENANT.

V. DECLARATION AND SERVICE.

VI. OF PROCEEDINGS TO JUDGMENT, AND WHO MAY BE MADE DEFENDANTS.

VII. SETTING ASIDE AND STAYING PROCEEDINGS.

VIII. PLEADINGS AND EVIDENCE.

I. PREMISES, HOW DESCRIBED.

- 1 Ejectment for a messuage and tenement is good after verdict: So for a messuage or tenement. *Doe d. Stewart v. Denton.* 1 T. R. 11
Sed vide contra. *Doe d. Bradshaw v. Plowman.* 1 E. R. 441
- 2 After verdict in ejectment for a messuage and tenement, the Court will give leave to enter the verdict, according to the Judge's notes, for the messuage only, (pending a rule to arrest the judgment) without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway.* 8 E. R. 357
And see Doe d. Freeland v. Burt. 1 T. R. 701, *post*, page 296.
- 3 It is not necessary in ejectment to state the premises to be in a parish: For if they are described as being in the parish of *A.* and *B.* the Court of C. P. will construe it to mean part in the parish of *A.* and part in *B.*; *B.* being

the name of a parish. *Goodtitle d. Brentridge v. Walter.* 4 Taunt. 671
And see post, tit. VARIANCE.

II. TITLE OF LESSOR.

- 1 In ejectment, the plaintiff must recover on a legal title. See *Doe d. Hodsdon v. Staple.* 2 T. R. 694: *Goodtitle d. Jones v. Jones.* 7 T. R. 47: 18 T. R. 2. *Roe d. Eberall v. Lowe.* 1 H. B. 447.
- 2 Nor is there any difference in this respect between the case of an ejectment brought by a trustee against his *cestui que trust* and an ejectment brought by any other person. *Roe d. Reade v. Reade.* 8 T. R. 122
- 3 A right of entry cannot be reserved to a stranger to the estate. *Doe d. Barber v. Lawrence.* 4 Taunt. 23
- 4 A satisfied term may be presumed to be surrendered; but an unsatisfied term, raised for the purpose of securing an annuity, during the life of the annuitant, cannot, and may be set up as a bar to the heir at law in ejectment, *even though he claim only subject to the charge.* *Doe d. Hodsdon v. Staple.* 2 T. R. 684
- 5 Where a trust term is a mere matter of form, and the deeds were muniments of another's estate, it shall not be set up against the real owner. *Doe v. Pegge.* 1 T. R. 759, *n.*
- 6 A trust shall never be set up in an ejectment against him for whom the trust was intended. 1 T. R. 759, *n.*
- 7 A tenant in possession under a lease, whose tenancy is not meant to be disturbed by the lessor of the plaintiff in ejectment claiming the inheritance,

- shall never set up his lease to bar the recovery. *Per Lord Mansfield in Doe v. Pegge.* 1 T. R. 759, n.
- 8 The trustees under a Turnpike Act having demised to one of several mortgagees, such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates in order to repay himself the interest due to him: Held, that he might well maintain his action, notwithstanding a clause in the Act that all the mortgagees should be creditors upon the tolls in equal degree. *Doe d. Banks v. Booth* 2 B. & P. 219
- 9 The trustee of a term to satisfy creditors not having notice of an agreement for a lease before the grant of the term, may maintain an ejectment against the tenant in possession under the agreement. *Goodtitle d. Estwick v. Way.* 1 T. R. 735
- 10 It seems to have been held, that a *bond fide* lease made by an equitable tenant in tail, will prevent the trustees in whom the legal estate is vested, from recovering in ejectment against the lessee; although, if the lease be granted under suspicious circumstances of fraud and imposition, the trustees will not be barred: but, from the more recent decisions, this principle seems to have been much shaken, and it is now very doubtful whether in any case a lease from the *cestui que trust* can be set up against the trustee. *Roe d. Ebrull v. Lowe.* 1 H. B. 446
- 11 Where the possession and receipt of rents, issues, and profits of a trust estate, though for above 20 years after the creation of the trust, without any interference of the trustees, is consistent with and secured to the *cestui que trust* by the terms of the trust deed, such possession is not adverse to their title, so as to bar their ejectment against his grantees brought after the 20 years. *Keene v. Deardon.* 8 E. R. 248
- 12 One tenant in common cannot set up an outstanding unsatisfied term in bar to an ejectment for a moiety by another tenant in common. *Doe d. Bristowe v. Pegge.* 1 T. R. 759, n.
- 13 One tenant in common levying a fine of the whole, and taking the rents and profits afterwards without account for nearly five years, is no evidence from whence the Jury should be directed (against the justice of the case) to find an euster of his companion at the time of the fine levied; and consequently the latter may maintain ejectment without making an actual entry. *Peacock d. Hornblower v. Read.* 1 E. R. 568
- 14 A mortgagor cannot set up the title of a third person against his mortgagee in an ejectment; nor can a tenant set up the title of a third person in an ejectment to bar his own lessor. *Doe d. Bristowe v. Pegge.* 1 T. R. 759
- 15 A second mortgagee, who takes an assignment of a term to attend the inheritance, and has all the title-deeds, may recover in ejectment against the first mortgagee, not having had notice of such prior mortgage. *Goodtitle d. Norris v. Morgan.* 1 T. R. 755
- 16 If B., claiming under A., let lands for a year to C., and die, and A. afterwards bring an ejectment against C., C. cannot dispute the title of A. *Barwick d. Richmond Corp. v. Thompson.* 7 T. R. 488
- And see *Bryan d. Child v. Winwood.* 1 Taunt. 208
- 17 A surrender of chambers in *New Inn* to the treasurer and ancients of the Society, made with their assent, to the intent that they may grant the said chambers to a purchaser, passes the estate to such purchaser, before admission; for admission in this case is not necessary as in the case of copyholds to complete the grantee's estate, but it is only for the purpose of signifying the assent of the Society that the grantee should become a member of the Inn; and therefore upon the death of the surrenderee before admission, the Society may maintain ejectment for them. *Doe d. Warry v. Miller.* 1 T. R. 393
- 18 One having good title to the possession of a copyhold, as tenant by the curtesy, by the custom of the manor; his possession of the copyhold after his wife's death will be referred to that, and not to any adverse title; though he were admitted after his wife's death to hold to him *pursuant to the settlement*, by which the estate of the wife was limited to the survivor in fee, so as to let in the title of the heir at law of the wife, in ejectment brought within 20 years after the husband's death, though more than 20 years after the death of the wife. *Doe d. Milner, Bart. v. Brightwen.* 10 E. R. 583

- 19 The title to copyhold lands relates back from the time of the admittance to the surrender as against all persons but the lord; so that the surrenderee may recover in ejectment against the surrenderor on a demise laid between the times of surrender and admittance. *Holdfast d. Woollams v. Clapham.*
1 T. R. 600
- 20 An admittance of the surrenderee before trial will maintain ejectment brought by him before admittance, upon a demise laid between the time of surrender and admittance. *Doe d. Bennington v. Hall.* 16 E. R. 208
- 21 The surrenderor before admittance is considered as a trustee for the surrenderee, and therefore is not permitted to set up a formal objection against the plaintiff's recovering that property which he holds for his benefit. *ibid.*
- 22 The devisee of a copyhold or customary estate which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment, for he cannot be put into a better situation than his deviser was, and his admittance has no relation to the last legal surrender, but the legal title remains in the heir of the surrenderor. *Doe d. Vernon v. Vernon.*
7 E. R. 8
Doe v. Reade. 8 E. R. 353
And see COPYHOLD, III. ante, 197.
- 23 One admitted tenant, upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission, as upon a new and substantive grant of the lord. *Zouch d. Forse v. Forse.* 7 E. R. 186
- 24 It was held, that a plaintiff who claims under an *elegit* subsequent to a lease granted to the tenant in possession, cannot recover in ejectment, though he give the tenant notice that he does not mean to disturb his possession, only wishing to get into the receipt of the rents and profits of the estate. *Doe d. Da Costa v. Wharton.*
8 T. R. 2
- 25 Where a prescriptive ecclesiastical corporation of vicars choral of the cathedral of *Chichester* had, besides other estates in common, four vicarial houses with their appurtenances, which had always been appropriated to the several use and residence of the four vicars; and by ancient custom, upon every vacancy the vicars, according to seniority, made their option of taking in *severalty* any one of such vicarial houses with the appurtenances; of which option an entry was made in the corporation *Act Book*, and signed by the vicars: Held, that a new vicar, having made an option, which was entered in the book and signed by all, to take one of the vicarial houses, with certain appurtenances, then in the possession of J. S., which were not all the appurtenances formerly annexed to and enjoyed with the same house by his predecessors therein, could not maintain an ejectment for the other appurtenances, such as part of the ancient garden which had been leased off by the corporation before his appointment. For, supposing him entitled to make an option of the *entire premises*, and to have it entered in the *Act Book*, as against the corporation; yet no such option having been made and entered in the *Act Book*, according to the custom, he had no separate legal title to the premises in question, on which he could maintain an ejectment. *Goodtitle d. Miller Clerk v. Wilson.*
11 E. R. 334
- 26 Though a purchaser for a valuable consideration, may recover in ejectment against one who claims only under a voluntary settlement, of which such purchaser had notice: yet, it seems that the inadequacy of consideration for such purchase is material if it extend so far as to shew that it was not made *bonâ fide*, but merely colourably, to get rid of the first settlement, and make another, which was also in truth a voluntary settlement. *Doe d. Parry v. James.* 16 E. R. 212
- 27 Where a pauper had been put in possession of a cottage 40 years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant, and went away; yet, held, that the existing overseers could not maintain ejectment for it, having no derivative title as a corporation from their predecessors, so as to connect themselves in interest with the overseers by whom the pauper was put in possession, and the pauper having done no act to re-

cognize his holding under the demising sets of overseers. *Doe d. Grundy v. Clarke.* 14 E. R. 488

- 28 Where the lessor of the plaintiff and the defendant in ejectment had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, the award concludes the defendant from disputing the lessor's title in an action of ejectment. *Doe d. Morris v. Rosser.* 3 E. R. 15

III. ACTUAL ENTRY.

- 1 An actual entry is necessary to avoid a fine, (*i. e.* a fine with proclamations;) and the lessor of the plaintiff bringing his ejectment upon such avoidance must lay his demise subsequent to such entry. *Berrington v. Parkhurst.* 13 E. R. 489
- 2 Where tenant for life levies a fine, though it is no bar to those in remainder, yet it seems that a remainder-man must make an actual entry before he can maintain an ejectment. *Doe d. Compere v. Hicks.* 7 T. R. 433
- 3 Where an entry is necessary the demise must be laid after it. *ibid.*
- 4 An actual entry is necessary to avoid a fine, and the party so avoiding it cannot lay his demise in an ejectment, or recover the mesne profits that accrued, before such entry. *Doe d. Compere v. Hicks.* 7 T. R. 727
- 5 Where ejectment is brought after a fine levied by the defendant, but before all the proclamations have been made under the stat. 4 Hen. 7. c. 24., it is not necessary for the lessor to prove an actual entry to avoid such fine; considering it to operate only as a fine at common law: but by the defendant's confession of lease, entry, and ouster, the merits only of the lessor's title are put in issue. *Doe d. Duckett v. Watts.* 9 E. R. 17

IV. BETWEEN LANDLORD AND TENANT.

- 1 In ejectment by a landlord against a tenant, whose lease is expired, the latter is not barred from shewing that his landlord's title is expired. *England d. Syburn v. Slade.* 4 T. R. 682
- 2 Where a landlord has a right to re-enter for non-payment of rent, he cannot recover in ejectment at common law, unless he demand the rent on the day when it becomes due; nor under the stat. 4 G. 2. c. 28. s. 2., if there be a sufficient distress on the premises. *Doe d. Forster v. Wandlass.* 7 T. R. 117

- 3 Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm-house, and actually occupy the land, &c. and not let, set, assign over or otherwise depart with the lease: Held, that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessor's actual occupation. *Doe d. Lockwood v. Clarke.* 8 E. R. 185

- 4 If a copyhold descends by custom to all the children equally of the tenant last seised, one of the joint tenants may maintain ejectment on his single demise for his own share. *Roe d. Raper v. Lonsdale.* 12 E. R. 39

- 5 A parol agreement to lease lands for four years only creates a tenancy at will; and if that tenancy be not determined before the day of the demise laid in the declaration, the plaintiff cannot recover. *Goodtitle d. Gallaway v. Herbert.* 4 T. R. 680

- 6 If a declaration in ejectment be served on a tenant, and his landlord be admitted to defend, the plaintiff can only recover such premises as the tenant is proved to be in possession of. *Fenn d. Blanchard v. Wood.* 1 B. & P. 573

- 7 One who is put in possession upon an agreement for the purchase of land cannot be ousted by ejectment before his lawful possession is determined by demand of possession or otherwise; and even considering such lawful possession as a tenancy at will, the defendant's confession, (by entering into the common rule), of a lease by the lessor to the nominal plaintiff, is not a constructive determination of the will whereon to maintain the ejectment. *Right d. Lewis v. Beard.* 13 E. R. 210
- 8 If the sheriff sell a term under a writ of *fi. fa.* which is afterwards set aside for irregularity, and the produce of the sale directed to be returned to the termor, the termor cannot maintain ejectment to recover his term against the vendee under the sheriff. *Doe d. Emmett v. Thorn.* 1 M. & S. 425

- 9 The mortgagee of a lease has the same title to relief against an ejectment for

non-payment of rent, and upon the same terms, as the lessee against whom the recovery is had. *Doe d. Whitfield v. Roe.* 3 Taunt. 402

- 10 The Court of C. P. will not, after a plaintiff has obtained judgment and possession in an undefended ejectment, without collusion, and has sold part of the premises, and transferred the possession, let in a landlord to defend, from whom his tenants had concealed the ejectment. *Goodtitle v. Badtitle.* 4 Taunt. 820

V. SERVICE OF DECLARATION.

- 1 Service of a declaration in ejectment on one of two tenants, was held by the Court of C. P. to be good service on both. *Doe d. Bailey v. Roe.* 1 B. & P. 369
- 2 A declaration in ejectment may be served on the wife either on the premises or at the husband's house off the premises. *Doe d. Morland v. Bayliss.* 6 T. R. 765
Doe d. Baddam v. Roe. 2 B. & P. 55
S. P. Oates d. Chatterton v. Cotes. 6 T. R. 765

- 3 The Court of C. P. refused to admit the mere acknowledgment of the wife of the tenant in possession, that she had received a declaration in ejectment to bind the husband. *Goodtitle d. Read v. Badtitle.* 1 B. & P. 384

- 4 That Court held service of the declaration in ejectment on the wife of the tenant in possession sufficient, provided it could be shewn that she lived with the husband. *Jenney d. Preston v. Cutts.* 1 N. R. 308

- 5 Service of the copy of the declaration, &c. in ejectment, before the essoign day of the Term, on the daughter of the tenant in possession in the absence of him and his wife, is not sufficient, even though the tenant had since declared that he had received the same, if it do not appear that he had received it before the essoign day. *Roe v. Doe.* 14 E. R. 441

N. B. This case overturns the decision of the Court of C. P. in the case of *Smith d. Stourton v. Hurst.*

1 H. B. 644, quod vide.

- 6 Service of a declaration in ejectment on a person appointed by the Court of Chancery to manage an estate for an infant, is insufficient. *Goodtitle d. Roberts & Ux. v. Badtitle.* 1 B. & P. 385
- 7 Nailing the declaration on the barn-door of the premises, in which barn the tenant had occasionally slept; there being no dwelling-house, and

the tenant not being to be found at his last place of abode, was deemed good service. *Fenn d. Buckle v. Roe.*

1 N. R. 293

- 8 Affidavit of service in ejectment made by a person who saw the declaration served, and heard it explained to the tenant in possession, is sufficient. *Goodtitle d. Wanklen v. Badtitle.* 2 B. & P. 120

VI. OF PROCEEDINGS TO JUDGMENT, AND WHO MAY BE MADE DEFENDANTS.

- 1 The clerk of the rules shall keep a book for entering rules in ejectments, containing a list of the ejectments moved, the number of the entry, the county and the names of the parties; and the rule for judgment shall be drawn up and taken away from the office within two days after the end of the Term in which the ejectment shall be moved. *Reg. Gen. M. 31 G. 3. 4 T. R. 1*
- 2 The same rule is adopted by the Court of C. P. 1 Taunt. 317

- 3 In ejectment against several tenants, the name of each was prefixed to the notice served on him; and held, that only one rule was necessary on motion for judgment against the casual ejector. *Roe d. Burlton v. Roe.* 7 T. R. 477

- 4 A tenant to a mortgagor, who does not give him notice of an ejectment brought by the mortgagee to enforce an attornment, is not liable to the penalties of stat. 11 G. 2. c. 19. s. 12. for secreting ejectments. *Buckley v. Buckley.* 1 T. R. 647

- 5 In a country ejectment, the notice to the tenant in possession may be to appear in the next issuable Term, and judgment against the casual ejector may be moved for in that Term. *Doe d. Clarke v. Roe.* 4 Taunt. 738

- 6 Where a defendant in ejectment shews by affidavit that he is coparcener, joint tenant, or tenant in common, and denies actual ouster, the Court of C. P. will permit him to confess lease and entry only, without confessing ouster. *Doe d. Gigner v. Roe.* 2 Taunt. 397

- 7 The Court of C. P. will not, at the instance of the defendant in an ejectment, interfere against a plaintiff who lays a demise by the assignees of a bankrupt without their permission; they having given up the property to the bankrupt, and the plaintiff claiming under him. *Doe d. Vine v. Figgins.* 3 Taunt. 440
- 8 In ejectment for a forfeiture of a lease, the Court will compel the plaintiff to deliver a particular of the breaches of

covenant, on which he intends to rely. *Doe d. Birch v. Phillips.* 7 T. R. 596

9 The defendant in ejectment is entitled to the general reply, where the plaintiff, claiming by descent, proves his pedigree and stops, and the defendant sets up a new case in his defence, which is answered by evidence on the part of the plaintiff. *Goodtitle d. Revett v. Braham*, (trial at bar.) 4 T. R. 497

10 Where the plaintiff in ejectment is non-suited at the trial for want of the defendant's confessing lease, entry and ouster, he is not entitled to sign judgment against the casual ejector till the *postea* comes in on the day in Bank. *Doe v. Copeland.* 2 T. R. 779

11 A declaration in ejectment contained two demises by two different lessors of two distinct undivided thirds; judgment was given that the plaintiff "do recover his said terms." On error it appeared, from the facts stated on a bill of exceptions to the Judge's directions on a point of law, that the ejectment respected only one undivided third: Held, well enough on this record, where the point was only raised by bill of exceptions. *Roue v. Power*, in error. 2 N. R. 1

Seemle, that it would be well enough even on special verdict. *ibid.*

12 The Court will not permit a *cestui que trust*, not having been in possession, to be made defendant in ejectment instead of the tenant, as landlord, under stat. 11 G. 2. c. 19. s. 13.: but they will permit the *heir at law*, or *remainder-man* claiming under the same title. *Lovelock d. Norris v. Dancaster.* 3 T. R. 783

Or a *devisee* in trust. 4 T. R. 122

13 The Court permitted a mortgagee to be made defendant in ejectment with the mortgagor. *Doe d. Tilyard v. Cooper.* 8 T. R. 645

VII. SETTING ASIDE AND STAYING PROCEEDINGS.

N. B. See *tit. costs*, ante, 224.

1 The Court will not, after a trial, stay the proceedings on payment of the rent, &c.; the stat. 4 G. 2. c. 28. only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises. *Roe d. West v. Davis.* 7 E. R. 363

2 The Court of C. P. in their discretion, will set aside a writ of *habere facias*

possessionem executed, and let in a landlord to try an ejectment, on suggestion of collusion. *Doe d. Grocers' Company v. Roe.* 5 Taunt. 205

3 The Court will not set aside the proceedings in ejectment for irregularity, because the notice at the foot of the declaration is subscribed in the name of the nominal plaintiff, instead of the casual ejector. *Hazlewood d. Price v. Thatcher.* 3 T. R. 351

4 The Court will not stay the proceedings in an ejectment brought by a mortgagee against a mortgagor on the latter paying principal, interest and costs, if he has agreed to convey the equity of redemption to the mortgagee. *Goodtitle d. Taysum v. Pope.* 7 T. R. 185

5 Though the stat. 16 & 17 Car. 2. c. 8. s. 3. provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c.; yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail: but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment. *Keene v. Deardon.* 8 E. R. 298

6 The Court of C. P. will not set aside a judgment and execution in ejectment in order to let in a person to defend, though he make an affidavit setting forth a clear title, and offer to pay costs. *Doe d. Ledger v. Roe.* 3 Taunt. 506

7 If a mortgagee recovers possession of the mortgaged premises under a judgment in an undefended ejectment, the Court of C. P. has no jurisdiction to restore, on payment of the debt, interest, and costs, the possession to the mortgagor, who has not appeared. But if the recovery is had against a tenant of the mortgagor, they will set aside the judgment, and let in the mortgagor to defend as landlord, that he may be in a condition to apply to the Court to stay proceedings on the terms of the statute. *Doe d. Tubb v. Roe.* 4 Taunt. 687

VIII. PLEADINGS AND EVIDENCE.

1 In the case of a tenancy from year to year as long as both parties please, if the tenant die intestate, his administrator has the same interest in the land which his intestate had, and the lessee

of such administrator may declare in an ejectment on a term for *seven years*; for the time is not conclusive. *Doe d. Shore v. Porter.* 3 T. R. 13

- 2 Proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment. *Doe d. Renning, v. Griffin.*

15 E. R. 293

- 3 But where the lessor of the plaintiff in ejectment claimed as heir by descent, proof of the death of his elder brothers, without also proving that they died without issue, was held not sufficient. *Richards v. Richards. ibid.* 294 And see *tit. WITNESS, post.*

- 4 In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of a lease; proof by the lessor of the counterpart of the lease by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry (contained in the original lease) in case of non-payment of rent. *Roe d. West v. Davis.*

7 E. R. 363

- 5 Under a proviso in a lease for the entry of the landlord, in case the rent should be in arrear for 14 days, and no sufficient distress found upon the premises, he is entitled to recover in ejectment, on proof of half a year's rent due at *Lady-day*, and no distress on the premises on *some day in May*; the demise being laid on the 2d of *May*, and the declaration served on the 6th of *June*; the defendant giving no evidence to rebut the inference, that there was no sufficient distress on the premises within the terms of the proviso; as by shewing that there was a sufficient distress on the premises in *May*, up to the day of the demise inclusive, or on the 6th of *June*, when the declaration was served, if that were material with reference to the stat. 4 G. 2. c. 28. On such proof by the plaintiff the stat. 4 G. 2. c. 28. dispenses with proof of a demand of the rent on the day it became due. *Doe d. Smelt v. Fuchs.*

15 E. R. 286

- 6 In ejectment, the landlord having proved payment of rent by the defend-

dant, and half a year's notice to quit, cannot be turned round, by his witness proving on cross-examination that an agreement *relative to the land in question* was produced at a former trial between the same parties, and was, on the morning of the then trial, seen in the hands of the plaintiff's attorney, *the contents of which the witness did not know*; no notice having been given by the defendant to produce that paper; for though it might be an agreement *relative to the land*, it might not affect the matter in judgment, nor even have been made between these parties. *Doe d. Wood (Sir M.) v. Morris.*

12 E. R. 237

And see *Doe d. Shearwood v. Pearson. id.* 238, n.

- 7 The declarations of a deceased occupier of land, of whom he held the land, are evidence of the seisin of that person. *Peaceable d. Uncle v. Watson.*

4 Taunt. 16

- 8 But it must first be shewn that the land the deceased occupied, was the land now in the tenant's possession. *id. ibid.*

- 9 In the case of a plain trust, where the trustees were directed to convey to a devisee on his attaining 21, the jury may be directed to presume a conveyance at any time afterwards, though considerably less than 20 years. *England d. Syburn v. Slade.* 4 T. R. 682

- 10 In ejectment, brought upon the joint demise of several trustees of a charity, it is not enough for the defendant who had paid one entire rent to the common clerk of the trustees, to shew that the trustees were appointed at different times, as evidence that they were tenants in common: for as against their tenant his payment of the entire rent to the common agent of all, is at all events sufficient to support the joint demise, without making it necessary for them to shew their title more precisely. *Doe d. Clarke v. Grant.*

12 E. R. 221

- 11 The Jury may presume an old satisfied term surrendered to the *cestui que use*, in order to substantiate a lease executed by him, or a conveyance by trustees where they ought to have conveyed. *Doe d. Bowerman v. Sybourn.*

7 T. R. 2

But if no such presumption be made, and it appear in a special verdict in ejectment that such a term is still outstanding in a trustee who is not joined

in bringing the ejectment, the *cestui que use* cannot recover. *Goodtitle d. Jones v. Jones.* 7 T. R. 47

12 A rector may recover in ejectment against his lessee on the ground of the lease of the rectory being avoided on account of his own non-residence, by force of the stat. 13 Eliz. c. 20. and the lease to the defendant describing him as *doctor in divinity* produced by him at the trial in support of his title, is *prima facie* evidence of his being such as he is therein described to be, so as also to avoid the lease under the stat. 21 H. 8. c. 13. s. 3. *Frogmorton d. Fleming, (Clerk), v. Scott, (Clerk).* 2 E. R. 467

13 Where A. being tenant for life, with a limited power of leasing, reserving the *ancient* rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate, which letter the tenant for life indorsed *A Particular of my Estate, &c.*; and handed down to B. the succeeding tenant for life, who had a like limited power of leasing, by whom it was preserved and handed down amongst the muniments of the estate, to the first tenant in tail: Held, that such paper was evidence for the tenant in tail against a lessee of B., in order to shew that the rent reserved by B. was less than the *ancient* rent reserved at the time to which such account referred. *Roe d. Brune, (Clerk) v. Rawlings.* 7 E. R. 279

14 The entries by A. in his account-book of the receipt of rent to the amount stated, are also evidence of the same fact. 7 E. R. 279

15 A demise of premises in *Westminster*, late in the occupation of A., particularly describing them, part of which was a yard, does not pass a cellar situate under that yard which was then in the occupation of B., another tenant of the lessor; and the lessor, in an ejectment brought to recover the cellar, is not estopped by his deed from going into evidence to shew that the cellar was not intended to be demised. *Doc d. Freeland v. Burt.* 1 T. R. 701
Whether parcel or not of the thing demised is always matter of evidence. *ibid.*

16 A possession of crown land, commencing at least 55 years ago by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death,

19 years ago, and afterwards continued for two years by his widow, when the defendant obtained the possession, would be sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown were capable of making such a grant; in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by license from it. *Goodtitle d. Parker v. Baldwin.* 11 E. R. 488

17 But it appearing, upon a second trial, that by the stat. 20 Car. 2. c. 3. all future grants of land by the crown in the forest of *Dean* (within which the land in question lay), were avoided, and consequently no presumption could be made of a valid grant; the lessor of the plaintiff, who can only recover in ejectment by the strength of his own title, was held not entitled to recover even against a stranger, whose possession, adverse to him, was not defended by the crown: And this, notwithstanding a part of the premises was first held by the lessor's father 60 years ago, and by the stat. 9 G. 3. c. 16. the suit of the crown is barred after a continuing adverse possession for 60 years under the original trespasser: for, from the death of the father, 19 years ago, the possession was adverse to his heir, the lessor of the plaintiff; or at least the defendant's possession for the last 17 years was adverse; and the Act of *Geo. 3.* does not give a title to the first wrongful possessor and those claiming under him, but only bars the remedy of the crown against them after 60 years' continuing adverse possession by them; and as it does not repeal the stat. 20 Car. 2. c. 3. no presumption of a grant to legalize the possession of the lessor's father for the first 41 years, on which alone the lessor's claim could be founded, can be made against that statute. And the jury, it seems, may presume that the possession of the lessor's father for the first 41 years, and that of the defendant (adverse to the heir) for the last 17, were both legally holden by the license of the crown. 11 E. R. 488

18 The plaintiff in ejectment under the several demises of two, may, after notice to quit, recover the possession of

premises held by the defendant as tenant from year to year, upon evidence that the common agent of the two had received rent from the tenant, which was stated in the receipts to be due to the two lessors; even assuming such receipts to be evidence of a joint tenancy; for a several demise severs a joint-tenancy; and, supposing the contract with the tenant to have been entire, no objection lies on that account to

the plaintiff's recovery in this case, as he had the whole title in him. *Doe d. Marsack v. Read.* 12 E. R. 57
 19 The lessor of the plaintiff in ejectment is bound at the trial to prove the defendant in possession of the premises which he seeks to recover, although the defendant has entered into the general consent-rule to confess lease, entry, and ouster. *Goodright d. Bulch v. Rich.* 7 T. R. 327

ERROR.

I. IN WHAT CASES A WRIT OF ERROR LIES.

II. HOW BROUGHT, AND HEREIN OF ASSIGNMENT OF ERRORS.

III. HOW FAR A SUPERSEDEAS OF EXECUTION.

IV. BAIL IN ERROR.

V. PROCEEDINGS.

(a) *When staid pending Writ of Error.*

(b) *Irregularity in, what shall be and how remedied.*

I. IN WHAT CASES A WRIT OF ERROR LIES.

1 Error lies not upon an interlocutory judgment. *Samuel v. Judin, (in error).* 6 E. R. 333

2 In trespass against two who suffer judgment by default, if plaintiff execute writs of inquiry against them separately, and take several damages against them, and enter up final judgment for those several damages, it is error. *Mitchell v. Milbank.* 6 T. R. 199

3 Defendants having agreed under a consolidation rule not to bring any writ of error, cannot do so, though there be manifest error on the record. But the Court will not grant an attachment against the attorney for having brought such writ of error, if it appears: that it was not done for delay; and that he was led into a mistake. *Camden v. Edie.* 1 H. B. 21

4 After an award of a writ of inquiry of damages, if final judgment be given for a certain sum with the plaintiff's assent, it is no cause of error, although

the record contain no entry of any inquisition executed. *Gould v. Hammersley, (in error).* 4 Taunt. 148

5 It is not a cause of error to enter a judgment of *miser cordia* in a *qui tam* action for a penalty. *Humble v. Bland, (in error).* 6 T. R. 255

6 Nor that the plaintiff is adjudged to be in *miser cordia* instead of the defendant. *Pullin, one &c. v. Stokes, one, &c. (in Cam. Scac.)* 2 H. B. 312

7 *Semble*, In an action on a penal statute where the record was entitled generally of *Hil. 41 G. 3.* and the fact was laid under a *viz.* on 21st of January 1801, whereas the return of the *capias* must have been at latest on the 20th of January, and so the suit appeared to be commenced, before the cause of action, contrary to the averment in the declaration; such repugnancy is no ground of error. *Lee v. Clarke, (in error).* 2 E. R. 333

8 *Semble*, If a statute give an action within six months after the fact committed, (by which must be understood lunar months) and the declaration aver such fact within six calendar months before, it is no error; as it will be presumed that the fact was proved within due time, notwithstanding such irrelevant allegation. *ibid.*

9 In an action on stats. 1 Jac. 1. c. 15. s. 11. and 12. : 5 G. 2. c. 30. s. 29. after any person has been convicted on an indictment for false swearing to a debt under the commission of bankrupt (on which indictment he is to suffer the punishment inflicted by the several statutes against perjury) the assignees of the bankrupt may recover from him double the sum so sworn to in an action in which it is

sufficient to state the conviction of the defendant on the indictment, and no advantage can be taken of any defect in that judgment but by writ of error. *Holmes v. Walsh.* 7 T. R. 458

- 10 The Court will not quash a return to a *mandamus* (which directed an Inferior Court to give judgment on an indictment) merely because it states an erroneous judgment given below : but a writ of error must be brought to reverse that judgment. *Rex v. the Justices of the W. R. of Yorkshire.* 7 T. R. 467

- 11 Though it appears on the return to a *certiorari*, that no bill was filed in the Court of King's Bench against the defendant, (in a suit there by bill,) in the Term of which the declaration is entitled, but that a bill was filed against him by the plaintiff in the following vacation, it is not erroneous, if it also appears that the bill was filed of the preceding Term. *Parrot v. Spraggon, (in Cam. Scac.)* 2 H. B. 608

II. HOW BROUGHT, AND HEREIN OF ASSIGNMENT OF ERRORS.

- 1 The defendant in the original action need not obtain a Judge's order to change his attorney upon bringing a writ of error. *Batchelor v. Ellis.* 7 T. R. 337

- 2 If the defendant in error from C. P. to K. B. give an eight-day rule to certify the record, the record may be certified in less time, though the rule expire in vacation : and a *sci. fa. quare executionem non* having been issued immediately upon the record being certified returnable to first day of the following Term; the defendant may serve the plaintiff in error on that day with a rule to appear to the *sci. fa.*, and a rule to assign errors. *Sambridge v. Housley (in error.)* 2 T. R. 17

- 3 It is irregular to rule the plaintiff in error to assign errors before the expiration of the rule to appear to the *scire facias*. *James v. Staples (in error.)* 6 T. R. 387

III. HOW FAR A SUPERSEDEAS OF EXECUTION.

N. B. See proceedings when stayed pending the writ, post, 302.

- 1 Though a writ of error be sued out before judgment signed, it cannot have

any effect till the judgment is actually signed. *Jaques v. Nixon.* 1 T. R. 279

- 2 And if a copy of the allowance be served before judgment signed, it only operates as an allowance from the time of signing judgment. *ibid.*

- 3 The service of the allowance is only to bring the party into contempt if he proceeds ; for the allowance is of itself a *supersedeas*. *ibid.*

- 4 If a writ of error be sued out before judgment is signed, (which is frequently the case,) and the plaintiff will not sign judgment till after the return of the writ, in order to avoid the effect of it, and then sues out execution, the Court will set aside the execution. 1 T. R. 279

- 5 The Court will not infer that a writ of error was sued out for delay, because it was sued out before final judgment signed. And though it should be made returnable before final judgment, it will still operate as a *supersedeas* upon the judgment, which, when signed in the same Term, relates back to the first day of it; and therefore, execution issued thereon, after such writ of error allowed and served, was set aside for irregularity. *Somerville v. White.* 5 E. R. 145

- 6 A writ of error may be made returnable before the day on which the judgment is actually signed, if the writ of error and judgment are of the same Term. *Hill v. Tebb.* 1 N. R. 298

- 7 And the *teste* of a writ of error need not be on a seal day. *ibid.*

- 8 A writ of error may operate as a stay of proceedings, though sued out before interlocutory judgment. *Emanuel v. Martin.* 2 M. & S. 334

- 9 Two things are requisite to make a writ of error a *supersedeas* of execution, viz. the allowance, (*i. e.* the delivery of the writ to the clerk of the errors) and putting in bail. If the writ of error be allowed before judgment, the time for putting in bail (four days) runs from the judgment ; if after judgment, from the time of the allowance. *Gravall v. Stimpson.* 1 B. & P. 478

- 10 The allowance of a writ of error may be served before the plaintiff is entitled to sign final judgment. *Payne v. Whaley.* 2 B. & P. 137

- 11 But the allowance of the writ of error, previous to the judgment being signed, is an irregularity permitted for the convenience of the party ; for the judg-

- ment in the action is the true foundation of the writ of error. *Gravall v. Simpson*. 1 B. & P. 479
- 12 A writ of error operates as a *supersedeas* from the time of the allowance though it be not served till after execution. *Meagher v. Vanduyck*. 2 B. & P. 370
- 13 So, though it be not returned. *Sampson v. Brown*. 2 E. R. 439
- 14 So, though the plaintiff be proceeding at a distant place in ignorance of the allowance. *Hawkins v. Jones*. 5 Taunt. 204
- 15 If a defendant in an action of covenant, sue out a writ of error in a plea of trespass on the case, and obtain an allowance of error, whereupon the record of the plea in covenant is transcribed: *Semble*, that it is no *supersedeas*; although the plaintiff, after receiving notice of the allowance of error, gave a rule to transcribe, and sued out two writs of *scire facias quare executionem non*. *Sampayo v. De Payba*. 5 Taunt. 82
- 16 If the plaintiff after obtaining a verdict in ejectment, sues out a writ of *habere facias possessionem* without waiting to tax his costs, the defendant's writ of error will not operate as a *supersedeas*. *Doe d. Messiter v. Dynley*. 4 Taunt. 289
- 17 If defendant bring a writ of error, and plaintiff bring another action on the judgment and recover; he cannot sue out execution on the second judgment till the writ of error be determined. *Benzell v. Black*. 3 T. R. 643
- 18 A rule for setting aside an execution, sued out after the allowance of a writ of error, discharged without costs, the writ of error having been taken out against *good faith*. *Cutts v. West*. 2 T. R. 183
- 19 But it is not enough that the defendant's attorney has declared the debt would be settled, and that time was all the defendant wanted. *Rawlins v. Perry*. 1 N. R. 307
- 20 So, on such declaration by the attorney, the Court of C. P. refused to set aside an execution issued after notice of the allowance of a writ of error. *Mitchell v. Wheeler*. 2 H. B. 30
- 21 The Court refused to set aside an execution issued pending a writ of error, where after judgment against defendants, their attorney proposed to give a *cognovit* for the debt and costs, payable at a future time, and offered to sign it, observing that it would save expense to the parties, as he should otherwise be under the necessity of bringing a writ of error to obtain the time he had requested in the *cognovit*, for that he must obtain time. *Spooner v. Garland*. 2 M. & S. 474
- 22 Where defendant on being served with process declared to plaintiff's attorney he could not pay, that it was useless to go on with the action, as he would delay all he could, and when he had got judgment, would bring a writ of error and put it off all in his power, and afterwards brought a writ of error, and on the plaintiff's proceeding to execution, requested him to keep it secret, and acknowledged that he had shewn him lenity, and requested that he might pay the money by instalments: Held, that the defendant had admitted that the writ of error was for delay, so as to prevent its being a *supersedeas*. *Hawkins v. Snuggs*. 2 M. & S. 476
- 23 The Courts have refused to set aside a defendant's execution for the costs of a nonsuit sued out after notice of allowance of a writ of error, on the ground that the writ of error could only be for delay. *Kempland v. Macaulay*. 4 T. R. 436
- And *Bor v. Bennett*. 1 H. B. 432
- 24 The Court will not set aside an execution sued out before, but executed after the allowance of a writ of error served on the sheriff and the party, if the plaintiff in error has not regularly put in bail. *Lane v. Bacchus*. 2 T. R. 44
- Secus*, if bail be put in in time. *ibid.*
- 25 The Court will not permit execution to be taken out pending a writ of error in Parliament, on the ground that the writ of error is brought for delay; merely because the defendant suffered the judgment to be affirmed in the Exchequer Chamber without any objection. *Harrison v. Grote*. 6 T. R. 400
- 26 The Court will not allow a plaintiff to issue a *test. fi. fa.* tested in the last Term on the return day of the original *fi. fa.* which was after the allowance and service of the writ of error and before the death of the plaintiff in error. *Kinnaird (Lord) v. Lyall*. 7 E. R. 296

- 27 And after the writ of error allowed, though afterwards abated by the death of the plaintiff in error, the defendant in error cannot take out execution without the leave of the Court. 7 E. R. 296
- 28 Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same Court is not a *supersedeas* of execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact *coram vobis*, which is not within the statutes requiring bail in error, the writ of error is or is not a *supersedeas* according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Triste*. 8 E. R. 412
- 29 The Court will not set aside a *testatum capias ad satisfaciendum*, sued out without an original *capias* to warrant it, though a writ of error has been brought, if a *capias ad satisfaciendum* has been afterwards sued out, returned and entered on the roll. *Milstead v. Coppard*. 5 T. R. 272
- IV. BAIL IN ERROR.
- N. B. See the difference of the form of the recognizance on writs of error in *Cam. Scuc.* and *K. B.* 2 T. R. 59, n. And see post, tit. SCIRE FACIAS.
- 1 Bail in error are not chargeable in an action upon their recognizance with mesne profits, where they have not been ascertained by writ of inquiry, pursuant to 16 & 17 Car. 2. c. 8. *Doe v. Reynolds (in error)*. 1 M. & S. 247
- 2 Where a *ca. sa.* is returnable against the principal on a particular day, before which a writ of error is allowed and served; that operates as a *supersedeas* to any proceeding against the bail, though the *ca. sa.* has lain four days in the office before the allowance of the writ of error. *Perry v. Campbell*. 3 T. R. 390
- 3 A writ of error allowed is a *supersedeas* in law to all further proceedings in the Court below; and therefore proceedings were set aside with costs for irregularity where the *ca. sa.* (being returnable on a day after the allowance of the writ of error) was returned after notice of such allowance, on the same day; and *sci. fa.* afterwards taken out against the bail. *Miller v. Newbald*. 1 E. R. 662
- 4 A writ of error allowed, though not returned, is of itself a *supersedeas*; and may be pleaded by the bail to have been issued and allowed after the issuing and before the return of the *ca. sa.* against the principal, so as to avoid proceedings against them in *scire facias* upon the recognizance of bail prosecuted after a return by the sheriff of *non est inventus* made pending such writ of error. *Sampson v. Brown*. 2 E. R. 439
- 5 The Court refused to stay proceedings against the bail, pending a writ of error on the judgment against the principal, where the principal had confessed that the writ of error was brought purely for delay. *Pool v. Charnock*. 3 T. R. 79
- 6 Upon a writ of error, sued out by the principal after the bail are fixed, and proceedings against them in *scire facias*, the Court will only stay proceedings against the bail pending the writ of error, on the terms of the bail's undertaking to pay the condemnation money, and the costs of the *scire facias*, and, (if it be a case in which there is no bail in error) to pay the costs also of the writ of error, if judgment should be affirmed. *Buchanan v. Alders*. 3 E. R. 546
- 7 On the *quarto die post* of the return of the *ca. sa.* against the principal the bail are fixed; and if after that time they apply to stay proceedings against themselves pending a writ of error, the Court of C. P. will not grant the application unless they undertake not only to pay the condemnation money, but also the costs of the action against themselves, of the application, and (where there is no bail in error) of the proceedings in error. *Copous v. Blyton*. 1 N. R. 67
- 8 Where a writ of error is allowed before the expiration of the time permitted to the bail to render their principal, the bail are entitled to stay the proceedings against them pending the writ of error, on the terms of undertaking to pay the damages recovered, or to surrender the defendant within four days of the determination of the writ, if determined in favour of the original plaintiff. *Sprang v. Monprivatt*. 11 E. R. 316

- 9 The same persons who were bail in the Court of King's Bench may justify again as bail upon a writ of error returnable in parliament. *Martin v. Justice*. 8 T. R. 639
- 10 A recognizance entered into by the bail in error without the principal is good. *Dixon v. Dixon*. 2 B. & P. 443
- 11 If, on a bond debt; double the sum secured by the bond be the sum for which the bail bind themselves in the recognizance in error, it is sufficient; though a further sum be due for interest and costs, and nominal damages have been recovered. *ibid.*
- 12 Bail in error must be put in within four days after final judgment signed, without reference to the time of the allowance, or serving the copy of it. *Jacques v. Nixon*. 1 T. R. 279
- 13 A defendant has four clear days after final judgment to put in bail in error. *Bennett v. Nichols*. 4 T. R. 121
- 14 Where the plaintiff in error within four days after being ruled to put in better bail, viz. on the day after *Hilary* Term, gave notice that he should justify the same bail on the first day of the ensuing Term, and two days before the first day of that Term gave notice of fresh bail: Held, that the latter bail were not entitled to justify, there being no reason assigned for the non-attendance of the former bail. *Lunn v. Leonard*. 1 M. & S. 366
- 15 Where the plaintiff in error was ruled in vacation to put in better bail, and took no notice of it until four days before the next Term, when he gave notice of added bail for the day of the Term: the Court would not permit the bail to justify. *Ostrèich v. Wilson*. 1 M. & S. 367, *notèd*
- 16 Where a writ of error is sued out before final judgment, the four days for putting in bail in error, are to be reckoned from the time when the taxation of costs is completed by the insertion of the sum. *Blackburn v. Kymer*. 1 Marsh. 278
- 17 It is not necessary under stat. 3 Jac. 1. c. 8. to give bail in error on a judgment, though in *debt*, for goods sold and delivered, and on an account stated. *Alexander v. Biss*. 7 T. R. 449
- 18 Though such judgment were by default. *Ablett v. Ellis*. 1 B. & P. 249
- 19 Nor on such judgment on a count on a promissory note. *Trier v. Bridgman*. 2 E. R. 359
- 20 To bring a case within the stat. 3 Jac. 1. c. 8. the Court of C. P. must see distinctly that a specific contract has been entered into. *Ablett v. Ellis*. 1 B. & P. 249
- 21 The statute should be construed liberally. *ibid.*
- 22 A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 Jac. 1. c. 8. either as a judgment upon an obligation conditioned for payment of money only; (the recognizance being to pay money, or do something else;) or as a judgment upon a contract which is there used in contradistinction to an obligation. *Dell v. Wild*. 8 E. R. 240
- 23 The Court held that bail in error was not necessary upon the statute, 3 Jac. 1. c. 8. in debt on bond, conditioned for the payment of money, and also for performing all covenants in a mortgage deed. *Butler v. Brushfield*. 10 E. R. 407
- 24 A mortgage deed, containing a covenant for the re-payment of the money, is within the meaning of the stat. 3 Jac. 1. c. 8.; a contract upon which bail in error is necessary. *Buckney v. Metham*. 3 Taunt. 383
- 25 If there be one count in the declaration for which debt would not lie at the time of making stat. 3 Jac. 1. c. 8. no bail in error is required. *Trier v. Bridgman*. 2 E. R. 360
- 26 Where a writ of error is brought up on a judgment on demurrer in the case of a *scire facias* sued out pursuant to the statute 8 & 9 W. 3. c. 11. s. 8. bail in error is not required. *Sparkes v. O'Kelly*. 1 Taunt. 168
- 27 As the bail in error cannot surrender the principal, they are not entitled to relief, though the principal become a bankrupt pending the writ of error. *Southcote v. Braithwaite*. 1 T. R. 624
- 28 A recognizance of bail in error for a less sum than double the sum recovered by the judgment, does not stay the execution; and the Court of C. P. will not permit the bail-piece to be amended by enlarging the penalty, in order to defeat the execution. *Reid v. Cooper*. 5 Taunt. 320
- 29 If a defendant, (the plaintiff in the action) upon judgment being affirmed, take in execution the body of the plain-

- tiff in error, for debt, damages, and costs in error, he does not thereby discharge the bail in error, but may sue them on their recognizance. *Perkins v. Petit.* 2 B. & P. 440
- 30 Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in; but they were made to pay the costs to the time, the plaintiff having been induced by former cases to proceed against them. *Gould v. Holmstrom.* 7 E. R. 580
- 31 Where bail in error was put in in vacation, and excepted to, and the plaintiff in error gave notice that they would justify on the first day of next Term, and before that day non-prossed his own writ of error, and the bail did not justify: Held, that the bail were not entitled to stay proceedings in an action against them upon the recognizance, nor to have an *exoneretur* entered on the bail-piece. *Dickenson v. Heselstine.* 2 M. & S. 210

V. PROCEEDINGS.

(a) *When staid pending Writ of Error.*

- 1 The Court stayed the proceedings in an action on a judgment, pending a writ of error brought to reverse that judgment, notwithstanding the plaintiff swore that the writ of error was brought for delay, and that he offered to the defendant's attorney to waive the judgment if he would point out any error, which was refused. *Christie v. Richardson.* 3 T. R. 78
But see *Entwistle v. Shepherd.* 2 T. R. 78
- 2 Where defendant's attorney, in effect told the plaintiff that the writ of error was brought for delay, the Court refused to stay proceedings pending it. *Law v. Smith.* 4 T. R. 436, n.
And *Miller v. Cousins.* 2 B. & P. 329
- 3 The same on a similar declaration by one of the bail. *Evans v. Gilbert.* 4 T. R. 436, n.
- 4 The Court will not stay the proceedings pending a writ of error on a judgment of nonsuit, without some declaration of the party, &c. that the writ of error was brought for delay. *Levet v. Perry.* 5 T. R. 669
- 5 Where the defendant's attorney had used expressions equivalent to such a declaration, the Court refused to stay

- the proceedings pending a writ of error. *Masterman v. Grant.* 5 T. R. 714
- 6 The defendant in an action on the judgment cannot apply to the Court to stay the proceedings pending a writ of error on that judgment, until he has put in bail. *Smith v. Shepherd.* 5 T. R. 9
- 7 And the bail must be perfected before he can make such application. *Bicknell v. Longstaffe.* 6 T. R. 455
- 8 Where an action is brought on a judgment recovered in K. B. and after judgment the defendant brings a writ of error, and obtains a rule to stay proceedings in the mean time, and the plaintiff dies before judgment affirmed, the Court will not permit judgment to be entered *nunc pro tunc.* *Bates, q. t. v. Lockwood.* 1 T. R. 637
- 9 But if the action be brought on a judgment recovered in the Common Pleas, the Court will not stay proceedings pending a writ of error without the defendant's giving judgment in the second action. *ibid.*

(b) *Irregularity in, what shall be, and how remedied.*

- 1 On writs of error, the question whether the Judges below were properly constituted cannot be entered into: it is sufficient that they were Judges *de facto* in a Court having jurisdiction of the subject-matter. *Milward v. Thatcher.* 2 T. R. 87
- 2 When a record is removed to K. B. from a County Palatine Court by a writ of error, and that writ is *non-prossed*, this Court will award execution. *Cowperthwaite v. Owen.* 3 T. R. 657
- 3 A writ of error in parliament may be *non-prossed* without carrying over the transcript to the Court of Error. *Milborn v. Copeland.* 1 M. & S. 104
- 4 After the return day of the *scire facias quare executionem non*, &c. sued out by the defendants in error, and a four-day rule to assign errors served on the plaintiff in error, though judgment of *non-pros* were entered up, and execution sued out before the expiration of the rule to assign errors, yet if error were not assigned in time, the execution stands good. *Wright v. Peckham (in error).* 15 E. R. 204
- 5 After the rule to certify the record in error has run out, the defendant in error may sue out his writ of *scire fa-*

cius quare executionem non, &c. though the transcript was not then actually delivered and filed, as it ought to have been. *Branscombe v. Hughes (in error)*.

15 E. R. 646

- 6 The clerk of the errors in C. P. in transcribing the record, by mistake entitled it generally instead of specially, and error was assigned thereon; after which he amended the transcript by inserting the special memorandum; the Court would not restore the transcript to the state in which it stood at the time when the plaintiff in error assigned his error. *Randole v. Bailey, in error*.

1 M. & S. 232

And see *Dickinson v. Plaisted*.

7 T. R. 474

- 7 If there be a bill of exceptions to the rejection of evidence in the Court of Great Sessions in Wales, and upon error in K. B. the evidence is deemed admissible, the Court will award a *venire de novo* into the next English county. *Davies v. Pierce*.

2 T. R. 125

- 8 A bill may be filed to warrant judgment after the want of a bill has been assigned in error. *French v. Cook (in error)*, in *Cam. Scac.* 1 Taunt. 126

- 9 If judgment be given for the plaintiff on one count in a declaration, and a distinct judgment for defendant on another, and the defendant bring a writ of error to reverse the judgment on the first count, the Court of Error cannot examine the legality of the judgment on the second count, no

error being assigned on that part of the record. *Campbell v. French (in error)*.

6 T. R. 200

- 10 Where judgment for the defendant on a special verdict is reversed in the *Exchequer Chamber*, that Court, on motion, will give a final judgment for the plaintiff. *Denn d. Mellor v. Moore (in error)*.

1 B. & P. 30

- 11 If the plaintiff recover a judgment against two defendants in K. B., and one of them bring a writ of error in *Cam. Scac.* the plaintiff cannot charge the other defendant in execution till the record be remitted into the Court of K. B. notwithstanding the writ of error might have been quashed immediately, because not brought by both defendants. *Laroche v. Washborough*.

2 T. R. 737

- 12 If a writ of error is sued out before final judgment, but the allowance not served until after the writ of error is spent, the plaintiff may afterwards regularly sign final judgment. *Stevens v. Ingram*.

3 Taunt. 384

- 13 Where a verdict is given for a greater sum than the amount of the damages laid in the declaration, and for that cause a writ of error is brought, the Court of C. P. will permit the plaintiff to enter a *remittitur* of the excess above the sum laid in the declaration, on payment of the costs of the writ of error. *Pickwood v. Wright*.

1 H. B. 643

- 14 Neglect to deliver paper books in error punished by payment of costs. *Johnson v. Prescott*.

4 Taunt. 147

ESCAPE.

I. WHAT SHALL BE.

II. ACTION FOR, BY WHOM BROUGHT.

III. LIABILITY OF SHERIFFS AND OTHER OFFICERS.

IV. WHEN A PRISONER MAY BE RETAKEN.

V. PLEADINGS.

VI. EVIDENCE.

I. WHAT SHALL BE.

- 1 An escape from the rules of the *King's Bench* prison without the mar-

shal's knowledge, is not a voluntary escape. *Bonafous v. Walker*. 2 T. R. 126

- 2 If a sheriff's officer, having taken a prisoner in execution, permit him to go about with a follower of his before he takes him to prison, it is an escape. *Benton v. Sutton*.

1 B. & P. 24

- 3 *Qu.* Whether it would not have been an escape also, if the officer himself had accompanied him? *ibid.*

- 4 A voluntary return of a prisoner, after an escape, before action brought, is equal to a retaking on a fresh pursuit; but it must be pleaded. *Bonafous v. Walker*.

2 T. R. 126

II. ACTION FOR, BY WHOM BROUGHT.

- 1 An administratrix may maintain an action in her own name against the marshal for the escape of a prisoner who is in execution on a judgment obtained by her as *administratrix*. *Bonafous v. Walker*. 2 T. R. 126
- 2 The nominal plaintiff in ejectment, in whose name the mesne profits have been recovered may sue for an escape of the defendant in execution for such mesne profits. *Doe v. Jones*. 2 M. & S. 473

III. LIABILITY OF SHERIFFS AND OTHER OFFICERS.

- 1 If a sheriff, (having arrested a defendant on *mesne* process,) keep him in his custody after the return of the writ, and then carry him to prison, he is not liable to an action on the case as for an escape; if the Jury find that the plaintiff has not been delayed or prejudiced in his suit. *Plank v. Anderson*. 5 T. R. 37
- 2 In an action against the sheriff for the escape of a prisoner on *mesne* process, the plaintiff was nonsuited, because he could not prove any debt against the prisoner who escaped. *Alexander v. Macaulay*. 4 T. R. 611
- 3 The bailiff of a liberty, who has the return and execution of writs, is liable to an action of debt for an escape, if he remove a prisoner taken in execution to the county gaol, situate out of the liberty, and there deliver him into the custody of the sheriff. *Boothman v. Surrey (Earl.)* 2 T. R. 5
- 4 An action of *debt* will lie against a gaoler for the escape of a prisoner in execution, though the escape were without the knowledge or fault of the gaoler, who in such case can avail himself of nothing but the act of God, or the King's enemies, as an excuse. *Alsept v. Eyles*. 2 H. B. 108
- 5 In debt against a sheriff or gaoler for an escape of a prisoner in execution, the Jury cannot give a *less sum* than the creditor would have recovered against the prisoner, namely, the sum indorsed on the writ, and the legal fees of execution. *Bonafous v. Walker*. 2 T. R. 126
- 6 If a mob demolish a gaol by which the debtors escape, the sheriff or gaol-

er is answerable to the creditors for such escape. *Elliott v. Norfolk (Duke.)* 4 T. R. 789

- 7 If upon the execution of a writ of *capias ad satisfaciendum*, which requires the sheriff to take, and keep the body, so that he may have it on the return-day of the writ at *Westminster* to satisfy the plaintiffs of their damages, costs, and charges; the sheriff before the return-day receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape: and his return under the common rule of *cepi corpus*, and that he detained the prisoner until he satisfied him (the sheriff) the *levy-money* indorsed on the writ, which he had ready, as commanded, &c. is of no avail. *Slackford v. Austin*. 14 E. R. 468
- 8 A sheriff who carries a prisoner taken in execution to a lock-up-house within his own bailiwick, and keeps him there 14 days before the return of the writ, is not thereby guilty of an escape. *Houlditch v. Birch*. 4 Taunt. 608
- 9 If a sheriff's officer on an arrest take an undertaking for the appearance of the party, instead of a bail-bond, without the plaintiff's assent, and bail above is not duly put in, the sheriff is liable to an action for an escape, and the Court will not relieve him by permitting him to put in and justify bail afterwards. *Fuller v. Prest*. 7 T. R. 109
- 10 *B.* being in custody at the suit of *A.* in a joint action against *B.* and *C.*, *B.* justifies bail in an action entitled by mistake "*A.* against *B.*" only, and a rule so entitled is served on the marshal of *K. B.* who thereupon discharges *B.* out of custody, he not being charged in custody in any more than one action at the suit of *A.*: Held, that the marshal was liable in an action for an escape. *White v. Jones*. 5 E. R. 292
- 11 The sheriff having arrested a party permitted him to go at large without taking a bail-bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: Held, that he was not liable either to an action of escape or false return. *Pariente v. Plumbtree*. 2 B. & P. 85 And see *Hamilton v. Wilson*. 1 E. R. 383

IV. WHEN A PRISONER MAY BE RETAKEN.

- 1 A bailiff, who has arrested a prisoner on mesne process, may retake him before the return of the writ, though he voluntarily permitted the prisoner to escape immediately after the arrest. *Atkinson v. Matteson.* 2 T. R. 172
- 2 After a voluntary escape, the sheriff cannot retake a prisoner. *Atkinson v. Jameson.* 5 T. R. 25

V. PLEADINGS.

- 1 In an action against the sheriff for an escape on mesne process, it is sufficient to aver that the sheriff had not the body at the return of the writ, without negating the appearance of the party, or his putting in bail. *Stovin v. Perring.* 2 B. & P. 561
- 2 If the writ issue from the King's Bench and the declaration for an escape aver that the defendant had not the body "before our said Lord the King" on the return day, it is bad on special demurrer. *ibid*
- 3 A plea to an action against the marshal, for the escape of a prisoner in custody for a debt, after stating the return of the prisoner into custody after such escape, before action brought &c. ought to shew a detention of him by the officer down to the commencement of the action, or a legal discharge from that detention: and therefore, though the plea only stated, that after the return of the prisoner into custody, the defendant did thereupon *then and afterwards keep and detain* the said prisoner in his custody in execution, &c. under and by virtue of the commitment, &c.: and the replication traversed, that after the prisoner's return the defendant did *keep and detain* him in custody in execution, &c. *in manner and form* as stated in the plea; a *detention down to the commencement of the action*, or until a legal discharge from such detention, is virtually implied in the plea and included in the traverse; and therefore the plea is negated by shewing in evidence, that after the prisoner's return he again escaped and died out of custody. *Chambers v. Jones.* 11 E. R. 406
- 4 To debt on an escape, defendant pleaded a negligent escape, and voluntary return, since which the prisoner had been safely kept; plaintiff in his replication admitted the negligent es-

cape and voluntary return, but alleged that the prisoner had not been safely kept since that time, having again escaped, which was a different escape from that mentioned in the plea, and the same for which the action was brought; defendant in his rejoinder traversed the allegation that the prisoner had not been safely kept, and then pleaded to the latter part of the replication as to a new assignment, a negligent escape, a voluntary return, and safe keeping since, in the same manner as in the plea. This latter part of the rejoinder the Court of C. P. refused to strike out on motion, but held it bad on special demurrer. *Griffin v. Eyles.* 1 B. & P. 413

VI. EVIDENCE.

- 1 Under a count for a *voluntary* escape, the plaintiff may give evidence of a *negligent* escape; and the defendant may plead a retaking on a fresh pursuit to such a count, without traversing the voluntary escape. *Bona-fous v. Walker.* 2 T. R. 126
- 2 In escape against the sheriff, if the plaintiff aver in his declaration, that J. S. was arrested "under a writ indorsed for bail by virtue of an affidavit now on record," he must produce the affidavit in evidence, though the latter part of the averment was unnecessary. *Webb v. Herne, (Sheriff of Middlesex.)* 1 B. & P. 281
- 3 In an action against the marshal for an escape, it being alleged in the declaration that the prisoner was arrested on mesne process, and brought before a Judge at chambers by virtue of a writ of *habeas corpus*, and was by him thereupon *committed* to the custody of the marshal, *as by the record thereof now remaining in the court* appears, &c. such allegation is either impertinent and surplusage; (for properly speaking, such documents are not records nor capable of becoming so) or, considering them as *quasi of record*, the allegation is sufficiently proved by the production of them from the office of the clerk of the papers of the King's Bench prison, with whom they were properly deposited. *Wigley v. Jones.* 5 E. R. 440
- 4 In an action for an escape out of execution, the declaration alleged that the prisoner was, by *habeas corpus*, brought before a Judge of K. B. and

by him committed to the custody of the marshal, "as by the said writ of *habeas corpus*, and the said commitment thereon now remaining in the said court more fully appears;" held that evidence of a commitment by a

Judge of K. B. but not filed of record, would not support the action. *Turner v. Eyles.* 3 B. & P. 456

5 Held also that the above allegation (even if unnecessary) must be proved as laid. *ibid.*

ESCHEAT.

1 The statutes 8 H. 6. c. 16. & 18 H. 6. c. 6., prohibiting the granting to farm of lands seised into the king's hands, upon inquest before escheators, until such inquest be returned in the Chancery or Exchequer, and for a month afterwards, *if the king's title in the same be not found of record*, unless to the party grieved who shall have tendered his traverse to such inquest; and avoiding all grants made contrary thereto; extend to the case of an escheat upon the death of the tenant last seised, without heirs, where no immediate tenure of the crown was found by the inquest. And as the crown could not grant to a stranger in such a case without office, neither can the plaintiff in ejectment recover upon the demise of the crown. *Doe d. Hayne, & Rex v. Redfern.*

12 E. R. 96

2 The 8th section of Stat. 2 & 3 Ed. 6. c. 8. (which is in general terms and not confined to the particular inquisitions mentioned in other clauses of the Act,) extends to avoid any such inquisition on office before escheators, not finding of whom the lands are holden; in the same manner as if the jury had expressly found their ignorance of the tenure; and a *melius inquirendum* shall be avoided. 12 E. R. 96

3 *Quare*, Whether at common law, upon the death of the tenant last seised of the land, without heirs, the right and possession must be presumed to be immediately in the crown, without office, as though the person last seised were the king's immediate tenant; the king's title not appearing by any matter of record, and the possession not having been vacant from the death of the tenant last seised? *ibid.*

ESSOIGN.

1 There cannot be an essoign in a personal action. *Argent v. The Dean and Chapter of St. Paul's.* 2 T. R. 16, n. And see 16 E. R. 8

2 When a corporation are defendants, they are not entitled to an essoign. *ibid.*

3 Where an essoign is not adjourned to a particular day, and no motion made to quash it, the declaration cannot be delivered till the first day of the Term. 2 T. R. 16

4 The essoign day is considered for many purposes the first day of the Term. *Belk v. Broadbent.* 3 T. R. 185

5 And if a writ be pleaded as sued out

on a day between the essoign day and the first day of the Term, and there be a special demurrer for that cause, the objection will not prevail, though the Court do not in fact sit till the *quarto die post.* *ibid.*

6 If, on the return of a writ in a personal action the defendant cast an essoign, which is not adjourned to a particular day, and it is not quashed, and the plaintiff deliver his declaration on the first day of the following Term, the defendant is not entitled to an imparlance. *Rooke v. The Earl of Leicester.*

2 T. R. 16

ESTOPPEL.

- 1 In general, the grantor is estopped by his deed to say he had no interest. *Fairtitle d. Mytton v. Gilbert.* 2 T. R. 171
- 2 But that principle does not apply where the grantor is a trustee for the public. *ibid.*
- 3 Still less can it apply where the trustee, deriving his authority under a public Act of Parliament, grants that which the Act does not empower him to do. 2 T. R. 171
- 4 A. asserting that he had a right to a patent machine, covenanted with B. that he should use it in a particular manner, in consideration of which B. covenanted that he would not use any other; in an action by A. on the covenant, B. is not estopped by his covenant from pleading in bar to the action, *that the invention was not new, or that the patentee was not the inventor*; but he may thus shew that the patent was void, and consequently that there was no consideration to him. *Hayne v. Malby.* 3 T. R. 438
- 5 But in an action by the assignee of the patentee against the patentee himself, he is estopped from shewing that it was not a new invention against his own deed. *Oldham v. Langmead.* 3 T. R. 439 & 441
- 6 Plaintiff agreed to serve as a seaman during a voyage to and from the *West Indies*: on his arrival there he was claimed as a runaway slave, and delivered up to his master; whereupon it was agreed between the plaintiff, his master, and the captain, that upon payment of a sum of money by the captain unto the master, the latter should *manumit* the plaintiff; he covenanted to serve the captain as a seaman for three years, at certain stipulated wages; plaintiff was accordingly *manumitted*, and having served the captain on the homeward voyage, brought an action against him to recover wages for that voyage on a *quantum meruit*: Held, that he was estopped by his covenant from claiming more than the sum stipulated. *Wiltiams v. Brown.* 3 B. & P. 69
- 7 A lessor is not estopped by his deed from going into evidence to shew that a cellar, which is situate under the demised premises particularly described, was not intended to be demised. *Doe d. Freeland v. Bent.* 1 T. R. 701
- 8 If the heir apparent of a copyholder in fee surrender in the lifetime of his ancestor, and survive him, the heir of such surrenderer is not estopped by that surrender of his ancestor from claiming against the surrenderee. *Goodtitle v. Morse.* 3 T. R. 365
- 9 *Quere*, Whether in the case of a freehold estate, if the heir had made a feoffment under such circumstances, his heir would not be estopped? *ibid.*
- 10 An assignee of a lease by indenture is estopped by the deed which estops his assignor. *Taylor v. Needham.* 2 Taunt. 278
- 11 Devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; nor will such a surrender operate by estoppel against the parties or their heirs. *Doe d. Blacksell v. Tomkins.* 11 E. R. 185
And see *Doe d. Lushington v. Landaff.* 2 N. R. 491
- 12 A lease executed by the tenant for life in which the reversioner, who was then under age, was named, but it was not executed by him till after the death of the tenant for life; *quere*, How far the lessee might have been estopped in an action of covenant brought by the reversioner if he had not himself shewn these facts by his declaration? *Ludford v. Barber.* 1 T. R. 86
- 13 If a verdict be found on any fact or title, distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties or their privies, in respect of the same fact or title. *Outram v. Morewood, Clerk.* 3 E. R. 346
- 14 N. B. Where plaintiffs are estopped from maintaining an action for money had and received on an illegal contract. See *De Mitton v. De Mello, ante*, page 70.
- 15 A defendant is estopped by the condition of a bond from pleading an indenture of lease. *Horin v. Searle, ante*, page 168.

16 Defendant is estopped by the recognition of bail entered into for him by the name in which he is sued from

pleading a misnomer though he himself be no party to the recognizance.
Meredith v. Hodges. 2 N. R. 453

EVIDENCE.

I. RECORDS.

Where evidence, and how proved.

II. JUDICIAL PROCEEDINGS.

When admissible.

III. STATE PAPERS.

Where evidence.

IV. PUBLIC INSTRUMENTS.

When, and how far admissible.

V. PRIVATE WRITINGS.

(a) *Where evidence, and herein of the proof and execution of Deeds.*

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VI. HEARSAY AND REPUTATION.

In what cases admissible.

VII. PAROL.

(a) *To explain written Instruments.*

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VIII. ADMISSIONS.

(a) *By parties.*

(b) *— Wife.*

(c) *— Partners.*

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IX. DEGREE OF EVIDENCE.

(a) *Best or secondary.*

(b) *Presumptive.*

X. NEGATIVE AVERMENTS.

I. RECORDS.

Where evidence, and how proved.

N. B. See the respective titles in the Digest to which the head of EVIDENCE may apply.

1 Upon an appeal against a rate made under a private Act of Parliament, the respondent appearing to answer the appeal, and admitting that he had made the rate by virtue of the Act of Parliament, a printed copy of which was

produced in Court by the appellants; and the Sessions having thereupon decided on the merits of the appeal, notwithstanding an objection of the respondent that the printed copy was not examined by the rolls of Parliament: the Court refused to quash the order, which was removed thither by *certiorari*. *Rex v. Shaw.* 12 E. R. 479

2 A judgment of ouster against one corporator is conclusive evidence against another who derives title under him. *Rex v. The Mayor of York.* 5 T. R. 68

3 *Qu.* Whether a judgment of acquittal *in rem* in the Exchequer, is conclusive as to the illegality of the seizure of the goods in a subsequent action to recover them from the seizing officer? *Cooke v. Sholl.* 5 T. R. 256

4 A judgment of condemnation *in rem*, in such case is conclusive. *ibid.*

5 To prove a copy of a record, it is sufficient to prove that the paper agrees with what the officer of the court read as the contents of the record: it is not necessary for the persons examining, to exchange papers and read them alternately. *Rolf v. Dart.* 2 Taunt. 52

6 An averment of a judgment obtained against A. B. is not proved by evidence of a judgment against A. B. and C. B. *Readshaw v. Wood.* 4 Taunt. 13

7 A conviction of a justice of peace having competent jurisdiction, upon which the plaintiff was arrested and imprisoned, is, till reversed or quashed, conclusive evidence in favour of the justice against whom an action of trespass and false imprisonment was brought. *Strickland v. Ward.* 7 T. R. 635, n.

8 In case, against a judgment creditor for maliciously suing out an *alias fi. fa.* after a sufficient execution levied upon the plaintiff's goods under the first *fi. fa.* held that the sheriff's return in-

dorsed upon the two writs (which writs had been produced in evidence by the plaintiff as part of his case), wherein the sheriff stated that he had forborne to sell under the first, and had sold under the second writ, by the request and with the consent of the now plaintiff, were *prima facie* evidence of the facts so returned; credence being due to the official acts of the sheriff between third persons. *Cyfford v. Woodgate.* 11 E. R. 297

- 9 The Sheriff's return to a writ of *fi. fa.* that he has levied the money, is not sufficient evidence to prove that he has paid it over to the judgment-creditor so as to charge the latter with the receipt of it, in an action for money had and received. *Cator v. Stokes.*

F. M. & S. 599

II. JUDICIAL PROCEEDINGS.

When admissible.

- 1 A bill in Chancery is ~~no~~ evidence of the facts contained in it, not even of those on which the prayer of relief is founded. *Doe d. Bowerman v. Sybourn.* 7 T. R. 2
- 2 Except in the instance of a bill filed by an ancestor, which may be evidence of a family pedigree therein set forth. *Taylor v. Cole.* 7 T. R. 3, n.
- 3 If a defendant give in evidence an answer in Chancery of the plaintiff, it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay. *Roe d. Pellett v. Ferrars.* 2 B. & P. 548
- 4 Where the plaintiffs filed a bill in Chancery for the examination of a witness *de bene esse*, to which the defendant did not put in any answer, and the plaintiffs afterwards obtained an order of the Court for the examination of the witness, and gave notice thereof to the defendant, and of the interrogatories intended to be put, and on the same evening examined the witness, who left London the next day for a foreign country, and never returned; and the plaintiffs afterwards obtained a further order that the deposition of the witness should be published in order that it might be read in evidence at the trial: Held, that the deposition was admissible evidence at the trial, for, as the defendant had notice of the time of the examination, he might have cross-examined at that

time, or applied for further time for that purpose; and it must be presumed from his not having done either, that he did not wish to cross-examine. *Cazenove v. Vaughan.* 1 M. & S. 4

- 5 The judgment book is not evidence of the judgment entered therein, though the record has not been made up, and though the person interested in proving the judgment be no party to the action. *Ayrey v. Davenport.*

2 N. R. 474

- 6 The examination of a pregnant woman, taken before a justice of peace under stat. 6 G. 2. c. 31., is admissible evidence on an application to the Quarter Sessions to make an order of filiation on the putative father, if the woman die before such application is made; and if not contradicted, ought to be conclusive. *Rex v. The Inhabitants of Ravenstone.* 5 T. R. 373

- 7 A certificate by justices of the peace that a highway (indicted) is in repair, is a legal instrument, recognized by the courts of law, and admissible in evidence after conviction when the Court are about to impose a fine. *Rex v. Mawbey, Bart.* 6 T. R. 619

- 8 And consequently it is illegal to conspire, to pervert the course of justice, by producing a false certificate in evidence to influence the judgment of the Court. *ibid.*

- 9 The origin of these certificates is not now to be traced. 6 T. R. 635

- 10 Certificates of bishops with respect to marriage are received in evidence. 6 T. R. 637

- 11 So were formerly certificates from the captain of Calais. 6 T. R. 637

- 12 So are the certificates of the Judges in Wales, respecting the practice of their Courts. 6 T. R. 638

- 13 In an action on a foreign judgment, it is not sufficient to prove the Judge's hand-writing subscribed to it, without proving that the seal affixed thereto is the seal of the Court. *Henry v. Adey.* 3 E. R. 221

- 14 The certificate of a British vice-consul at the Brazils, of the amount of the proceeds of damaged goods, which by the law of that country are compellable to be sold under his inspection, is not evidence. *Waldron v. Coombe.*

3 Taunt. 163

- 15 An inquisition made by the sheriff's jury to ascertain to whom the property of goods taken under a *fi. fa.* belongs,

though found in favour of *A.* is not admissible evidence in an action of trover for the goods brought by *A.* against the sheriff. *Lutkow v. Eamer.*

2 H. B. 437

- 16 In an action by plaintiff claiming under an *elegit* for use and occupation, an examined copy of the judgment roll containing the award of *elegit* and return of the inquisition, is evidence of plaintiff's title, without proving a copy of the *elegit* and of the inquisition. *Ramsbottom v. Buckhurst.*

2 M. & S. 565

- 17 Upon an indictment against the parish of *H.* for not repairing an highway, an award made by commissioners under an Inclosure Act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants without shewing that the commissioners had given the previous notices required by the Act before they ascertained the boundaries; it appearing that the usage had not been pursuant to the award, the defendants having since the award, as well as before, repaired the highway. *Rex v. The Inhabitants of Haslingfield.*

2 M. & S. 558

III. STATE PAPERS.

Where evidence.

- 1 A gazette is evidence of all acts of state. *Rex v. Holt.* 5 T. R. 436
- 2 And therefore a gazette, in which was stated that certain addresses had been presented to the king from different bodies of subjects, expressing their loyalty, &c. was admitted in evidence to prove an averment in an information for a libel, "that divers addresses, &c. had been presented to his Majesty by divers of his loving subjects," &c. *ibid.*
- 3 The journals of the House of Lords are evidence to prove, not only the address of the lords to the king, but the king's answer also. 5 T. R. 445
- 4 The articles of war, as printed by the king's printer, are evidence of such articles. *Rex v. Withers.*

5 T. R. 442, 446

IV. PUBLIC INSTRUMENTS.

When, and how far admissible.

- 1 The prison books of the *Fleet* and *King's Bench* prisons, though admissible evidence to prove the period of the commitment and discharge of a prisoner, are not admissible to prove

the cause of his commitment. *Salte v. Thomas.* 3 B. & P. 188

- 2 The entry in the register book of the custom-house of the certificate of a transfer of a vessel to a particular person, is not even *prima facie* evidence for a stranger to charge that person as owner, unless the entry be shewn to be made by the authority of the person named in it. *Frazer v. Hopkins.*

2 Taunt. 5

- 3 The entry in the *South Sea Company's* books of the minutes of a licence granted by them, is admissible in evidence, as being a declaration adverse to their interest, without calling as a witness the officer who made the entry. *Hodgson v. Fullarton.*

4 Taunt. 787

- 4 The certificate and affidavit of a ship's registry are not evidence to charge as owners any of the persons therein named as such, other than those who have joined in the affidavit on which the registry is obtained. *Cooper v. South.*

4 Taunt. 802

- 5 Property in a ship must be proved by evidence of possession in the plaintiff, his vendors, or bailees, accompanied with a certificate of registry. *Pirie v. Anderson.*

4 Taunt. 652

- 6 By the 51 G. 3. c. 60. (Local Act) the register book of the *Bristol Canal Company* is evidence, in an action brought by them for calls, of the defendant's being proprietor of the number of shares affixed to his name. *The Bristol and Taunton Canal Navigation Company v. Amos.*

1 M. & S. 569

- 7 Proof of the execution of a bill of sale of a ship to the defendant is not evidence to charge him as an owner with stores furnished to the ship, without shewing his assent to such sale. Neither is the register of the ship, naming him as a part-owner, made by and upon the oaths of others, *prima facie* evidence to charge him as owner, without his assent or adoption. *Tinkler v. Walpole.*

14 E. R. 226

- 8 An entry in the court-rolls of a manor, stating the mode of descent of lands in the manor, is admissible evidence of the mode of descent although no instances of any person having taken according to it be proved. *Roe d. Beebee v. Parker.*

5 T. R. 26

- 9 A customary of a manor, appearing to be of great antiquity, and delivered down with the court-rolls from stew-

- ard to steward, although not signed by any person, is good evidence to prove the course of descent within the manor. *Denn v. Spray*. 1 T. R. 466
- 10 Parchment writings preserved among the muniments of a manor dated 1698 and 1717, purporting to be signed by several copyholders of the manor, stating an unlimited right of common in the commoners, which having been found inconvenient, they had agreed to stock the common in a certain restricted manner, were admitted by the Court as evidence of reputation as to the general right of common. *Chapman v. Cowlan*. 13 E. R. 10
- 11 Ancient grants are not to be received in evidence, unless they can be accounted for; as coming from the hands of some one connected with the estate to which they relate. *Swimmer-ton v. Marquis of Stafford*. 3 Taunt. 91
- 12 The mere production in Court of a diploma of Doctor of Physic under the seal of one of the Universities, is not in itself evidence to shew that the party named in the diploma is entitled to that degree. *Moises v. Thornton*. 8 T. R. 303
- 13 Proof of a curacy augmented is made by shewing an order for the augmentation of it, entered in a book, and signed by the governors of Queen Anne's bounty, according to stat. 1 G. 1. st. 2. c. 10. s. 20.; without going on to prove that the money was afterwards laid out in land, and allotted by deed under the corporation seal of the governors to be annexed to the curacy, and that such deed was enrolled within six months after its execution, according to that statute, s. 21. and 9 G. 2. c. 36. *Doe d. Graham, (Clerk) v. Scott, (Clerk)*. 11 E. R. 478

V. PRIVATE WRITINGS.

(a) *Where Evidence, and herein of the proof and execution of Deeds.*

N. B. *When secondary evidence is admissible, see post, page 319. And see post, tit. STAMPS.*

- 1 A receipt is not conclusive evidence against the party signing it; but he may shew that he did not receive the sum or thing in question. *Srarton v. Rastall*. 2 T. R. 366
- 2 If the plaintiff's attorney, previously to bringing an action for a distress

under the warrant of a magistrate make out two papers precisely similar, purporting to be demands of a copy of the warrant pursuant to 21 G. 2. c. 44. s. 6. and having signed both for his client, deliver one to the defendant, the other is sufficient evidence at the trial. (*Dissentiente Rooke J.*) *Jory v. Orchard*. 2 B. & P. 39

- 3 There is no difference between civil actions and criminal prosecutions as to the evidence of papers. In neither case is the party bound to produce evidence against himself; but even in a criminal prosecution, notice may be given to him to produce papers in his possession, and in case of his refusal or neglect, other evidence may be given of their contents. *The Attorney General v. Le Merchant*. 2 T. R. 201, n.

- 4 And notice to the defendant's agent or attorney in such case is sufficient. *ibid.*

- 5 A copy of an attorney's bill, the original of which has been delivered to the defendant, may be admitted in evidence without proof of notice to produce the original; and is conclusive as to the reasonableness of the items. *Anderson v. May*. 2 B. & P. 237

- 6 An averment in a declaration on the stat. 8 Ann. c. 9. against the master of an apprentice for not inserting the true consideration in the indenture, "that A. B. the apprentice, by a certain indenture, executed on, &c. put himself apprentice to the defendant," &c. may be proved by the production of that part of the indenture executed by the defendant, in which it is recited that A. B. had put himself apprentice, &c. *Burleigh v. Stibbs*. 5 T. R. 405

- 7 In trover, for the certificate of a ship's registry, the certificate may be proved by the production of the registry from which it was copied, though no notice has been given to produce the certificate itself. *Bucher v. Jarratt*. 3 B. & P. 143

- 8 A deed coming out of the hands of the opposite party after notice to produce it, must *prima facie* be taken to be duly executed, and will be received in evidence without proof of the execution. *Rex v. The Inhabitants of Middelton*. 2 T. R. 41

- 9 Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other;

- which when produced appeared to have been executed by the party producing it, and third persons, and to be attested by a subscribing witness; the Court held that the production of it in that manner, did not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gordon v. Secretan.* 8 E. R. 548
- 10 Every instrument, to the signing of which there is a witness, should be proved by that witness, if living, or by proving the handwriting of the witness in case he is domiciled in a foreign country, or in case he cannot be found, so that there may be a presumption of his death. (*Per Kenyon, C. J.*) *Barnes v. Trompowsky.* 7 T. R. 266
- 11 The answer of the obligor of a bond to a bill filed for a discovery, in which he admitted the bond to have been executed by him, is only secondary evidence and cannot be received as evidence *per se* of the execution; without shewing that due diligence had been used to discover who the subscribing witness was, who was alleged to be unknown. *Call. Bart. v. Dunning.* 4 E. R. 53
- 12 In trover by the assignees of a bankrupt to recover goods taken by the defendant under a fraudulent bill of sale given by the bankrupt to the defendant; (and which was an act of bankruptcy,) the defendant's examination before the commissioners, in which he admitted the execution of the deed, is sufficient evidence to prove the execution, and supersedes the necessity of calling the subscribing witness. *Bowles v. Lungworthy.* 5 T. R. 366
- 13 Where, in an action on a bond, evidence was offered that diligent inquiry had been made after one of the subscribing witnesses at the places of residence of the obligors and obligee, and that no account could be obtained of such a person, who he was, where he lived, or any circumstance relating to him; held sufficient to let in proof of the hand-writing of the other subscribing witness, who had since become interested as administratrix to the obligee, and was a plaintiff to the record. *Cutliffe v. Sefton.* 2 E. R. 183
- 14 An instrument executed abroad, and witnessed by a foreigner residing there, may be proved by evidence of the hand-writing of the witness and of the contracting party, but not by the latter alone. *Barnes v. Trompowsky.* 7 T. R. 265
- 15 If a defendant calls on a plaintiff to produce at the trial a deed in his custody to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed when produced. *Pearce v. Hooper.* 3 Taunt. 60
- 16 The Court of C. P. (*per Buller J.*) held that in debt on a bond executed abroad, where one of the attesting witnesses was dead and the other beyond the process of the Court, it was sufficient to prove the hand-writing of the deceased witness, without proving the hand-writing of the other witness or of the obligor; the hand-writing of the attesting witness when proved, being evidence of every thing on the face of the paper. *Adam & Ux v. Kerr.* 1 B. & P. 360
- 17 If, on fair, serious, diligent inquiry, without evasion, an attesting witness to an intermediate assignment of a lease is not to be found; having absconded from his creditors, evidence of his hand-writing is admissible to prove the attestation. *Crosby v. Percy.* 1 Taunt. 304
- 18 If a subscribing witness to a deed be abroad, out of jurisdiction of the Court and not amenable to its process at the time of the trial, evidence of his hand-writing is admissible; though it do not appear whether he be domiciled or settled abroad. *Prince v. Blackburn.* 2 E. R. 250
- 19 If an attesting witness has set out to leave the kingdom, his absence is sufficiently accounted for, although in fact his vessel may unexpectedly have been beaten back into an English port by contrary winds, just at the time of the trial. *Ward v. Wells.* 1 Taunt. 461
- 20 A bond having been executed by A. and attested by one witness, was carried into an adjoining room and shewn to B., who was desired to attest it also, which he accordingly did in the presence of A.: Held, that B. was a good witness to prove the execution. *Parke v. Meara.* 2 B. & P. 217

- 21 If the subscribing witness to a bond be interested therein as well at the time of the attestation as at the trial, he cannot be examined as a witness to prove the execution; nor is proof of his hand-writing sufficient for that purpose. *Swire v. Bell*. 5 T. R. 371
- 22 But the hand-writing of the obligor having been proved, the Court refused to set aside a verdict given for the plaintiff. *ibid.*
- 23 Where a subscribing witness is appointed executor to the obligee, proof of the hand-writing of the former may be given in an action on the bond. 5 T. R. 371

(b) Hand-writing.

- 1 A Clerk of the Post-Office, accustomed to inspect franks for the detection of forgeries, may be examined as a witness to prove that the hand-writing of an instrument is an imitated, and not a natural hand, though he never saw the supposed person write; and also to prove that two writings, suspected to be imitated hands, were written by the same person. *Goodtitle d. Revett v. Braham*, (trial at bar.) 4 T. R. 497
- 2 Where a person had been dead a great number of years, whose hand-writing was required to be proved, it was done by shewing the similarity of the hand-writing in question to the hand-writing of his will; and no objection was taken to it, either at the bar or by the Court. *Moorewood v. Wood*. 14 E. R. 327, *in notâ.*
- S. P. *Doe d. Brunc v. Rawlins*. 7 E. R. 282, *n.*

VI. HEARSAY AND REPUTATION.

In what cases admissible.

- 1 *Q.*—If there be any other instance in which hearsay evidence is admissible but these two, namely, the cases of pedigrees and prescriptions? *Rex v. Inhabitants of Eriswell* 3 T. R. 707
- 2 A certain paper being found along with other papers relating to the private concerns of the person last seised, after his death, in a drawer in his house; which paper purported to be the will of a person answering the description of his grandfather, made in 1738, but which was found cancelled, and no evidence was given of its ever having been acted upon, or probate of it taken out; is yet evidence of its recognition by the party last seised, as

the declaration of his ancestor concerning the state of his family, so as to let in the contents of it for the purpose of shewing that that ancestor acknowledged a brother of the name of *Thomas* to be older than another brother of the name of *William*; assuming the Jury to be satisfied of the fact, that the paper so found was kept there by the person last seised with a knowledge of its contents, and that no imposition was practised. *Doe d. Johnson v. The Earl of Pembroke*. 11 E. R. 504

- 3 Hearsay evidence of the declaration of a deceased father, as to the place of birth of his bastard child, is not admissible to prove the birth-settlement of such child. *Rex v. The Inhabitants of Erith*. 8 E. R. 539
- 4 Declarations by tenants are admissible evidence after their death, to shew that a certain piece of land is parcel of the estate which they occupied; and proof that they exercised acts of ownership in it, not resisted by contrary evidence, is decisive. *Davies v. Pierce*. 2 T. R. 53
- 5 Where the plaintiff claimed as devisee in remainder under a will 27 years ago, under which there was no possession; declarations by the tenant, who was in possession at that time, that he held as tenant to the deviser, are admissible evidence to prove seisin in the deviser. *Holloway v. Rakes*. 2 T. R. 55
- 6 Where the right to the soil is in issue, entries written in a book by the steward of a former owner, from whom title is derived of receipts of money, by the steward for that owner, as a satisfaction for trespasses committed on the place in question, are admissible evidence if the steward be dead. *Barry v. Bebbington*. 4 T. R. 514
- 7 An entry of the receipt of money by officers of a township from the officers of another township of a proportion of church-rates made in a parish book, is evidence, to charge the latter officers with the same proportion in future. *Stead v. Heaton*. 4 T. R. 669
- 8 And another entry, explaining the proportions, made on the same page, is also admissible evidence. *ibid.*
- 9 Upon a question whether certain ancient books, from 1586 to 1693, preserved in the archives of the dean and chapter of *Exeter*, intitled *Reynolds*,

and containing columns of the names of their estates, with the rents reserved on each, and *solvits* written in different hand-writing against such rents, were entries made by the receivers of the dean and chapter, charging themselves with the receipt of the rents, parol evidence cannot be received to prove them to be receiver's books, by shewing that the receivers of the dean and chapter for the last sixty years had kept their books of accounts in the same form. *Doe d. Webber v. Thynne (Lord)*. 10 E. R. 206

10 But it appearing that some of the entries in such books, (though not the entries as to the rent of the estate in question) contained internal evidence of their being the books of receivers, by such entries as "*solvit mihi*;" and "*solvit per me*," signed with the initials N. W.; which entries imported that N. W. was therein accounting to the dean and chapter for money paid to himself, and with the receipt of which he debited himself: the Court directed a new trial in order to have the inspection of the books again submitted to the Judge at *Nisi Prius*. *ibid.*

11 Entries made by a third person deceased, in his books of receipts of rent from his tenant for a particular estate, are not evidence to prove the identity of the land in a cause between two others. *Outram v. Morewood*.

5 T. R. 121

12 If a person have peculiar means of knowing a fact, and make a declaration and written entry of that fact, which is against his interest at the time; it is evidence of the fact, as between third persons after his death, if he could have been examined to it in his lifetime; and therefore an entry made by a man-midwife in a book, of having delivered a woman of a child on a certain day, referring to his ledger in which he had made a charge for his attendance, which was marked as *paid*, is evidence upon an issue as to the age of such child at the time of his afterwards suffering a recovery. *Higham v. Ridgway*. 10 E. R. 109

13 Entries of charges made by an attorney in his books, shewing the time when a certain lease prepared for a client of his was executed, which charges were shewn to have been paid, are evidence after the attorney's death, to shew that the lease executed under

a power to lease in possession, and not in reversion, which lease bore date the 31st of August, 1770, and purported to grant a term from the 29th of September then next ensuing, was not in fact executed till after the 29th of September, inasmuch as the charge for drawing and engrossing the lease was under the date of "October, 1770." *Doe v. Robson*.

15 E. R. 32

14 A bill of lading signed by a master of a vessel, since deceased, for goods to be delivered to a consignee or his assigns, he paying freight, is admissible as evidence of the consignee having an insurable interest in the goods. *Per Lawrence, J. Haddow v. Parry*.

3 Taunt. 303

15 But if the master guards his acknowledgment by saying, "contents unknown," so that he does not charge himself with the receipt of any goods in particular; the bill of lading alone is not evidence, either of the quantity of the goods, or of property in the consignee. *ibid.*

16 Upon an issue between A. and B, whether C. died possessed of certain property, evidence may be given of declarations made by C. that she had assigned the property to A. *Ivat v. Finch*.

1 Taunt. 141

17 What a dead witness has sworn on a former trial between the same parties is evidence in the cause, and may either be read from the Judge's notes, or proved upon oath by the notes or recollection of any person who heard it. *The Mayor of Doncaster v. Day*.

3 Taunt. 262

18 *Quare*.—Whether the declarations of a pauper as to his settlement be admissible evidence to prove his settlement after his death? *Rex v. The Inhabitants of Eriswell*.

3 T. R. 707

19 Where a testator, between fifty and sixty years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or had been acquired by his own purchase; evidence of reputation that the land had belonged to Sir J. S., and was purchased

of him by the first testator, is not admissible, though coupled with corroborative parol evidence that the land had belonged to Sir J. S. before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, *amongst other lands*, by the testator, of Sir J. S. *Doe v. Thomas.* 14 E. R. 323

20 2u.—Whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, be admissible? Two Judges against two. But one of those who held the affirmative thought it required other evidence of the right to be first laid as a foundation. It seems, however, that such evidence may be given as to a particular custom, though not as to a private prescription: by three to one. *Moorewood v. Wood.*

14 E. R. 327, *notd.*

81 Traditionary reputation is evidence of boundary between two parishes and manors; and this, though the old persons deceased making the declarations claimed rights of common on the respective wastes, which might be enlarged by such evidence; there being no litigation pending or in contemplation at the time; which could induce a belief that they had in view to make evidence for themselves, though the boundary had long before been and afterwards continued to be *veratu questio*. *Nicholls v. Parker.* 14 E. R. 331, *notd.*

22 But evidence of reputation of a boundary between two estates was rejected. *Clothier v. Chapman.*

14 E. R. 331, *notd.*

23 To an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his soil and freehold, the plaintiff replied that *the trees* were his freehold, and not the freehold of the defendant; and this was held to be proved by shewing that they grew on a certain woody belt, 15 feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed a part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their

pleasure, cut down, for their own use, the trees growing within the belt; and that the several owners of the different closes inclosing the belt never felled trees there, though they felled them in other parts of the same closes; and that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors; in which the several owners acquiesced.

Stanley, Bart. v. White. 14 E. R. 332

24 Evidence that the tenants of defendant's estate for 30 years and upwards had publicly, and without interruption from the lord, and with his knowledge, cut and sold the planted wood on the estate in large quantities, was held to be admissible in this case, and therefore a new trial was granted: but evidence of reputation that the tenants of defendant's estate had the right of cutting and selling planted wood, was held not to be admissible. *Blackett, Bart. v. Lowes.* 2 M & S. 49

25 Evidence of reputation of the custom of a manor that in default of sons, the eldest daughter, and in default also of daughters, the eldest sister, and in case of the death of all the descendants of the eldest daughter or sister, the descendants of the other daughters or sisters respectively of the person last seised should take; is proper to be left to the Jury of the existence of such a custom as applied to a great nephew (the grand-son of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of the eldest daughter and eldest sister, and the son of an eldest sister: the existence of such extended custom in adjacent manors seems to be no evidence of the custom in the particular manor. *Doe d. Foster v. Sisson.* 13 E. R. 62

26 An allegation, in an action for a false return to a *mandamus*, of a custom of payment by the chapelwardens of A. to the churchwardens of B., may be supported by evidence of a custom of payment to officers acting only for the township of B., not co-extensive with the parish of B., but who have always been described as the churchwardens of B. *Stead v. Hewson.* 4 T. R. 669

27 Upon a question whether the lord of a manor was entitled to the coals

under a freehold tenement within the manor, it is competent to him to shew by parol evidence that there was a known distinction within the manor between old and new land, and that in fact the plaintiff's lands lay within the boundary of the new land; and also to shew by evidence of general reputation, as well as acts of taking coal under the lands of other freeholders within the same boundary, that the right to the coals under the plaintiff's lands was in the lord. *Burnes v. Mauston.* 1 M. & S. 77

- 28 Trespass *quare clausum fregit*. Plea of prescriptive right of common over the *locus in quo* at all times for his cattle, *levant and couchant*; replication prescribing in right of his messuage to use the *locus in quo* for tillage with corn, and until the taking in of the corn to hold and enjoy the same in every year, and traversed the defendant's prescription; on which issue joined: Held, that many persons besides defendant having a right of common over the *locus in quo*, evidence of reputation as to the right claimed by plaintiff was admissible, a foundation being first laid by evidence of the enjoyment of such right; and that plaintiff's right might legally exist as a qualification of defendant's right, and was not repugnant to it. *Weeks v. Sparke.* 1 M. & S. 679

VII. PAROL.

(a) To explain written Instruments.

- 1 Parol evidence may be admitted to explain a written instrument or agreement which on the face of it appears to be equivocal. *Atwood v. Kinnaird.* 8 T. R. 379
- 2 No parol evidence can be received to explain an agreement, in which there is no latent ambiguity. *Coker v. Guy.* 2 B. & P. 565
- 3 Parol evidence may be admitted to explain a latent ambiguity in a will, or codicil. *Thomas d. Evans v. Thomas.* 6 T. R. 671
Lord Walpole v. The Earl of Cholmondeley. 7 T. R. 138
- 4 Parol evidence may be admitted to shew that at the time of making a will the deviser gave instructions to the attorney to insert the name of A. in the will, when the attorney inserted that of B. by mistake. *Thomas d. Evans v. Thomas.* 6 T. R. 671
- 5 But parol evidence of declarations made by the testator before the making of a will cannot be received to contradict the will. *ibid.*
- 6 If a devise be to A. by name, with a description annexed not applicable to A., but shewn by parol evidence to be applicable to B., so that it is uncertain which of them was intended, the devise is void, and the heir at law shall take; and no parol evidence can be admitted to shew, that previous to the making of his will, the deviser had declared that he meant to leave the premises to A. 6 T. R. 671
- 7 But if the description annexed to A.'s name be not applicable to any other person, it may be rejected as surplusage; and then A. will take under the devise. *ibid.*
- 8 Parol evidence may be admitted to shew that the name of A. was inserted by mistake for the name of B. 6 T. R. 671
- 9 But where the deviser made one will in 1752, and another in 1756, without disposing of his personalty, or appointing executors by a codicil (reciting that by his last will dated in 1752, he had made no disposition of his personalty) disposed of it, and appointed executors; it was held that there was no latent ambiguity so as to let in parol evidence to shew that the testator intended by the codicil to confirm the will of 1756, and not to republish that of 1752. *ibid.*
- 10 A. by his will devised lands to B., and afterwards upon his marriage conveyed them by lease and release to trustees to other uses, with the usual limitations in marriage settlements; on a trial at bar the Court of C. P. refused to admit parol evidence to shew that A. meant his will to remain in force, unless revoked by the subsequent conveyance. *Goodtitle d. Holford v. Orway.* 2 H. B. 516
- 11 A. devised his estate at Lushill in the county of Wilts, and Hearn and Buckland in the county of Kent, "to his son in fee;" at the time of the devise A. had lands in the parish of Hearn, and also in the several parishes of C. W. S. R. and S. all which he purchased by one contract of one person, and used to call his "Hearn

estate," or "*Hearne-Bay* estate;" the estate at *Lushill* in *Wilts.* and also a farm called *Buckland Farm* in *Kent*, were sold before the testator's death, and at the time of his death he had no estate in *Kent*, except that which lay in the parishes of *Hearne*, *C. W. S. R.* and *S.* *Qu.* Whether the above facts were admissible in evidence to shew that the testator intended to pass the land in the several parishes of *C. W. S. R.* and *S.* as well as that in the parish of *Hearne*? *Whitbread v. May*.

2 B. & P. 593

- 12 Upon a devise to the testator's wife of all his wines, &c. for housekeeping, in addition to the settlement he had made her upon his copyhold estate; and to his niece *M.* the rents and profits of his new inclosed freehold cow pasture close in *North Collingham*, during the life of his wife; and then to two nephews all his personal estate, to be divided between certain nephews and nieces, and their sons and daughters: and after the decease of his wife, he devised to the same two nephews all his furniture, plate, &c. and "all his copyhold estates in *North and South Collingham*," and all other his personal estate, to sell and divide amongst his nephews and nieces, &c., including *T. B.* who, he declared, should be an equal sharer in this division of his real and personal estate: Held, that extrinsic evidence could not be given, that the settlement on his wife included a certain freehold close, mistakenly there enumerated as one of several copyhold closes settled, and which was in fact intermingled with the copyholds, (as were also some other freehold closes, the bounds of which were no longer distinguishable from the copyhold, and all of which freeholds were included in the settlement;) for the purpose of shewing that by the devise of "all his copyhold estates in *North and South Collingham*," after his wife's decease, in trust to be divided, &c. the freehold close in question passed; as meant to include all his real estate in settlement upon his wife, and which settlement was referred to in the first devise to the wife. And as the settlement which was thus referred to in the former part of the will was not evidence for that purpose, so neither were other instruments and papers,

not referred to, admissible for the same purpose; such as, 1st. a bond of the same date with the settlement, and in aid of it, speaking only of copyhold to be settled; 2ndly. the rough draught of the settlement altered by the testator; 3rdly. a book indorsed "*Collingham* estate survey," kept with the muniments of his property, and including the freehold in question, without distinguishing it from the copyhold closes; and 4thly. a rental kept in the same place, and on which was indorsed by the testator, that "all the rents of the copyhold lands in *North and South Collingham*, &c. were settled on his wife for life." *Doe d. Brown v. Brown*.

11 E. R. 441

- 13 Where there is an estate sufficient to satisfy a devise according to one meaning of the description of the premises, collateral evidence is not admissible to shew that the testator meant to use the description in a more extensive sense. *Doe d. Chichester, Bart. v. Oxenden*.

3 Taunt. 147

- 14 Devise of "my estate of *Ashton*," the testator having a maternal estate comprehending a manor and capital farm, and lands, in the parish of *Ashton*, as well as several other estates, some in the adjacent parishes, some 10 and 15 miles distant; evidence is not admissible to shew that he was accustomed to call all his maternal estate, his *Ashton* estate, to raise the inference that he meant to devise the whole by that name. 3 Taunt. 147

- 15 Devise of "all that my farm called *Trogues farm*, now in the occupation of *A. C.*," is not necessarily limited to the lands of *Trogues farm* in the occupation of *A. C.*, but may be shewn by evidence to extend to other lands of *Trogues farm* not in his occupation. *Goodtitle d. Radford v. Southern*.

1 M. & S. 299

(b) Vary or discharge written Instruments.

- 1 Parol evidence has been admitted of questions asked by the testator, at the time of executing his will, whether the contents were the same as those of a former will, to which he was answered in the affirmative; in order to set aside the latter will on the ground of fraud. *Doe d. Small v. Allen*. 8 T. R. 147

So evidence may be given to shew that one will was substituted for another.

ibid.

2 The hand-writing of one dead, who was an attesting witness to the supposed execution of a bond being proved in an action on the bond, *Heath J.* permitted the defendant to give in evidence that the deceased had in his dying moments acknowledged that he had been concerned in forging the bond, cited by Lord *Ellenborough*.

6 E. R. 195

3 In trover for a bond, the plaintiff may give parol evidence of it to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it; as the nature of the action gives sufficient notice to the defendant of the subject of inquiry to prepare himself to produce it, if necessary, for his defence. *How v. Hall*.

14 E. R. 274

4 After proof of the loss of an order of removal, parol evidence may be given of it. *Rex v. The Inhabitants of Metheringham*.

6 T. R. 556

5 Evidence of an usage at the Navy Office to pay bills indorsed by an attorney in his own name, and negotiated by him, under such a power, cannot be received to enlarge the operation of the power. *Hogg v. Smith*.

1 Taunt. 347

6 The verbal declarations or warranting of an auctioneer at the time of the sale, are not admissible evidence to contradict the printed conditions. *Gunnis v. Erhart*.

1 H. R. 289

And *Powell v. Edmunds*. 12 E. R. 6

7 Where the plaintiff, having contracted by charter-party sealed, to let a ship, then in the *Thames*, to freight for eight months, from the day of her sailing from *Gravesend*, and that she should sail from the *Thames* to any British port in the *Channel*, to lade goods and sail to the *West Indies*, &c. afterwards agreed by parol that the ship should lade in the *Thames*, and that freight should commence from her entry outwards at the custom-house; the Court held, that the parol contract was distinct from and not inconsistent with that by deed, and might, be enforced by action of *assumpsit*. *White v. Parkin*. 12 E. R. 578

VIII. ADMISSIONS.

(a) By Parties.

1 The whole of the account which a party gives of a transaction must be

taken together, and his admission of a fact disadvantageous to himself shall not be received, without receiving at the same time his contemporaneous assertion of a fact favourable to himself; and that, not merely as evidence that he made such a counter claim, but as admissible evidence of the existence of the matter in his discharge, which he asserts. *Randle v. Blackburn*.

5 Taunt. 245

2 The defendant may give in evidence the declarations or admissions of the plaintiff on the record to defeat the action, although such plaintiff appear to be only a trustee for a third person. *Baerman v. Radenius*. 7 T. R. 663

3 Declarations of a party accompanying an act done, and tending to explain such act, are evidence for the latter purpose, as part of the *res gesta*.

Arcson v. Lord Kinnaird. 6 E. R. 193

4 A rated parishioner not being bound, upon an appeal touching the settlement of a pauper, to give evidence against his own parish, the opposite parish may give evidence of his declarations as to the facts in issue; the weight due to which must depend upon his means of knowledge as to the facts so declared, and the genuineness of the declarations, to be collected from circumstances. *Rex v. Inhabitants of Hardwick*.

11 E. R. 578

5 Upon appeal against an order of removal, the declarations of a rated inhabitant of the appellat parish are evidence against that parish, without calling the inhabitant and shewing that he refused to be examined. *Rex v. The Inhabitants of Whitley Lower*.

1 M & S. 636

(b) By wife.

1 In an action by husband and wife in right of the wife as executrix, no declarations of the wife can be given in evidence by the defendant. *Alban v. Pritchett*.

6 T. R. 680

And see *Rex v. Cliviger (Inhabitants)*.

2 T. R. 263

2 In an action by the husband upon a policy of insurance on the life of his wife, declarations by the wife made by her when lying in bed apparently ill, stating the bad state of her health at the period of her going to *M.* (whither she went a few days before in order to be examined by a surgeon, and to get a certificate from him of

good health, preparatory to making the insurance) down to that time, and her apprehensions that she could not live ten days longer, by which time the policy was to be returned, are admissible in evidence to shew her own opinion, who best knew the fact of the ill state of her health at the time of effecting the policy, which was on a day intervening between the time of her going to *M.*, and the day on which such declarations were made; and particularly after the plaintiff had called the surgeon as a witness to prove that she was in a good state of health when examined by him at *M.*; his judgment being formed in part from the satisfactory answers given by her to his inquiries, and this being but a sort of cross-examination of her. *Aveson v. Lord Kinnaird.* 6 E. R. 188

(c) By Partner.

- 1 Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone: Held, that his declaration was evidence against all the partners, and therefore they could not sue jointly upon such a contract. *Lucas v. De la Cour.* 1 M. & S. 249

(d) By Agent.

- 1 Offers made by the plaintiff's attorney in the hearing of a third person to do an act relative to the defendant, which lay within the scope of his authority, are not admissible evidence to affect the plaintiff with such offer. *Wilson v. Turner.* 1 Taunt. 398
- 2 Letters of an agent to his principal, in which he is rendering him an account of the transactions he has performed for him, are not admissible in evidence against the principal. *Langhorn v. Allnutt.* 4 Taunt. 511
- 3 Letters written by an agent in making a contract, which form part of the contract or of the *res gesta*, are admissible in evidence against the principal. *ibid.*
- 4 The letters of an agent of the assured in a foreign country, stating the contents of letters from another agent of the assured, are not evidence against the principal. *Kahl v. Jansen.* 4 Taunt. 565

- 5 Letters written to the assured by his agent or correspondent on the continent, are not admissible as evidence against him. *Reynor v. Pearson.* 4 Taunt. 662

IX. DEGREE OF EVIDENCE.

(a) Best or secondary.

- 1 Where plaintiff declared on bond *with a proferit*, on *non est factum* pleaded, secondary evidence of the bond by means of a copy, and shewing that the defendant had taken away the original, and before action brought said that he had burnt it, is not sufficient to sustain the declaration. *Smith v. Woodward.* 4 E. R. 585
- 2 If two parts of an instrument are prepared, but one only is stamped, the party having the custody of the unstamped part may give secondary evidence of the contents of the agreement, if the other party refuse, on notice, to produce the stamped part. *Garnons v. Swift.* 1 Taunt. 507
- 3 If an attesting witness appears upon search made at the Admiralty to be serving in the navy, his absence is sufficiently accounted for to render secondary evidence admissible. *Parker v. Hoskins.* 2 Taunt. 223
- 4 If a licence to trade is lost, the next best evidence is the register of it in the books of the Secretary of State. *Rhind v. Wilkinson.* 2 Taunt. 237
- 5 Upon appeal against an order of removal, the appellant township, having produced one of its inhabitants as a witness, who, being examined upon the *voir dire*, stated that he was the occupier of a cottage there of the annual value of 25 shillings, but that he was not rated to nor paid any public rate or tax; such answer must be taken to be true for the purpose; and it cannot be objected to his examination in chief, that the best evidence of the fact was not given, by the production of the rate itself. *Rex v. The Inhabitants of the Township of Gisburn.* 15 E. R. 57
And see *Williams v. E. I. C.*, next page.

(b) Presumptive.

- 1 If it be stated that the justices of our lord the king were assigned by letters patent under *his seal of Great Britain*, it will be presumed to be the *Great Seal.* *Rex v. Yandell.* 4 T. R. 521

2 Nothing is to be presumed after verdict to have been proved but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. *Spieres v. Parker.* 1 T. R. 141

3 If a person, claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the toll were before the time of legal memory in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls, and such original grant is a good consideration to support the demand. *Ld. Pelham v. Pickersgill.* 1 T. R. 660

4 The Sessions presumed that an indenture of apprenticeship (executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him the last 12 years), was properly stamped in proportion to the apprentice fee of 12l. received by the master; although the deputy registrar and comptroller of the stamp-duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period. And the judgment of the justices was confirmed in *K. B. Rex v. Long Buckby Inhabitants.* 7 E. R. 45

5. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. *Miles v. Rose.* 1 Marsh. 313

6 A deed whereby a person conveys "one full moiety," is *prima facie* evidence that the grantor is owner of the other moiety, and a notice of the contents of a deed is not to be presumed from the fact of attesting another person's execution thereof. *Reed v. Williams.* 5 Taunt. 257

X NEGATIVE AVERMENTS.

1 Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it in pleading. So, where any act is required to be done by one, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists on it. Therefore where a plaintiff declared that the defendants who had chartered his ship, put on board a dangerous commodity, by which a loss happened, *without due notice* to the captain or any other person employed in the navigation, it lay upon him to prove such negative averment. And it being shewn that the commodity was delivered by the defendants' officer, and received by the first mate of the plaintiff's ship, (which first mate was dead, and no other person was present to depose to the conversation which passed between them): Held, that the best evidence of the fact could only be given by the defendants' officer, who delivered the commodity on board to such first mate, and that the action could not be sustained by secondary evidence. *Williams v. The East India Company.* 3 E. R. 192

2 Where the issue is on the life or death of a person once existing, the proof lies on the party asserting the death. *Wilson v. Hodges.* 2 E. R. 312
And see *Dickson v. Evans.* 6 T. R. 57

EXCISE.

See tit. ACTION IV. (b) ante, 10,
CONVICTION, *ante, 191,*
OFFICER, *post.*

1 Persons charged with offences against

the excise laws, (who by the 26 Geo. III. c. 77. s. 18. and 35 Geo. III.) are to be committed to gaol in case they cannot find bail; and in whose names an appearance, and the plea of

- not guilty, are to be entered within a time to be limited by this Court, to any indictment or information exhibited against them for the same, unless they appear and plead,) are allowed by rule of Court six days to enter an appearance and plead, in case they are confined within 40 miles of London, and 8 days if above 40 miles. *Reg. Gen. T. 35 G. 3. 6 T. R. 400*
- 2 On 21st June an excise-officer granted a permit to the defendant to bring into his cellar 64 gallons of liquor; on the 25th he went to the defendant's cellar where he found a cask containing 76 gallons, for which quantity no permit had been obtained; the defendant being thereon convicted in the penalty of 20*l.* under stat. 9 G. 2. c. 28. s. 7. together with the value of the whole 76 gallons of liquor: Held a good conviction. *Rex v. Bass. 5 T. R. 251*
- 3 The information being required to be laid within three months after the offence committed, by 24 G. 2. c. 40. s. 29. referring to prior statutes, (1 W. & M. c. 4. s. 16. & 12 & 13 W. 3. c. 11. s. 17.) and the information in that case having been laid on the 15th September, and the discovery made on the 25th June, it is to be presumed that the liquor was then brought in, unless the contrary appear; in which case the information would be exhibited in time. *5 T. R. 251*
- 4 A person who sells spirituous liquors by retail without a licence from two justices of the peace, is liable to the penalties of stat. 5 G. 3. c. 46. though he has a licence from the commissioners of the excise to retail spirituous liquors. *Rex v. Downs. 3 T. R. 560*
- 5 The exception in stat. 26 G. 2. c. 28. that nothing in that Act shall extend to alter the time of granting licences in cities and towns corporate, does not exempt such places from the operation of other parts of that Act; but magistrates in such districts must give the same notice of their meeting to grant licences, as justices for a county give. *ibid.*
- 6 *Quære*, Whether Westminster be a city within stat. 26 G. 2. c. 28? *3 T. R. 560*
- 7 A person who intends to become a dealer in foreign wine must take out his licence and enter his warehouse, before he lays in his stock; and a dealer in wine is not entitled to a permit to remove wine sold, which wine was laid in before he took out his licence. *Rex v. The Commissioners of Excise. 2 T. R. 381*
- 8 Dealing means buying, in stat. 26 G. 3. c. 59. *ibid.*
- 9 A permit for the removing of wine from one place to another under stat. 26 G. 3. c. 59. dated 9 o'clock in the morning of one day, and giving the party one hour for removing it out of the stock of A., and two days more for delivering it into the stock of B., expires at ten in the morning of the second day after it is granted. *Cooke v. Sholl. 5 T. R. 255*
- 10 After the duties of excise are charged on wash made for extracting spirits, by stat. 26 G. 3. c. 73. if any part of the wash is lost by accident, the manufacturer cannot be relieved from the respective proportion of the duty, as for an overcharge. *Rex v. Sikes. 7 T. R. 56*
- 11 The stat. 26 G. 3. c. 77. s. 13. which enacts that no person shall prosecute "any action, bill, plaint, or information, in any of the King's Courts," for the recovery of any excise penalty &c. unless prosecuted by the Attorney-General, or some revenue officer, is confined to the superior Courts of record; and therefore an information for a penalty for removing wax candles from the place of manufactory before the duty paid (by s. 10 of the same statute) may be prosecuted before the commissioners of excise by one not averred to be such officer. *Rex v. Stevenon. 2 E. R. 363*
- 12 And the information stating in effect that the candles were home-made candles seems to be sufficient, without expressly naming them *British* candles, the words of the Act being "*British* spirits, soap, and candles:" though supposing this would have been a ground for error or appeal in the original information, it is no objection to an information in a collateral proceeding for conspiring to prevent the examination of a witness before the commissioners of excise on such prior information, which is only stated by way of recital in the information for the conspiracy. *ibid.*
- 13 The same answer applies to an uncertainty (if any) in the charge of the first information recited; in negating the excuse of a prior condem-

nation as well as prior payment of the duty before removal; though that seems proper enough. *Rex v. Steven-*
ton 2 E. R. 362

14 So the issuing of process against the original defendant, or the joining issue on the information recited, is immaterial as to the charging the offence of the subsequent conspiracy. *ibid.*

15 Neither is it necessary, (at least in such collateral proceeding,) to recite that the original information was prosecuted before the commissioners by name, though it be not averred to have been before three or more of them, according to stat. 1 G. 2. stat. 2. c. 16. *ibid.*

16 Neither is it necessary, in reciting such prior information, averred to have been made within three months after the offence committed, according to statute 1 W. & M. c. 54. s. 13, also to aver notice thereof to the original

defendant within a week, as is directed to be given by the same statute.

2 E. R. 362

17 Where the stat. 7 & 8 W. 3. c. 30. s. 24. enables the commissioners of excise to summon witnesses before them, upon a charge exhibited against another for an offence against the excise laws, and an information in a collateral proceeding recited such summons to have been duly made; proof of a printed summons distributed and issued in blank by order of the commissioners to their agents, and afterwards filled up by one of the latter, without any special directions from the board is sufficient, although not signed by any of the commissioners, nor issued in their individual names: such having been the constant usage in that respect since the introduction of the excise. *Rex v. Steven-*
ton 2 E. R. 362

EXCOMMUNICATION.

1 A writ *de excommunicato capiendo*, stating that the defendant was excommunicated in a cause of "defamation and slander merely spiritual," is good. *Rex v. Payton*. 7 T. R. 153

2 If the sentence of the greater instead of the lesser excommunication be pronounced, it is only a ground of appeal;

and the Court will not quash a writ *de excommunicato capiendo* for that objection. 7 T. R. 153

3 It is not necessary that the defendant should be resident in the diocese at the time of the excommunication; it is sufficient if he were there at the time of the citation. 7 T. R. 153

EXECUTION.

I. CAPIAS AD SATISFACIENDUM.

How far considered as Satisfaction.

II. FIERI FACIAS.

(a) *Relation of, and how sued out.*

(b) *What may be taken under it.*

(c) *Sheriff's duty in executing.*

(d) *Landlord's claim for Rent.*

III. LEVARI OR SEQUESTRARI FACIAS.

How sued out and executed.

IV. EXPENSES, HOW LEVIED.

I. CAPIAS AD SATISFACIENDUM.

How far considered as Satisfaction.

1 A separate *ca. sa.* against one defendant on a joint judgment against two, cannot be supported. *Clark v. Clement*. 6 T. R. 525

2 If the plaintiff consent to discharge one of several defendants taken on a joint *ca. sa.* he cannot afterwards retake him, or take any of the others. 6 T. R. 525

3 If one of two defendants taken on a joint *ca. sa.* be discharged under an Insolvent Debtors' Act, that will not operate as a discharge of the other;

the discharge of the former not being with the actual consent of the plaintiff. *Nadin v. Battie*. 5 E. R. 147

II. FIERI FACIAS.

(a) Relation of, and how sued out.

See post, tit. PRISONER.

- 1 A judgment signed in any part of the Term, or the subsequent vacation, relates back to the first day of the Term, notwithstanding the death of the defendant before judgment actually signed; and an execution against the defendant's goods may be taken out upon it, tested the first day of the Term. *Bragner v. Langmead*. 7 T. R. 20
 - 2 But if the execution be not tested until after the defendant's death, it is irregular. 7 T. R. 24
 - 3 Judgment on a warrant of attorney, entered in *Easter* vacation against a defendant who died in *Easter* Term, is good; but a writ of execution, tested after the defendant's death, cannot be sued out upon the judgment, till it be revived against the defendant's representative by *scire facias*. *Heapy v. Parria*. 6 T. R. 363
 - 4 If a *fi. fa.* be tested before defendant's death, but delivered to the sheriff and executed after, the execution is regular. *Waghorne v. Langmead*. 1 B. & P. 571
 - 5 The statute of frauds only secures the possession of innocent vendees under an execution: but as to the rest of the world, the goods are bound from the delivery of the writ to the sheriff. *Hutchinson v. Johnson*. 1 T. R. 729
 - 6 The defendant having given a warrant of attorney to confess judgment, took the benefit of an Insolvent Act, then became bankrupt, and obtained his certificate; after which the plaintiff entered up a general judgment, and sued out a general execution: Held regular, no dividend appearing to have been made. *Edmonson v. Parker*. 3 B. & P. 185
- And see post, tit. INSOLVENT.
- 7 An execution against the goods of a bankrupt, taken out after his certificate is signed by the creditors, and before it is allowed by the Chancellor, is valid. *Callen v. Meyrick*. 1 T. R. 361
 - A *testatum fi. fa.* was set aside for irregularity, no original *fi. fa.* having issued to warrant it. *Brand v. Mears*. 3 T. R. 388

- 9 But such an irregularity may be cured by the subsequent production of a *fieri facias*. 3 T. R. 388, and *Cowperthwaite v. Owen*. 3 T. R. 658
- 10 A writ of *fieri facias*, directed in the first instance to the bailiff of the *Isle of Ely* out of the Court of King's Bench, is erroneous and void, and the bailiff executing the same is guilty of a trespass against the party whose goods are taken in execution. *Grant v. Bagge*. 3 E. R. 128
- 11 A plaintiff may sue out execution by a different attorney from the attorney in the cause, without an order of Court for changing the attorney. *Tipping v. Johnson*. 2 B. & P. 307
- 12 If judgment be entered up for the penalty of a bond given to secure an annuity, and the defendant be taken in execution thereon, when the warrant of attorney under which such judgment was entered up only authorized the taking out execution for the arrears, the Court will set aside the execution *in toto*, and not merely charge the defendant *pro tanto*. *Tilly v. Best*. 16 E. R. 163
- 13 If a plaintiff consent to the defendant's being discharged out of execution on his undertaking to pay at a future day, he cannot afterwards sue out any execution on that judgment, in the event of the defendant's not fulfilling his undertaking. *Tanner v. Hague*. 7 T. R. 420
- 14 A defendant cannot be taken in execution twice on the same judgment, though he were discharged the first time by the plaintiff's consent upon an express undertaking that he should be liable to be taken in execution again, if he failed to comply with the terms agreed on, which he did. *Blackburn v. Stupart*. 2 E. R. 243

(b) What may be taken under it.

- 1 A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of *fi. fa.* at the suit of a judgment creditor. *Scott v. Scholey*. 8 E. R. 467
- And *Metcalfe v. Scholey*. 2 N. R. 461
- 2 If A. lend money on the security of a ship, and take possession before execution executed at the suit of B., the vessel cannot be seized under B.'s execution. *Ladbroke v. Crickett*. 2 T. R. 649
- 3 Goods of a testator in the hands of his

executor cannot be seized in execution of a judgment against the executor in his own right. *Farr v. Newman.* 4 T. R. 621

(But see *Whaley v. Booth*, 4 T. R. 625, n. and the opinion of the Court of C. P. 1 B. & P. 295)

- 4 If an executrix use the goods of her testator as her own, and afterwards marry, and then treat them as the goods of her husband, she shall not be allowed to object to their being taken in execution for her husband's debt. *Quick & Ur. v. Statnes*, (Knt.)

1 B. & P. 293

- 5 A *fi. fa.* having issued against the effects of the defendant, who was jointly concerned in a manufactory with 25 other persons, to whom he was indebted to a greater amount than his whole share, and the sheriff having seized the whole of the partnership property, the Court of C. P. refused to refer it to the prothonotary to inquire what was the defendant's interest in the effects seized: *Chapman v. Koops.*

3 B. & P. 289

- 6 Money, the surplus of a former execution against the defendant's goods, was refused to be stayed in the late sheriff's hands for the purpose of satisfying another execution at the suit of the same plaintiff against the same defendant, who had no other effects on which the sheriff in office could levy. *Fieldhouse v. Croft.*

4 E. R. 510

- 7 The Court will not order the sheriff to retain in satisfaction of a present writ of *fi. fa.* issued by the plaintiff against the defendant, money or Banknotes, which the sheriff had before received for the use of the defendant, in discharge of an execution levied by the defendant against another, and which the sheriff had not paid over. *Knight v. Criddle.*

9 E. R. 48

- 8 Defendant having recovered a verdict against the sheriff for seizing his goods under a *distringas* in an action at the suit of J. S., and having given a *cognovit* to the plaintiff, on which a *fi. fa.* issued, the Court of C. P. refused to order the sheriff to pay over the damages recovered by defendant against him to the plaintiff, in satisfaction of the *fi. fa.* *Willows v. Ball.*

2 N. R. 376

- 9 Where the husband of the plaintiff's mother assigned his effects to trustees for the benefit of his creditors, and absconded, leaving his wife in possession

of his house and goods, and notice of such assignment was advertised in the newspaper, and the goods were afterwards sold by the trustees at public auction, and the plaintiff purchased them in order to accommodate his mother, and paid for them at a fair valuation, and removed some, but left the greater part in her possession: Held, that such purchase by the plaintiff would protect the goods against a judgment afterwards obtained, and execution levied by a creditor of the husband, who had notice of the assignment at the time; although the plaintiff permitted his mother to continue in possession: and therefore he was entitled to recover them from the sheriff. *Leonard v. Baker.*

1 M. & S. 251

- 10 The plaintiff having purchased a public-house, for which he could not himself obtain a licence, because he resided in another tavern, put B.: an insolvent person, into the house as his servant, to keep it for him, and supplied him with money to pay for the licence, which was granted to B.: Held, that the sheriff was not entitled to take, under an execution against B., the plaintiff's liquors and chattels in the house, committed to B.'s custody. *Dawson v. Wood.*

3 Taunt. 256

- 11 An outgoing tenant having agreed to assign the remainder of his term to the incoming tenant, the sheriff, before an actual assignment made, may, under an execution against the outgoing tenant, sell his interest in such remaining term, and set upon it the same value that the incoming tenant had agreed to give for it. *Sparrow v. Earl of Bristol.*

1 Marsh. 10

(c) *Sheriff's duty in executing.*

- 1 A sheriff having entered at the open doors of an house, need not demand to have the inner doors opened to him before he breaks them, in order to take under a writ of *ieri facias*, goods which are within them. *Hutchinson v. Birch.*

4 Taunt. 619

- 2 Where two writs of *ieri facias* against the same defendant are delivered to a sheriff on different days, and no sale is actually made of the defendant's goods, the first execution must have the priority; even though the seizure was first

made under the subsequent execution. *Hutchinson v. Johnson.* 1 T. R. 729

3 And if the person claiming under the second execution, pay the sheriff the amount of the debt under the first execution for his security, the Court will not compel the sheriff to refund the money on motion. *ibid.*

4 But where the sheriff had given a bill of sale to the person claiming under the second execution; that was held to bind the sheriff. *Rybot v. Peckham.* 1 T. R. 731, n.

5 Though a writ of *fi. fa.* bind the goods as against the defendant, yet the property is not devested out of him till execution executed: and therefore an execution and sale under a subsequent writ delivered to the sheriff, will bind the goods: but the plaintiff in the first execution has his remedy against the sheriff, if the non-execution did not proceed from his own laches. *Payne v. Drew.* 4 E. R. 523

6 *Qu.* Whether the sheriff, who sells a term in possession of the debtor under a *fi. fa.* may not put the vendee in possession? *Taylor v. Cole.* 3 T. R. 295. 298

7 *Semble.* Where a tenant is in possession, and the execution is against the landlord, whose term is to be sold, the sheriff cannot turn the tenant out of possession. 3 T. R. 298

8 Where the late sheriffs of London, having taken the defendant's goods in execution under a writ of *fi. fa.* were ruled, on the 8th of February 1811, to return the writ; and returned on the 11th that they had the goods in hand for want of buyers; after which the plaintiff, without issuing a writ of *venditioni exponas*, lay by till after a commission of bankrupt against the defendant, founded on an act of bankruptcy prior to the execution, and till after the then sheriffs had delivered the goods up to the assignees of the bankrupt on the 16th of March, and had gone out of office in the September following; and then in January 1812, issued a writ of *distringas* to the present sheriffs to distrain the late sheriffs for not selling the goods; the Court set a-side the last mentioned writ, leaving the plaintiff to his remedy by action, if the commission were fraudulent, as alleged by him. *Clutterbuck v. Jones.* 15 E. R. 78

9 If the Crown and a subject are con-

tending for priority in an execution, the Court of C. P. will not compel the sheriff to return the writ of *fi. facias* at his own peril of rightly deciding the law, but upon application, will enlarge the time for the making his return, till the Court of Exchequer shall have decided the point. *Thurston v. Thurston.* 1 Taunt. 120

10 If a *fi. fa.* issue against one of several partners, the Court of C. P. will not, at the request of the partnership creditors, give the sheriff time to return the writ, until an account can be taken of the several claims upon the partnership property. *Parker v. Pistor.* 3 B. & P. 288

(d) *Landlord's claim for rent.*

1 A tenant, having committed an act of bankruptcy in October 1810, upon which a commission issued on the 21st of January 1811, and the sheriff having on the 7th of January levied an execution at the suit of the landlord, for a judgment debt of 600*l.* under which he sold the goods of the tenant on the 21st and 22d of January for 520*l.* and out of that sum when received, paid the landlord 140*l.* for one year's rent in arrear; held, in an action for money had and received, brought by the assignees of the bankrupt tenant against the sheriff, to recover the whole amount of the sum levied, that the property in the goods being changed by the act of bankruptcy and commission, and transferred to the assignees, it lay upon the sheriff to prove that he had paid over the money to the landlord and execution creditor before he had notice of the commission issued; and not giving such proof, that he was liable for the amount to the assignees; and that he was not entitled to deduct the 140*l.* paid over to the landlord, as for the year's rent in arrear, under the statute 8 Ann. c. 14. s. 1. (a commission of bankrupt not being an execution within the meaning of that statute,) which directs that no goods upon demised premises shall be taken by virtue of any execution, unless the execution creditor shall, before the removal of such goods from off the premises, pay to the landlord all arrears of rent not exceeding a year's rent. *Lee v. Lopes, Bart.* 15 E. R. 230

2 The landlord of premises, upon which the goods of his tenant are taken in execution, can only claim from the

party suing the execution, the rent due at the time of taking the goods, and not that which accrues after the taking, and during the continuance of the sheriff in possession. *Hoskins v. Knight, & Basset v. Same.*

1 M. & S. 245

- 3 *Seemle*, that a sheriff is not bound to find out what rent is due to a landlord, and pay it him, under 8 *Ann. c. 14.*, unless the landlord give him notice. *Smith v. Russell.* 3 Taunt. 400

III. LEVARI OR SEQUESTRARI FACIAS.

How sued out and executed.

- 1 Though a *levari facias de bonis ecclesiasticis* is a continuing execution, and a levy under it may be made from time to time *after it is returnable*, till the sum indorsed be satisfied, yet if it be *actually returned*, the authority of the bishop is at an end: Therefore, where such a writ remained in the hands of the bishop long after it was returnable, who sequestered the profits of a vicarage accruing as well before the return-day, as after; and being ruled to return the writ, returned only the amount of the sum levied up to the *return-day*; the Court of C. P. would not, for the purpose of securing the plaintiff's priority, order the writ and return to be taken off the file, but would only permit the return to be amended, by inserting the sum levied up to the time when the writ was *actually returned*. *Marsh, Kut. v. Fawcett, Ck.*

2 H. B. 582

- 2 The proper way to have proceeded would have been to have ruled the bishop from time to time, to know what he had levied. *ibid.* Allowing that the award of a writ of sequestration out of Chancery, (which is the process of that Court to compel appearance and the performance of

decrees) has the same obligatory effect to bind the goods as a writ of *fi. fa.* at common law; yet, if the party at whose prayer such sequestration is issued, take no measure to compel the execution of it in due time, and the sequestrators do not in fact possess themselves of the goods; it is no excuse to a sheriff, to whom, at a distance of 18 months, a writ of *fi. fa.* is directed against the goods of the party, defendant in the suit in Chancery, for not executing such writ, and selling the goods; the plaintiff, in the sequestration having at all events lost his priority by such *laches*. And therefore the sheriff, who had seized under the *fi. fa.*, having, on notice of such supposed obstacle returned *nulla bona*, was holden liable to the plaintiff in an action for a false return. *Payne v. D'ewc.*

4 E. R. 523

IV. EXPENSES, HOW LEVIED.

See post, tit. SHERIFF, fees of.

- 1 In actions on simple contracts and judgments for a *debt certain*, the expenses of levying must be paid by the plaintiff; so that if the sheriff overcharge, the plaintiff is the party grieved under the statute 29 *Elix. c. 4.* which limits sheriff's fees: but if the judgment be for a *penalty*, the defendant must pay the expenses of levying, and is the party grieved if the sheriff overcharge. *Woodgate v. Knatchbull.* 2 T. R. 157
- 2 Where the defendant suffers judgment by default in an action of debt on simple contract, the plaintiff is not entitled to levy the expenses of the execution; notwithstanding those expenses, together with the debt and costs of the action, do not exceed the sum confessed upon record. *Thornton v. Merredew.* 3 B. & P. 362

EXECUTORS AND ADMINISTRATORS.

- I. RIGHTS AND INTERESTS.
- II. POWERS AND DUTIES.
- III. LIABILITIES.
- IV. EXECUTOR DE SON TORT.
- V. PLEADINGS BY AND AGAINST.
 - (a) *Declaration.*
 - (b) *Pleas.*

VI. EVIDENCE.

Administration and Assets, how proved.

I. RIGHTS AND INTERESTS.

- 1 An executor's right is derived from the will; the probate is only evidence of it: therefore he has a constructive

possession from the testator's death. *Smith v. Milles.* 1 T. R. 480

- 2 A probate, as long as it remains unrepealed, cannot be impeached in the temporal Courts. *Allen v. Dundas.* 3 T. R. 125

- 3 Payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the intestate, notwithstanding the probate be afterwards declared null, and administration be granted to the intestate's next of kin. *ibid.*

- 4 And the only way of proving a right to personal property under a will is by the probate. *Rex v. The Inhabitants of Netherseal.* 4 T. R. 258

- 5 In a case of a tenancy from year to year as long as both parties please, if the tenant the intestate, his administrator has the same interest in the land which his intestate had. *Doe d Shore v. Porter.* 3 T. R. 13

- 6 Where one devises land to five trustees to sell and apply the money to certain uses, and afterwards makes the same persons his executors; they do not take the land as *executors*, but as *devisees in trust and joint-tenants*. And, at any rate, the case is not helped by the statute 21 H. 8. c. 4. so as to pass the whole estate upon production of a conveyance purporting to be executed by the five, but the execution of which by three only could be proved. But taking it to be a conveyance by the three only, it would sever the joint-tenancy and convey 3-5ths of the estate to be held in common with the two remaining parts. *Denne d. Bowyer v. Judge.* 11 E. R. 288

- 7 If money belonging to a testator be received by one after the testator's death, his executor may maintain an action for money had and received in his own right. *Smith v. Barrow.* 2 T. R. 476

- 8 An administrator, cannot have an action for a breach of promise of marriage to the intestate, where no special damage is alleged. *Chamberlain v. Williamson.* 2 M. & S. 408

- 9 By indenture tripartite between A. B., and C. A., tenant for life, demised to C., and C. covenanted with B. (a receiver) and other the receiver or receivers for the time being, and to and with such other person, who, for the time being, should be entitled to the freehold, and to and with every of

them. A. died: Held, that his executrix could not maintain covenant for a breach in her testator's lifetime, but that the action was joint, and survived to B. *Southcote v. Houre.* 3 Taunt. 87

II. POWERS AND DUTIES.

- 1 If executors carry on trade, they must do it as individuals; unless they carry it on under the direction of the Court of Chancery. *Barker v Parker.* 1 T. R. 295

- 2 The administratrix of an executor cannot sue for the double value of lands held over, after notice to quit under a demise from the testator, contrary to 4 G. 2. c. 8. without taking out administration *de bonis non*: even though the tenant has attorned to her. *Tingrey v. Brown.* 1 B. & P. 310

- 3 The authority of an administrator appointed according to the provisions of 38 G. 3. c. 87, during the absence of an executor from this country, does not become actually void upon the death of such executor, but only voidable. *Taynton v. Hannay.* 3 B. & P. 26

- 4 An executrix gave an acceptance for a debt due from her testator, taking an engagement from the drawer, to renew the bill from time to time, until sufficient effects were received from the estate of the testator: Held, that this meant sufficient effects in the ordinary course of administration; and that she had not precluded herself from first applying *assets* to pay 3000*l.* to trustees for her own use, in discharge of a bond given by her husband before marriage to that effect, before she paid the acceptance. *Bowerbank v. Montciro.* 4 Taunt. 844

III. LIABILITIES.

See costs, ante, 217.

- 1 Debt does not lie against an administrator upon a single contract of his intestate. *Barry v. Robinson.* 1 N. R. 293

- 2 *Semble*, that a letter of attorney given by an executor to A., enabling him to transact the affairs of the testator in the name of the executor *as executor*, and *to pay, discharge, and satisfy all debts due from the testator*, conveys sufficient authority to A., to accept a bill of exchange, in the name of the executor, drawn by a creditor for the amount of a debt due from the testa-

- tor, so as to make the executor *personally* liable. *Howard v. Baillie*. 2 H. B. 618
- 3 But clearly, if the executor admits that such a bill, which has been so accepted by *A.*, with the knowledge of the executor, is for a just debt, and that it ought to be paid, it affords sufficient evidence of an authority given by him to *A.*, to accept that particular bill, without resorting to the letter of attorney. 2 H. B. 618
- 4 But it was held by the Court of King's Bench, that a power of attorney given by an executrix to act for her as *executrix* does not authorize the accepting bills of exchange, to charge her in her own right, though for debts due for her testator. *Gardner v. Baillie*. 6 T. R. 591
- 5 A promise by an administrator to pay the debts of the intestate, if there be no assets, is *nudum pactum*. *Pearson v. Henry*. 5 T. R. 6
- 6 In an action against an administrator, on promises of the intestate, an *insinul computassent* with the administrator *as such*, of money due from the intestate; does not make him personally liable. *Secar v. Atkinson*. 1 H. B. 102
- 7 An executor cannot be charged as *such* either for money had and received by him, money lent to him, or on an account stated of money due from him *as such*; those charges making him personally liable. *Rose & Ur. v. Bowler*. 1 H. B. 108
- 8 Though, by the statute of frauds, an executor is not liable *personally* without a written promise, yet such written promise does not render him liable, at all events, unless there be an adequate consideration. *Rann v. Hughes*. 7 T. R. 350, *n.*
- 9 An executor having once received assets of his testator, and paid over money to his co-executor for the purpose of satisfying a bond creditor, but who misapplied the money by retaining it to satisfy his own simple contract debt, is liable for such misapplication of his co-executor in an action brought by such bond creditor, and cannot discharge himself from such action by pleading thereto *plene administravit*. *Cross & Ur. v. Smith*. 7 E. R. 246
- 10 If an arbitrator under a reference between *A.*, and *B.* administrator, award that *B.* shall pay a certain sum as the amount of *A.*'s demand, *B.* cannot afterwards object that he had no assets, but may be attached for non-payment. *Worthington v. Barlow*. 7 T. R. 453
- 11 *A.* declared against *B.* and his wife, administratrix of *C.* deceased; for that whereas *C.* died intestate, possessed of South Sea Stock, which she held in trust for *A.* and upon which certain dividends were due, in consideration that *A.* at his own expense would procure administration to be granted to the wife of *B.* as next of kin to *C.* and would furnish evidence to enable *B.* and his wife to receive the dividends; *B.* and his wife as such administratrix promised to pay over to *A.* the amount of the dividends when received: Held, that as the dividends never made part of the intestate's estate, the action against *B.* and his wife as administratrix could not be maintained. *Parker v. Baylis & Ur.* 2 B. & P. 73
- 12 A *feme covert*, having an estate settled to her separate use, gave a bond for re-payment by her executors, of money advanced at her request, on security of that bond, to her son-in-law. After her husband's decease, she wrote, promising that her executors should settle the bond. Held, that *assumpsit* will lay against the executors on this promise of the testatrix. *Lee v. Mugeridge*. 5 Taunt. 36
- 13 If a debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator. *Rawlinson v. Shawe*. 3 T. R. 557
- 14 An action at law lies against an executor, to recover a specific chattel bequeathed after his assent to the bequest. *Doe v. Guy*. 3 E. R. 120
- 15 Where the executors of a deceased partner, continued his share of the partnership property in trade for the benefit of his infant daughter: Held, that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt; although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors when they divided the profits and loss of the trade, carried the same to the account of the

infant, and took no part of the profits themselves. *Wightman v. Townroe*.

1 M. & S. 412

IV. EXECUTOR DE SON TORT.

1 What acts make a person liable as *executor de son tort* is a question of law: the Jury are to say whether the acts be sufficiently proved. *Padget v. Priest*. 2 T. R. 97

2 The slightest circumstance of intermeddling with the intestate's goods, will constitute a man an *executor de son tort*. *Edwards v. Harben*.

2 T. R. 97, & 597

3 Therefore if A., the servant of B., sell the goods of C., an intestate, as well after his death, as before, though by the orders of C., and pay the money arising therefrom into the hands of B., B. may be sued as an *executor de son tort*. *ibid.*

4 If a person, having intermeddled in the intestate's affairs, has money belonging to him in his hands at the time when an action is brought against him as *executor* for a debt due from the intestate, he is liable as an *executor de son tort*. 2 T. R. 597

5 If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as *executor de son tort* for the debts of the deceased; for the debtor's continuing in possession is inconsistent with the deed, and fraudulent against creditors. *Edwards v. Harben*. 2 T. R. 587

6 A creditor of an intestate, who received goods of the intestate, after his death, from his widow, in payment of the debt, cannot protect his possession against an action of trover by the lawful administrator, upon the ground of such delivery having been made by one, who had, by such intermeddling, made herself *executrix de son tort*; no fact appearing to give colour to her having acted in that respect in the character of executrix, except the single act of wrong complained of, in which defendant participated. *Mumford v. Gibson*. 4 E. R. 441

7 2u. How far any payment by an *executor de son tort* to a creditor can be set up as a bar to an action of trover by the lawful executor, &c. though if

it be such as the latter would have been bound to make; it shall be recouped in damages. 4 E. R. 441

8 An *executor de son tort* cannot discharge himself from an action brought by a creditor, by delivering over the effects to the rightful executor after the action is brought. *Curtis v. Vernon*.

3 T. R. 587 n.

Affirmed in *Cam. Scac. (in error.) Vernon v. Curtis*. 2 H. B. 18

9 Nor can he retain for his own debt of an higher nature by consent of the rightful executor, given after the bringing of the action by the creditor. *Curtis v. Vernon*. 3 T. R. 587

10 Nor can he plead that such delivery over and retainer were after action brought, but before plea pleaded; though, in fact, no administration was granted until after the action was brought. *Vernon v. Curtis*. 2 H. B. 18

V. PLEADINGS.

(a) Declaration.

1 A declaration against an executor suggesting a *devastavit*, brought in the *detinet* only, is at any rate cured by verdict. But *semble*, that independent of the verdict the plaintiff on such a declaration may take judgment *de bonis testatoris*. *Hope v. Bague*.

3 E. R. 2

2 In *assumpsit* brought by an administrator *de bonis non*, the promise may be laid to have been made to the first administrator. *Hirst v. Smith*.

7 T. R. 182

3 Where executors pay a sum of money on the testator's account, which they need not have done, and afterwards bring an action to recover it back again, they must declare in their own right, and not as executors. *Munt v. Stokes*. 4 T. R. 565

4 Where a payee of a bill of exchange indorses it to A. and B. as executors, they may declare as such in an action against the acceptor. *King v. Thom*. *The same v. McLinnan*. 1 T. R. 487

5 In an action against executors, in their own right, on a covenant for good title and quiet enjoyment against any person or persons whatever, contained in an assignment (by way of mortgage) the declaration must shew a breach by some act of the covenantors; or that the evictor's title commenced prior to the assignment made by them. *Noble v. King*. 1 H. B. 34

- 6 Where the plaintiff, as executrix, declared that the defendant, by deed, conveying to the plaintiff's testator certain lands in fee, subject to redemption on payment of a sum certain, covenanted with the testator that he was at the time of executing the deed seised in fee, and had a right to convey, &c.; and assigned for breach that the defendant was not seised, &c., and had not a right to convey, &c.: this was held ill upon special demurrer, and that the executrix could not maintain an action for such breaches of covenant, without shewing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises. Covenant upon request of the testator, his heirs or assigns, to make further assurance to the testator, his heirs and assigns, and breach assigned that the plaintiff, as executrix, requested the defendant to execute a release between the defendant, the plaintiff, and S. A., for farther assuring the premises to the uses mentioned in the deed, which the defendant refused; without shewing that the plaintiff claimed an interest, or to whose use the release was to enure, or why S. A. was a party to it; was considered ill on special demurrer. *Kingdon v. Nottle.* 1 M. & S. 355
- 7 Where the goods of the testator never were in the possession of the executor, he must, in an action of trover, declare as executor. *Cockerill v. Kynaston.* 4 T. R. 280
- 8 And whether the conversion happen before or after the testator's death; if the goods when recovered will be assets in the hands of executors, he may sue for them in that character. *ibid.*

(b) *Pleas and Demurrers.*

- 1 Upon a *devastavit* against executors, not guilty may be pleaded as well as *nil debet*. *Coppin q.t. v. Carter.* 1 T. R. 462
- 2 *Assumpsit* by several as executors; plea in bar, that the promises were made by the defendant jointly with one of the plaintiffs and held good on demurrer. *Moffatt v. Van Millingen.* 2 B. & P. 124. n.
- 3 Where the defendant bound himself, as administrator, to abide by an award to be made touching matters in dispute between his intestate and another; and the arbitrators awarded that he as administrator, should pay, &c. he

cannot plead *plene administravit* to debt on the bond. *Barry v. Rush.* 1 T. R. 691

- 4 To *assumpsit* against an executrix she pleaded that the testator became bound to A. in 2800*l.* conditioned (among other things) to indemnify him against another bond for 800*l.* which A. had executed jointly with the testator to B., but for the proper debt of the testator: that the 800*l.* became due in the testator's lifetime, and was still unpaid; that upon the testator's death the indemnity bond became forfeited, and the money therein contained was still unpaid; and that the defendant had administered all (except so much as would satisfy the indemnity bond:) this was held a good plea. *Cor v. Joseph.* 5 T. R. 307

N. B. In the above case the plaintiff might have taken issue on the allegation in the plea that the original bond for 800*l.* became due and payable in the lifetime of the testator. *id.* 309

- 5 It is not enough for the executor of an executor, sued for breach of covenant made by the original testator, to plead *plene administravit* of all the goods and chattels of the original testator at the time of his death come to the hands of the defendant, &c. without also pleading *plene administravit* by the first executor; or at least that he, the second executor, had no assets of the first; so as to shew that he had no fund, out of which any *devastavit* by the first executor could be made good. *Wells v. Eydeell.* 10 E. R. 315

- 6 Debt on bond against an administrator, to which he pleaded a bond debt due to himself and retainer: Held, that it was not necessary to aver in the plea that such bond was given to himself for a just and true debt; nor to set out the letters of administration: for the plaintiff by his declaration admits him to be a lawful administrator. *Picard v. Brown.* 6 T. R. 550

- 7 A plea of judgment recovered on a simple contract, pleaded by an administrator to debt on a bond, must aver that such recovery was had before notice of the bond debt. *Sawyer v. Mercer.* 1 T. R. 690

- 8 A debt on a judgment against a testator or intestate, not docketed according to the directions of stat. 4. & 5 W. & M. c. 20, is put by that Act on a level with simple contract debts. *Hickey v. Hayter.* 6 T. R. 384

- 9 Therefore such judgment not docketed, cannot be pleaded by an executor or administrator to an action on a simple contract. *Steele v. Rorke.* 1 B. & P. 307
- 10 A judgment confessed by an executrix to a creditor of the testator, as well for his own debt as in trust for the debts of many of the creditors, cannot be pleaded in bar to an action brought against her by another creditor of the testator. *Tolput v. Wells.* 1 M. & S. 395
- 11 Plea, that *M.* recovered a judgment against defendant as executrix for 1990*l.* claimed to be due to him from the testator; rejoinder that the judgment was confessed to *M.* for that sum for his own debt and as trustee for the debts of many other creditors: Held, that the rejoinder was a departure from the plea. *ibid.*
- 12 *Qu.* if a plea of judgment recovered ought to state the cause of action? 1 M. & S. 401
- 13 To an action against an executor for goods sold to the testator, the defendant at *nisi prius* pleads a plea *puis darrein in continuance* of judgment recovered in a plea of debt on the simple contract of the testator, commenced since the present action: On demurrer. Held, 1st, that it was no answer to this plea, that the judgment pleaded was in a plea of debt on the testator's simple contract; and 2dly, that the plea was not invalidated by the defendant having suffered judgment to pass against him voluntarily. *Prince v. Nicholson.* 1 Marsh. 280
- 14 A demurrer for cause of misjoinder of breaches of covenant must be to the whole declaration, and not to the breach alone which is misjoined. *Kingdon v. Nottle.* 1 M. & S. 355

VI. EVIDENCE.

Administration and Assets, how proved.

See post, tit. STAMP.

- 1 The original book of Acts, directing letters of administration to be granted with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another; the first not being recalled. *Elden v. Keddell.* 8 E. R. 187
- 2 An examined copy of the Act-Book in the registry of the Prerogative Court of Canterbury, stating that administration was granted to the defendant of her husband's goods at such a time, is proof of her being such administratrix, in an action against her as such, without giving her notice to produce the letters of administration. *Davis v. Williams.* 13 E. R. 232
- 3 If, to an action brought by a creditor of a testator, the executrix plead judgments recovered, and no assets beyond, &c.; to which the plaintiff replies *per fraudem* generally; it is not conclusive evidence of fraud, that the judgments as pleaded were confessed for more than the just debts; but the defendant may shew that they were entered up by mistake for more than was due, and that that circumstance was made known to the plaintiff before the action was brought. *Pease v. Naylor.* 5 T. R. 80
- 4 Where the plaintiff had recovered judgment against a testator in his lifetime, and afterwards had judgment of execution against the executors in *scire facias*, upon which judgment he sued the executors in debt in the *detinet*, suggesting a *devastavit*: Held, that the executors being fixed conclusively with assets by such latter judgment, the issue, upon *non detinet*, lay upon them to prove the due administration of such assets; otherwise the plaintiff was entitled to recover. *Hope v. Bague.* 3 E. R. 2
- 5 Paying interest on a bond due from testator, is not conclusive evidence of assets. *Cleverly v. Brett.* 5 T. R. 8 n.
- 6 The question whether there be assets or not in the executor's hands is settled by the judgment given on a plea of *plene administravit*; and as on that issue no evidence can be given of assets after the writ sued out. *Qu.* Whether the ordinary mode of entering up a judgment of assets *quando acciderint* be correct? for that leaves an interval between the suing out of the writ and the judgment, in which, if the executor received any assets, they could not be taken at all. *Mura v. Quin.* 6 T. R. 1
- 7 If an executor plead (to an action on bond) payment, and omit to plead *plene administravit*, and a verdict be given against him on such plea, it operates as an admission of assets in an action founded on that judgment, suggesting a *devastavit*. *Erving v. Peters.* 3 T. R. 685
- 8 But if he plead *plene administravit*, he is only liable to the amount of the assets in his hands. *Harrison v. Beccles.* 3 T. R. 688, n.

- 9 On plea of *plene administravit*, proof of an admission by the executor *that the debt was just, and should be paid as soon as he could*, is not evidence to charge him with assets. *Hindsley v. Russell.* 12 E. R. 232
- 10 A submission to an award by an administrator, is not an admission of assets. *Pearson v. Henry.* 5 T. R. 6
- 11 On a plea of *plene administravit* to debt on a judgment against a testator not docketed, the defendant may give in evidence payment of specialty debts which exhausted all the assets. *Hickey v. Haytor.* 6 T. R. 384

EXTENT.

Force, operation and priority of.

- 1 If goods be taken in execution on a *fi. fa.* against the King's debtor, and before they are sold, an extent come at the King's suit, grounded on a bond debt tested after the delivery of the *fi. fa.* to the sheriff, these goods cannot be taken upon the extent. *Rorke v. Dayrell.* 4 T. R. 402
- 2 The stat. 33 H. 3. c. 39. s. 74. does not extend, but abridge, the King's prerogative. 4 T. R. 413
- 3 Process sued out by the Crown against a defendant to recover penalties, upon which judgment for the Crown is afterwards obtained, entitles the King's execution on such judgment to have priority within the statute 33 Hen. 8. c. 39. s. 74. before the execution of a subject whose execution had issued and been commenced on a judgment recovered against the same defendant prior to the King's judgment, but subsequent to the commencement of the King's process: the King's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods under the plaintiff's execution. *Butler v. Butler* 1 E. R. 338
- S. P. Attorney General v. *Aldersey.*
- 4 The lands of every person who has received money belonging to the Crown, or for which he is accountable to the Crown, are liable to an extent under the stat. 13 Eliz. c. 4. *Per Mansfield, C. J. Wilde v. Fort.* 4 Taunt. 334
- 5 And at common law also. *Per Heath, J. ibid.*
- 6 Where goods were taken in execution by the sheriff on a *fi. fa.*, and whilst they remained in his hands unsold, an extent came at the King's suit tested after the entry of the sheriff under the *fi. fa.*; and that the sheriff thereupon seized the said goods subject to the former seizure, and afterwards sold them *under venditioni exponas issued upon such extent*, and paid over the proceeds of such sale by order of the Court of Exchequer: Held, that at all events, without determining whether the King's extent was under the circumstances entitled to priority, the plaintiff could not maintain *money had and received* against the sheriff for the proceeds of such sale. *Thurston v. Mills.* 16 E. R. 254
- 7 Goods seized under a *fi. fa.* at the suit of a subject, are before sale liable to be taken by virtue of the King's extent, tested after the delivery of the *fi. fa.* to the sheriff. *Rex v. Wells.* 16 E. R. 278, *in nota.*

FERRY.

- 1 An exclusive right to a ferry from A. to B. does not prevent persons going by any other boat from A. directly to C., though it be near to B., provided it be not done fraudulently and as a pretence for avoiding the regular ferry. *Tripp v. Frank.* 4 T. R. 666
- And see tit. POOR'S RATE, post.*

FINE OF LANDS.

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| <p>I. BY WHOM AND HOW LEVIED, AND WHO ARE BARRED THEREBY.</p> <p>II. WHEN AND HOW PASSED,</p> <p>III. AMENDMENT OF.</p> | <p>I. BY WHOM AND HOW LEVIED, AND WHO ARE BARRED THEREBY.</p> <p>1 A fine levied by a copyholder, who</p> |
|---|---|

- continues in possession, is void as against the lord. *Roe v. Hellicr*. 3 T. R. 162
- 2 The Court of C. P. will not permit a fine to be levied, in which it appears that the conusor is an alien enemy. *Cruttenden v. Bororbell*. 1 Taunt. 146
- 3 When the estate of a married woman has been regularly sold with the consent of her husband, the conveyance, executed by him, and the purchase-money paid, the Court of C. P. will not prevent the wife from levying a fine, because her husband has since become *non compos*. *Stead v. Izard*. 1 N. R. 312
- 4 But that Court refused to interfere to authenticate a fine levied by a married woman in the absence of her husband, though he become a bankrupt, and omitted to surrender himself, and was gone beyond seas. *Ex-parte Abney*. 1 Taunt. 37
- 5 If a fine be levied by a tenant for life which turns the estate of the reversioner to a right of entry, and the reversioner devises it without entering; if the devise be of any effect, the devisee must enter within the same time within which the devisor, if living, or his heir, must have entered. *Goodright d. Burton v. Forrester* (in Cam. Scac. in error.) 1 Taunt. 578
- 6 He who will take benefit of the second saving in the stat. 4 H. 7. must, 1st, be other than a party or privy to the fine. 2ndly. The right must first come to him. 3dly. It must first come after the fine and proclamation. 4thly, It must come by matter before the fine. 1 Taunt. 578
- 7 A fine *sur concessit* may be levied when the intention is to pass several mesne particular estates and a reversion in fee. *Ludlow & Ur. Conusors; Drummond Conusee*. 2 Taunt. 84
- 8 A fine must certainly express what estate it purports to grant: therefore the Court of C. P. will not permit a fine *sur concessit* to be levied of a dubious estate under the words of a description of "all and whatsoever the said—hath in the tenements." Nor will that Court permit two operations as that of a fine *sur concessit*, and one *sur conusance de droit*, to be combined in the same fine. *Seymour v. Barker & Ur.* 2 Taunt. 198
- 9 Where a fine was levied of Michaelmas Term, relating to the 6th of November, though in fact levied on the 8th; it is sufficient evidence of the seisin in fact of the cognizor at the time of the fine levied, that a writ of possession after a recovery in ejectment was executed on his behalf on the evening of the 6th, by the officer's entry on the land and claiming it for the cognizor, but without any actual change of the tenant in possession, who afterwards paid rent to the cognizor. And so it seems the receipt by a lawful possessor of rent due after a fine levied, for a period antecedent to such fine, is *prima facie* evidence, if no cōvin appear, of his possession during the period for which the rent is received. *Doc d. Osborn v. Spencer*. 11 E. R. 495
- 10 When once the five years allowed to an infant to make an entry for the purpose of avoiding a fine begin, the time continues to run, notwithstanding any subsequent disability. *Doc d. Count Duroure v. Jones*. 4 T. R. 300
- 11 Neither will subsequent insanity stop the running of a fine once commenced. *Doc d. Griggs v. Shane*. 4 T. R. 306, n.
- 12 A., seised in fee of lands, dies leaving B. his heir a feme covert. Upon his death a stranger makes a tortious entry on the lands, continues in possession, and levies a fine *sur cognizance de droit come ceo*, with proclamations. B. afterwards dies under coverture, no entry having been made on her behalf to avoid the fine, leaving C. her heir of the age of twenty-one, of sound mind, out of prison, and within the realm. The fine is a bar to the right of C. unless he make his claim within five years after the death of B. *Dillon v. Leman*. 2 H. B. 584
- 13 The fine of a tenant for life divests the estate of the remainder-man or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 H. 7. c. 24. is only to save to all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him. *Goodright v. Forrester*. 8 E. R. 552
- 14 The effect of a fine by tenant for life of parcel of a manor, the reversion of which parcel was in the tenant in fee

in possession of the other parts of the manor, is to sever such parcel from the manor. *Goodright v. Forrester*

8 L. R. 552

15 Tenant for life having levied a fine, and afterwards devised the premises and died seised; the entry and continuing possession of the devisee (the defendant in ejectment) is no disseisin of the reversioner: *disseisin* importing an ouster of the rightful tenant from the possession, and an usurpation of the freehold tenure. And therefore no question could arise whether, considering the devisee of the reversion as a disseisor, a fine *sur cognizance de droit come ceo* levied by her, before entry to a stranger without any declaration of uses, would bar her right of entry by estoppel, and fortify the estate of the disseisor, or whether it would simply enure to her own use or be altogether inoperative. *William d. Hughes & Ur. v. Thomas.* 12 E. R. 141

16 A. tenant for life, with remainder to his own executors for 40 years, with remainder to B. in fee, levies a fine with proclamations. After the fine, B. without entering, devises to C. for life, with remainder to D. in tail, and dies, living A. A. dies. C. does not enter thereon within five years after the expiration of the term of 40 years. D. is barred, and cannot enter within five years after the death of C. *Goodright v. Forrester, in Cam. Scac.*

1 Taunt. 578

17 R. D. being tenant for 99 years determinable on his life; remainder to trustees to preserve contingent remainders; remainder to his first and other sons in tail male; with remainders over; it was questioned at first whether a fine levied by the tenant for years in possession, and his eldest son the first tenant in tail in remainder, was void against the remainder-man over, by reason that the trustees to preserve contingent remainders, in whom it was contended that a present freehold was vested during the life of the tenant for years, were no parties thereto; but it was held afterwards that the trustees had a vested, and not a contingent remainder; and that the present freehold interest was in them, to commence in possession upon the determination of the term of years by forfeiture or other means, during the life of tenant for years; and there-

by that such fine was void against the remainder-man. Neither is the estate of such remainder-man ever discontinued, or his right of entry within five years taken away by another fine levied by the daughter of the first tenant in tail male; who, upon his death, wrongfully entered and were possessed, and thereby disseised the remainder-man over. *Berrington v. Parkhurst.* 13 E. R. 489

II. WHEN AND HOW PASSED.

1 Every fine, at the time of signing the Judge's *allocatur* thereon, shall have the writ of covenant sued out and annexed thereto. *Reg. Gen. C. P.*

1 H. B. 526, 7

2 No fine, which appears to have been acknowledged more than 12 months, can pass the King's Silver Office, without a rule of Court or Judge's order. In such case, if the consors be living, an affidavit must be made thereof. If dead, the affidavit must state the time of their death. And the application for a rule or order, that the fine may pass the King's Silver Office, shall be made, on motion, to the Court, if in Term time; if in Vacation, to a Judge at chambers; and the rule or order must be filled with the *præcipe* and concord at the King's Silver Office. *Reg. Gen. C. P.*

1 B. & P. 530

3 All fines to be left at the chirographer's office within 14 days after passing the King's Silver Office, on pain of contempt. *Reg. Gen. C. P.* 4 Taunt. 600

4 A fine may pass as to all the consors except one, who may be omitted on motion. *Anonymous.* 5 Taunt. 249

5 Any person may interfere to prevent a fine passing in a manner detrimental to the interests of the revenue. *Appleyard, Plaintiff, Brown, Deforciant.*

5 Taunt. 265

6 Any number of persons having separate interests in one tenement, of whatsoever value, may concur to pass their interests to any number of purchasers by one fine. The Court of C. P. will not usually entertain objections to the passing of a fine raised by persons claiming an interest in the land.

5 Taunt. 265

7 The Court of C. P. will allow a fine *concessit* for conveying a life estate, and a fine *sur cognizance de droit unicum* for conveying a reversionary interest in

the same premises, to pass as one and the same fine. *Prideaux v. Gifford*

1 Marsh. 422

8 If, under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine, the commissioners take the acknowledgment of six on one piece of parchment, and of three on another, the Court of C. P. will not allow the fine to pass. *Balch v. Phelps*. 3 B. & P. 366

9 All fines acknowledged in *Westminster* must be acknowledged before a Judge or Serjeant, if there is a Judge in town. *Nokes, Plaintiff; Styles, Widow, Deforciant*. 3 Taunt. 49

10 And if it be acknowledged before any other commissioners, it is irregular; whether it appear by the caption that it was acknowledged in *Westminster* or not. *ibid.*

11 The concord of a fine being lost before it had passed the *custos brevium* office, the Court of C. P. permitted a new concord and acknowledgment to be prepared, and the fine to be perfected. *Wright, Plaintiff; Wright, Deforciant*. 4 Taunt. 195

12 One of several consors having been misnamed in one *præcipe* and writ of *dedimus potestatem*, under which his acknowledgment had been taken, and he having acknowledged under a new *præcipe* and *dedimus potestatem*, in which he was rightly named, but to which the acknowledgment of another of the consors, who was then abroad, could not be obtained, the Court of C. P. permitted one fine to be compounded of the acknowledgments under the two several writs, but at the peril of the parties. *Sewell, Plaintiff; Fleming, Deforciant*. 4 Taunt. 817

13 The affidavit of acknowledgment of a fine made by one of the commissioners, in *France*, but not signed, appearing to be the same hand-writing as his signature to the acknowledgment at the foot of the *præcipe*, and concord, and indorsement on the writ; and such affidavit having been taken and attested in *France* by two *English* magistrates on account of an exorbitant demand of *per centage* on the part of the *French* officer authorized to take affidavits; the Court of C. P. allowed the fine to pass. *Lovibond v. Morshead, Barr. & Ur.* 2 N. R. 57

14 The notarial certificate, required in the case of a fine acknowledged in a foreign country, must be under seal;

a defect in this particular cannot be supplied by proof of the hand-writing of the cognizers. *Cruttenden v. Bourbell*. 1 Taunt. 144

15 Affidavits of the acknowledgments of fines and recoveries taken abroad must be authenticated by a notary public; but if a foreign notary makes this rule an instrument of extortion to draw *British* property into an enemy's country, the Court of C. P. will dispense with the notarial certificate. *Ruding v. Manning*. 2 Taunt. 313

16 But it must be upon affidavit of the circumstances. 2 Taunt. 313

17 If an attorney employed to levy a fine, mislays the papers, and does not complete it within the time required by the rule of Court, T. T. 52 G. 3. the Court of C. P. will not permit the fine to be afterwards perfected, but will, if all the parties be alive, direct a new fine to be levied at the expense of the attorney. *Stone v. Stone*. 4 Taunt. 601

18 If a fine has been delayed by the attorney's neglect beyond the time prescribed by the rule of Court, the Court of C. P. will not permit it afterwards to pass. *Lindo v. ———*. 5 Taunt. 305

III. AMENDMENT.

1 In a fine where the original writ is insensible, the Court of C. P. will permit it to be amended. *Cook, Plaintiff; Milles, Deforciant*. 4 Taunt. 644

2 The Court of C. P. refused to amend a fine passed two years back by altering the surnames of the deforcians, though it was sworn that a wrong name had been inserted by mistake. *Ex-parte Motley & Ur.* 2 B. & P. 455

3 A mistake having been made in the concord of a fine, in the number of messuages to be conveyed, the writ of covenant is altered in conformity to it, but is afterwards restored to its original form; the Court of C. P. will not amend the concord by the writ of covenant so altered, but leave the party to his remedy by a new caption, or by re-acknowledging the concord. *Clutterbuck v. Brabant, Deforciant*. 1 Marsh. 406

4 Fine amended by inserting the word *advowson*; the word *rectory* being thought insufficient. *Manley v. Tattersall*. 4 Taunt. 257

5 If one of the deeds to lead the uses of a fine (*viz.* the lease), contain the word "tithes," but the other deed, (*viz.* the

- release), omit that word, the Court of C. P. will not amend the writ of entry by inserting the word "tithes," though the release has the words, "and also all houses, ways, &c. hereditaments and appurtenances whatsoever, to the said messuages, lands, &c. belonging, or in any way appertaining." *Phillips v. Jones.* 3 B. & P. 362
- See 2 N. R. 431
- 6 A fine is passed of thirty acres of land, twelve acres of meadow, and twenty-five, acres of pasture; in the deed to lead the uses the estate is described as consisting of thirty-five acres in the whole. The Court of C. P. refused to amend the fine by increasing the quantity of each species of land, so as to make each cover the whole quantity intended to be conveyed. *Bartram v. Towne.* 1 Marsh. 446
- 7 The Court of C. P. permitted a fine to be amended by inserting the name of a parish in which part of the premises lay; upon its appearing from the deed to lead the uses that these premises were intended to pass. *Gladwin v. Brown.* 2 Taunt. 1
- 8 Fine amended by inserting a parish not named in the deed to lead the uses; it being certain by the deed specifying the quantities and occupiers that the land was intended to pass. *Lambe, Plaintiff; Reaston & Ux., Deforciant.* 5 Taunt. 207
- 9 If a deed to lead the uses, correctly describe land by its quantities and occupiers, though it describe it as being in a parish in which it is not, the land shall pass by the deed. 5 Taunt. 211
- 10 The heir of the conusor was heard to oppose a fine being amended to his disherison. *Lambe v. Reaston.* 5 Taunt. 207
S. C. 1 Marsh. 23
- 11 Fine amended by inserting a parish according to the deed to declare the uses, dated subsequently to the fine. *Rowlitt v. Orlebar.* 1 Marsh. 452
- 12 Where a deed leading the uses of a fine, no otherwise ascertained part of the premises omitted in the fine than by referring to a devise, which referred to a deed of partnership, which contained a covenant to purchase lands, which covenant had been performed, and lands had been purchased, the fine was permitted to be amended by the insertion of the lands so purchased thereunder. *Gill v. Yeates.* 4 Taunt. 708
- 13 Fine amended by insertion of newly-erected works and buildings. *ibid.*
- 14 Fine amended in clerical misprisions which made it insensible. *ibid.*
- 15 A writ of covenant cannot be transferred from one county to another, nor can parishes comprized in wrong counties be transposed to the right counties; but additional parishes in the same county may be inserted, where it is seen by a clear relation, that land in those parishes was intended to pass. *Gill v. Yeates.* 4 Taunt. 708

FISH AND FISHERIES.

- 1 *Prima facie*, every subject has a right to take fish found upon the sea-shore between high and low water-mark. *Bagott v. Orr.* 2 B. & P. 472
- 2 But such general right may be abridged by the existence of an exclusive right in some individual. *ibid.*
- 3 *Qu.* If there be a *prima facie* right in every subject to take fish shells found on the sea-shore between high and low water-mark? 2 B. & P. 472
- 4 The stat. 3 Jac. 1. c. 12. which prohibits persons willingly taking, destroying, or spoiling any spawn, fry or brood of any sea-fish in any wear or other engine or device whatsoever, seems not to comprehend shell-fish, and if it does, it means a taking for destruction, and not a taking of oysters spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. *Bridger q. t. v. Richardson.* 2 M. & S. 568
- 5 There may be a prescriptive right in a subject to a several fishery in an arm of the sea. *Mayor &c. of Orford v. Richardson.* 4 T. R. 439
- 6 Where one has a right under ancient deeds to have a wear across a river for taking fish, when such wear had theretofore been made of brushwood through which fish could escape, he cannot convert it into a stone wear, whereby the fish are prevented from escaping. *Weld v. Hornby (Clk.)* 7 E. R. 195
- 7 And an acquiescence in such alteration

- for 20 years, will not bind the party from seeking his remedy after that period, where the public are interested in the right. 7 E. R. 195
- 8 A stream of water running by the side of a piece of ground, which is enclosed on every side, except that on which it is bounded by the water, is not a stream in inclosed ground, within the meaning of the 5 Geo. 3. c. 14. s. 3. so as to subject a person fishing therein, to the penalty inflicted by that Act. *Little v. Brown*. 1 Marsh. 127
And see *Rex v. Edwards*.
1 E. R. 278. ante 192
- 9 By the custom of the Greenland whale fishery he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it. *Fennings v. Lord Grenville*.
1 Taunt. 241
- 10 But unless he who strikes a fish continues his dominion until he has reduced it into possession, any other person who kills it acquires the entire property. *ibid*.
And see *Littledale v. Scaith*.
1 Taunt. 243, n.

FOREIGN ATTACHMENT.

- 1 A sum of money directed to be paid by A. to B. by the master's *allocatur*, cannot be attached in A.'s hands by process out of the sheriff's Court in an action against B. *Coppell v. Smith*.
4 T. R. 312
- 2 Neither can money awarded under a rule of Court be attached. *Grant v. Hawding*.
4 T. R. 313, n.
- 3 A. proceeds by foreign attachment against B. who surrenders, and pleads to the jurisdiction of the Court, A. discontinues the foreign attachment, and arrests B. by process out of the Court: Held, that the foreign attachment was not such an arrest as to entitle B. to be discharged out of custody in the present suit, on entering a common appearance. *Wood v. Thompson*.
1 Marsh. 395
- 4 A. deposits goods with B. as a security for money advanced by B. with a promise to deliver the bill of lading, when it should arrive, indorsed to B. C. is employed as a broker to dispose of the goods for B.'s benefit. Before the bill of lading arrives, the goods are attached in the Mayor's Court in the hands of C. by a creditor of A. Held, that the transfer of the property to B. was complete, though the bill of lading had never been indorsed, and that, therefore, the foreign attachment was no answer to an action by B. against C. for the proceeds. *Giles v. Nathan*.
1 Marsh. 226
- 5 If a plea of foreign attachment (in London) state the custom to be "that if any person be or hath been indebted to any other person within the said city &c." it ought to aver that the defendant in the plaint was indebted to the plaintiff within the city. *Morris v. Ludlam*.
2 H. B. 362
- 6 But it is not necessary that the debt should arise within the jurisdiction, or that the defendant in that Court should reside within it, or be actually summoned. *Harrington v. Macmorris*.
5 Taunt. 232
S. C. 1 Marsh. 33
- 7 Neither is it necessary to aver the custom that the plaintiff below shall swear to the debt, or the fact that he did swear to it: nor that the plaintiff in the principal case was indebted to the plaintiff below within the jurisdiction of the Mayor's Court; nor that a writ of *scire facias* issued against the garnishee; it is enough that he was "warned to shew cause." *Banks v. Self*.
5 Taunt. 234, n.
N. B. This case contains the plea.
- 8 A garnishee, against whom a recovery was had in the Mayor's Court on foreign attachment, after a summons to the defendant and *nihil* returned, may protect himself by giving such proceedings in evidence upon *non-assumpsit* in an action to recover the same debt brought by the defendant below, without proving the debt of the plaintiff below who attached the money in his hands: although by the course of proceedings in the Mayor's Court, bail not having been put in, the plaintiff below was not obliged to prove the debt to entitle himself to recover against the garnishee. *M'Daniel v. Hughes*.
3 E. R. 267

FOREIGN LAWS.

- 1 *A.* and *B.* being inhabitants of the United States of *America*, while those states were colonies of *Great Britain* and before the war broke out between the two countries, *B.* executes a bond to *A.* During the war, but after the declaration of independence by the Congress, both parties are attainted, their property confiscated, and vested in the respective States of which they were inhabitants, by the legislative acts of those States, and a fund provided for the payment of the debts of *B.* in *America*. *A.* may maintain an action on the bond against *B.* in *England*. *Folliot v. Ogden*. 1 H. B. 123
 - 2 The several acts of attainder and confiscation being considered as passed by *Sovereign independent States* do not disable *A.* from suing, nor exempt *B.* from being sued in *England*. 1 H. B. 123
 - 3 It is not a good plea in bar of an action at law, that an ample fund was provided out of the effects of *B.* in *America* for the payment of his debts, to which *A.* might and ought to have resorted, and out of which he might have been paid. *ibid.*
 - 4 But it is good ground for relief in equity. 1 H. B. 123
 - 5 An injunction was granted by the Court of Chancery, to prevent execution being taken out on a judgment obtained in an action at law, on a promissory note, the circumstances of which resembled those of the above case. *Wright v. Nutt*. 1 H. B. 136, n.
 - 6 But see *Wright v. Simpson*, where a bill to have bonds delivered up, or to compel the creditor to resort, in the first instance, to the fund arising from the confiscation, was dismissed by Lord Eldon C. J. on the ground that it did not appear that the creditor had the clear means of making his demand effectual against that fund: the Lord Chancellor also expressing an opinion in favour of the right to sue personally was in that case against the authority of *Wright v. Nutt*. 6 Ves. jun. 714
 - 7 The penal laws of foreign countries are strictly local, and effect nothing more than they can reach, and can be seized by virtue of their authority. *Folliott v. Ogden*. 1 H. B. 135
 - 8 The judgment in the case of *Folliott v. Ogden*, was affirmed by the Court of King's Bench, on a writ of error, but on grounds different from those on which the Court of Common Pleas proceeded.—The former Court holding that the acts of confiscation passed in several states of *North America*, after the declaration of independence and before the treaty of peace, by which this country acknowledged their independence were to be considered as a nullity in the courts of law in this country. *Ogden v. Folliott*. 3 T. R. 726
- And see *Dudley v. Folliott*. 3 T. R. 584 and *Parl. Cases*, 8vo. 4. 111.
- 9 As to the effect of judgments in foreign courts, upon property of *British* subjects within their jurisdiction, and how far such judgments shall be allowed to interfere with the affairs of this country, see the opinion of *Eyre, C. J.* of *C. P. Philips v. Hunter* (in error). 2 H. B. 409, &c.

FORESTALLING AND ENGROSSING.

- N. B.* The following were declared to be offences at common law, and not done away by the repeal of the statute 5 & 6 Ed. 6. c. 14.
- 1 Spreading rumours with intent to enhance the price of hops, in the hearing of hop-planters, dealers and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price. *Rex v. Waddington*. 1 E. R. 143
 - 2 Spreading such rumours generally, with intent to enhance the price of hops. *ibid.*
 - 3 Endeavouring to enhance the price by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time. *ibid.* 144
 - 4 Engrossing large quantities of hops, by buying from many particular persons

- by name, certain quantities, with intent to re-sell the same for an unreasonable profit, and thereby to enhance the price. *Rex v. Waddington*. 1 E. R. 143
- 5 *Ad idem*, stating the particular contracts. *ibid.*
- 6 Procuring large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to re-sell at an unreasonable profit, and thereby greatly to enhance the price. *ibid.*
- 7 Buying large quantities with like intent. *id.* 145 & 168
- 8 Buying large quantities with intent to re-sell at exorbitant profit, &c. *ibid.*
- 9 Unlawfully engrossing, by buying large quantities with like intent. *ibid.*
- 10 Engrossing hops of divers persons by name, with an intent to re-sell at an unreasonable profit, and thereby enhance the price. *Rex v. Waddington*. 1 E. R. 167
- 11 Engrossing hops, then growing, by forchand bargains with like intent. *id.*
- 12 Buying all the growth of hops in several parishes by forehand bargains, with like intent. *Rex v. Waddington*. 1 E. R. 167, *id.*
- 13 Buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to sell at an unreasonable price, and to enhance the price. *ibid.*
- 14 Engrossing, by buying large quantities of persons unknown, with intent to re-sell at an exorbitant price, &c. *id.* 169
- 15 Buying hops, then growing, with intent to re-sell at an exorbitant price and lucre. *ibid.*
- 16 To forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preservation of any victual, though not formerly used or considered as such, is an offence at common law. 1 E. R. 169
And see *Bristow v. Waddington*, (*in error*.) 2 N. R. 355, *ante*, page 76.
Rex v. Gilbert. 1 E. R. 583

FORMER RECOVERY.

- 1 It is no bar to an action of *assumpsit* that there was a former action of *assumpsit* between the same parties, in which the plaintiff recovered one demand, and might also have recovered the present demand; if in point of fact the present demand were not the subject of inquiry in the former action. *Seddon v. Tutop*. 6 T. R. 607
- 2 *Secus*, if the present demand were inquired into in the former action. 6 T. R. 607
- 3 If several military officers falsely imprison a man, who recovers in trespass against one of them, he cannot afterwards sue another of them for the same wrong. *Per Lawrence J. Warden v. Bailey*. 4 Taunt. 88

FRAUDS, STATUTE OF.

I. LEASES.

II. AGREEMENTS.

- (a) *Promises on behalf of third persons.*
- (b) *Sale or interest in lands.*
- (c) *Sale of goods.*

III. WILL OF LANDS.

I. LEASES.

- 1 The first section of the statute of frauds as construed by the second, is meant to vacate parol leases, &c. conveying a greater interest in land than for three years, and whereon a rent is reserved. *Crosby v. Wadsworth*. 6 E. R. 603
- 2 Though by the statute of frauds, it is enacted that all leases by parol for more than three years shall have the effect of estates at will only, such a lease now enures as a tenancy from year to year; the meaning of the statute being that such an agreement should not operate as a term. *Clayton v. Blakely*. 8 T. R. 3
And see *Doe d. Rigge v. Bell*. 5 T. R. 471
- 3 The mere cancelling in fact of a lease, is not a surrender of the term thereby granted within the statute, which requires such surrender to be by deed or

note in writing, or by act or operation of law. *Roe d. Berkeley (Earl) v. Archbishop of York.* 6 E. R. 86

II. AGREEMENTS.

(a) Promises on behalf of third Persons.

1 No person can, by the Statute of Frauds, be charged upon any promise to pay the debt of another, unless the agreement upon which the action is brought, or some note or memorandum thereof, be in writing; by which word agreement must be understood the consideration for the promise, as well as the promise itself: And therefore, where one promised in writing to pay the debt of a third person, without stating on what consideration, it was holden that parol evidence of the consideration was inadmissible by the Statute of Frauds; and consequently such promise appearing to be without consideration upon the face of the written engagement, it was *nudum pactum*, and gave no cause of action. *Wain v. Walters.* 5 E. R. 10

2 There must be a good consideration for a promise in writing to pay the debt of another, as well as for any other promise; and a count averring that *J. A.* made a bill of sale of goods to the plaintiff, in consideration of a debt of 122l. 19s., due from *J. A.* to the plaintiff, and that plaintiff being about to sell the goods in satisfaction of his debt, the defendant undertook to pay him 122l. 19s. if he would forbear to sell, does not shew that this is a promise to pay the debt of another with sufficient distinctness to bring the case within the Statute. *Barrell v. Trussell.* 4 Taunt. 117

And see *Rann v. Hughes.* 5 T. R. 350

3 If the person, for whose use goods are furnished, be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds. *Matson v. Wharam.* 2 T. R. 80

4 There is no distinction between a promise to pay for goods furnished for the use of another made before they are delivered, and one made after. *ibid.*

5 A promise in these words, "if you do not know him, you know me, and I will see you paid," not being in writing, is void by the Statute.

2 T. R. 80

6 So is this, "you must supply my mo-

ther-in-law with bread, and I will see you paid." *Jones v. Cooper.*

2 T. R. 80

And see *Cowper's Rep.*

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7 A tradesman delivers goods to *A.* at the request and on the credit of *B.*, who says before the delivery, "I will be bound for the payment of the money as far as 800l. or 1000l." This promise of *B.* not being in writing, is void by the Statute of Frauds, if it appear that credit was given to *A.* as well as *B.* *Anderson v. Hayman.*

1 H. B. 120

8 A parol promise to pay the debt of another, and also to do some other thing, is void by the Statute. *Chater v. Beckett.*

7 T. R. 201

9 The plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances; the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies in order that he might collect for the principal the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: Held, that this was not a promise for the debt or default of another within the Statute of Frauds; and that the plaintiff might recover against the defendant as well for the breach of agreement in not providing for the payment of the acceptances, as also upon a count for money had and received. *Castling v. Aubert.* 2 E. R. 325

10 *A.* being insolvent, a verbal agreement was entered into between several of his creditors and *B.*, whereby *B.* agreed to pay the creditors 10s. in the pound, in satisfaction of their debts; which they agreed to accept, and to assign their debts to *B.*: Held, that this agreement was not within the Statute, not being a collateral promise to pay the debt of another; but an original contract to purchase the debts. *Anstey v. Marden.* 1 N. R. 124

11 A letter addressed by the defendant to Mr. *G.*, who was the plaintiff's attorney, stating that "the bearer *D. Williams* has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid,"

and signed by the defendant; is evidence within the fourth clause of the Statute of Frauds, to charge him with the debt due from *Williams* to the plaintiff, upon parol proof of its amount, and that Mr. G., to whom it was addressed, was the attorney of the plaintiff, and received the letter in that character from *Williams* the bearer, and not as the principal and creditor. *Bateman v. Phillips*.

15 E. R. 272

(b) *Sale or Interest in lands.*

1 If *A.* agree with *B.* to let him land rent free, on condition that *A.* shall have a moiety of the two succeeding crops, the agreement need not be in writing under the Statute of Frauds. *Poulter v. Killingbroke*. 1 B. & P. 397
And see *Bristow v. Waddington*.

2 B. & P. 452

2 A contract with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, was held to be a contract or sale of an interest in or concerning land, and voidable by the 4th section of the Statute of Frauds, if not reduced to writing, and may be discharged by parol notice from the owner before any part execution of it. *Crosby v. Wadsworth*.

6 E. R. 602

3 A contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell to the defendant the potatoes at so much per sack; the defendant, to get them out of the ground immediately; was held not to be a contract for any interest in land within that section; but the same as if the potatoes, which had done growing and were to be taken up immediately, had been sold in a warehouse, from whence they were to be removed by the defendant. *Parker v. Staniland*.

11 E. R. 362

4 Where defendant on the 12th of October agreed to sell to plaintiff (an infant) all the potatoes then growing on three acres at so much per acre, to be dug up and carried away by plaintiff, and plaintiff paid 40l. to defendant under the agreement, and dug a part and carried away a part of those dug, but was prevented by the defendant from digging and carrying away the residue: Held, that he was entitled to recover for this breach of

the agreement, and that such agreement (being by parol) was not within the 4th section of the Statute. *Warwick v. Bruce*.

2 M. & S. 205

5 A sale of growing turnips, no time being stipulated for their removal, and the degree of their maturity not being positively found; was held to be a sale of an interest in land. *Emmerson v. Heelis*.

2 Taunt. 38

6 A sale of lands, though by auction, is within the Statute of Frauds.

Walker v. Constable. 1 B. & P. 366

7 A tenant having agreed with his landlord, that if he would accept another tenant he would pay 40l. out of 100l. good will, and having received the 100l. is liable in an action for money had and received; the consideration being executed and the case thus taken out of the Statute of Frauds as a contract for an interest in land. *Griffith v. Young*.

12 E. R. 513

8 Where one was alleged to have bought an estate for another, which he had articulated for in his own name, but there was no written agreement between them, nor any part of the purchase-money paid by the plaintiff, parol evidence that the estate was purchased for the plaintiff was refused, and equity refused to compel a conveyance. *Bartlett v. Pickersgill*.

4 E. R. 577, n.

(c) *Sale of Goods.*

1 If it appear to have been the understanding of the parties to a contract, that it was not to be completed within a year, though it might be and was in fact in part performed within that time, it is within the 4th clause of the Statute of Frauds; and if not in writing signed by the party to be charged, &c., it cannot be enforced against him. And his signature in a book intitled "*Shakespeare subscribers, their signatures,*" not referring to a printed prospectus which contained the terms of the contract, and which was delivered at the time to the subscribers to the *Boydell Shakespeare*, cannot be connected together, so as to take the case out of the Statute, as such connexion could only be established by parol evidence. *Boydell v. Drummond*.

11 E. R. 142

2 A guaranty in writing to pay for any goods which the vendor delivers a third person is good, within the 4th

sect. of the Statute of Frauds, as containing a sufficient description of the *consideration* of the promise, (namely, the delivery of the goods when made) as of the *promise* itself; both of which are included in the word *agreement*, required by that section to be reduced into writing, &c. *Stadt v. Lill.*

9 E. R. 348

- 3 The Statute of Frauds will prevent a parol agreement to buy goods, without either earnest or delivery, from giving the buyer any property in them. In such case, therefore, the buyer cannot maintain *trover* against the vendor who sells them to another person. *Alexander v. Comber.* 1 H. B. 20

- 4 N. B. It was in this case said by Mr. J. *Wilson*, that where a sale is not immediate, as in case of a contract to purchase a carriage when built, it is not within the Statute.

1 H. B. 20

- 5 But in a subsequent case where *A.* and *B.* had entered into a verbal agreement for the sale of goods to be delivered to *A.* at a future period, (there being no earnest paid, nor any note in writing, nor delivery of any part of the goods), Lord *Loughborough*, *Gould*, and *Heath*, Justices, held this contract to be void within the Statute, though it had been admitted by *B.* in his answer to a bill in chancery, filed for the performance of it; at the same time pleading the Statute. *Rondeau v. Wyatt.*

2 H. B. 63

[Mr. J. *Wilson*, (absent as a commissioner in chancery), expressed his adherence to his former opinion.]

- 6 A sale of goods for more than 10*l.* by sample at one place, to be afterwards delivered at another, is within the Statute, if no part of the goods contracted for were delivered, nor any thing given by the buyer to bind the bargain, nor any memorandum thereof in writing. *Cooper v. Elston.*

7 T. R. 14

- 7 Where goods are ponderous and incapable of being handed over by actual delivery, it may be done by that which is tantamount, as by delivering the key of a warehouse in which they are. Therefore, after a bargain and sale of a stack of hay between the parties on the spot, evidence that the vendee actually sold part of it to another person, by whom, though against the vendee's approbation, it

was taken away, is sufficient to warrant the jury in finding a delivery to and acceptance by the vendee: thereby taking the case out of the Statute of Frauds. *Chaplin v. Rogers.*

1 E. R. 192

- 8 If a man bargains for the purchase of two horses, and desires the vendor to keep them in his possession at livery for an especial purpose for the vendee, and the vendor accepts the order, and in consequence thereof removes the horses out of the sale stable into another stable, this is a sufficient delivery of the horses within the Statute. *Elmore v. Stone.*

1 Taunt. 458

- 9 *A.* having sent to *B.* a bale of sponge (under a verbal order from the latter), for which he charged 11*s.* per pound; *B.* returned it, and at the same time wrote a letter to *A.* stating that he had examined the sponge, and finding that it was not worth more than 6*s.* per pound, he had sent it back. Held, that this letter did not amount to such an acceptance of the goods as would take the case out of the Statute. *Kent v. Huskinson.*

3 B. & P. 233

- 10 Where the defendant agreed by a written contract to purchase of the plaintiffs 300 hogs of bacon, to be delivered at fixed times and in specified quantities, and after a part of the bacon had been delivered, requested the plaintiffs, as the sale was dull, not to press the delivery of the residue; to which the plaintiffs assented: this was to be understood only as a parol dispensation of the performance of the original contract, in respect to the times of the delivery, and therefore was not affected by the Statute: the defendant was held liable for not accepting the residue within a reasonable time afterwards. *Cuff v. Penn.*

1 M. & S. 21

- 11 Sugars being advertised for sale by auction, samples were produced to the bidders assembled: after the biddings closed, these samples were delivered to and accepted by the purchaser as part of the purchase, to make up the quantity of sugars; and a fire having consumed the sugars before the delivery thereof to the purchaser: Held, that at common law there was a sale to change the property at the time and place of auction: and that the delivery to and acceptance by the buyer of the samples, as part of the sugars pur-

- chased, took the case out of the Statute of Frauds. *Hinde v. Whitehouse*. 7 E. R. 558
- 12 It seems that taking sales of goods by auction to be within the 17th section, the auctioneer or broker, who is a middle-man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature. *Hinde v. Whitehouse*. 7 E. R. 558
- 13 And it is now determined that an auctioneer is an agent lawfully authorized by the buyer to sign a contract for him, and his authority is given by the buyer bidding aloud; and the name of a purchaser of divers lots at an auction being written down on the sale bill opposite to such lots, for which the purchaser was declared to be the highest bidder, is a note or memorandum in writing sufficient to satisfy the intent of the Statute. *Emmerson v. Heelis*. 2 Taunt. 38
- 14 A memorandum, signed by the defendants, whereby they agreed to give so much for goods, takes the case out of the 17th sect. of the Statute, though not signed by the seller, nor expressing any consideration for the defendant's promise, otherwise than by inference from their own obligation. *Egerton v. Matthews*. 6 E. R. 307
- 15 But a note signed by the seller only, and not expressing the name of the buyer, is not sufficient. *Champion v. Plummer*. 1 N. R. 252
- 16 A bill of parcels, in which the vendor's name is printed, delivered to the vendee at the time of an order given for the future delivery of goods, seems to be a sufficient memorandum of a contract within the Statute. *Saunderson v. Jackson*. 2 B. & P. 238
- 17 At all events a subsequent letter, written and signed by the vendor, referring to the order, may be connected with the bill of parcels so as to take the case out of the Statute. *ibid.*
- 18 A bill of parcels, in which the name of the vendor is printed, and that of the vendee written by the vendor, is a sufficient memorandum of the contract within the Statute of Frauds to charge the vendor. *Schneider v. Norris*. 2 M. & S. 286
- 19 A memorandum in writing of a contract for the purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's rider in his common order-book in these terms; "19th February 1811, of John Smith, 64L, (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order,) "do. 40 of 3 — 58L," (which was explained by the witness to mean a new order for 40 sacks of flour, called thirds, at 58s. a sack,) and this without any signature, is not a sufficient memorandum in writing of the bargain within the Statute of Frauds, s.17. to bind the defendant, though it was read over to him by his desire at the time it was written. And such defective memorandum cannot be supplied by a letter written afterwards by the defendant, in which, though he recognized the order, yet he insisted that the flour had not been delivered in time, and therefore he was not bound to take it. And it was not competent for the plaintiff to prove, by the parol testimony of the person who took the order, that there was no such term in the contract as to deliver the flour within a given time. *Cooper v. Smith*. 15 E. R. 103
- 20 An order for goods, written and signed by the seller in a book of the buyer's, but not naming the buyer, may be connected with a letter of the seller to his agent mentioning the name of the buyer, and with a letter of the buyer to the seller, claiming the performance of the order, to constitute a complete contract within the Statute. And it is no objection to the validity of a contract for the sale of goods signed by the seller, that the seller cannot enforce the same contract against the buyer, because the buyer has never signed it. *Allen v. Bennet*. 3 Taunt. 169

III. WILL OF LANDS.

- 1 A will to direct the uses of a surrender of a copyhold or of a customary estate, passing by surrender, is not within the Statute of Frauds, and need not be signed unless such signature be required by the terms of the surrender to the uses of the will. *Doe d. Cook & Ur. v. Danvers*. 7 E. R. 298
- 2 Instructions for a will taken in writing by another in the presence and from the oral dictation of the deceased though without any signature or attes

tation, is a will in *writing* within the Statute, and complies with the terms of a surrender, directed to be to such uses, as A. B. *in or by her last will or testament in writing should limit, &c.*

7 E. R. 299, 324

3 It is not necessary to the validity of the execution of a will of lands by a blind man, that it should be read over to him in the presence of the attesting witnesses. *Longchamp d. Goodfellow v. Fish.* 2 N. R. 415

4 The 29 Car. 2. c. 3., which requires a will of lands to be attested and subscribed in the presence of the deviser, means that he should be in a situation that he may see the witnesses attest: therefore, where the attesting witnesses retired from the room where the

testator had signed, and subscribed their names in an adjoining room, and the jury found that from one part of the testator's room, a person by inclining himself forwards with his head out at the door might have seen the witnesses, but that the testator was not in such a situation in the room that he might by so inclining have seen them: Held, that the will was not duly attested. *Doe d. Wright v. Manifold.* 1 M. & S. 294

5 The wife of an acting executor taking no beneficial interest under the will, is a competent attesting witness to prove the execution of it within the description of a *credible witness* in the Statute of Frauds. *Bettison v. Bromley, Bart.* 12 E. R. 250

FRAUDULENT CONVEYANCE.

See ante, DEED III. 246, 7.

1 If A., being indebted to B. and C. after being sued to judgment and execution by B., go to C. and voluntarily give him a warrant of attorney to confess judgment, on which judgment is immediately entered and execution levied on the same day on which B. would have been entitled to execution, and had threatened to sue it out, the preference so given by A. to C. is not unlawful, nor fraudulent within the meaning of the stat. 13 Eliz. c. 5.

Holbird v. Anderson. 5 T. R. 235

2 After a creditor has distrained for rent the goods of his debtor, who was also under engagement with the creditor's agent for the sale of his goods, for the purpose of discharging the rent, and also certain book debts due to such creditor and his agent, the debtor confessed judgment to the defendant, another creditor, for a large nominal sum, with a defeazance that execution should only issue for such an amount as would cover the debt of the defendant, and all the other creditors, amongst whom a rateable distribution was to be made: Held, that such judgment confessed, being in fact made *bonâ fide*, and upon good

consideration, was not covenous or fraudulent within the statute 13 Eliz. c. 5., although its effect might be to delay or hinder such first-mentioned creditor from recovering the whole amount of his demands. Neither could it be said to delay or hinder at all his recovering the rent due to him, and for which he had distrained; such distress having a legal priority. But it seems that the penalty given by the third clause of the Statute attaches as well upon a covenous judgment as a covenous bond, though the latter alone be named in that part of the clause. *Meux q. t. v. Howell.* 4 E. R. 1

3 A voluntary settlement of lands, made in consideration of natural love and affection, is void against a subsequent purchaser for a *valuable consideration*; though with notice of the prior settlement before all the purchase-money was paid, or the deed executed; and though the settler had other property at the time of such prior settlement, and did not appear to be then indebted, and there was no fraud in fact in the transaction: for the law, which is in all cases the judge of fraud and covin arising out of facts and intents, infers fraud in this case, upon the

construction of the statute, 27 Eliz. c.

4. *Doe d. Otley v. Manning.*

9 E. R. 59

- 4 The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he

had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant. *Doe d. Borthell v. Martyn.*

1 N. R. 332

FREIGHT.

I. WHO ENTITLED TO.

II. HOW PAYABLE BY TERMS OF CHARTER-PARTY.

III. ——— UNDER BILLS OF LADING.

I. WHO ENTITLED TO.

- 1 The mortgagee of a ship cannot maintain an action for freight against a third person before he takes possession. *Chinnery v. Blackbourne.*

1 H. B. 117, n.

- 2 The plaintiff contracted to carry the defendant, his family, and luggage, from *Demerary* to *Flushing*; and in the course of the voyage, within four days' sail of *Flushing*, the ship was captured by an *English* ship of war, and brought into *England*, and the ship and cargo libelled for Prize in the Court of Admiralty, and the cargo condemned, and proceedings still pending against the ship; but the defendant, and his family, were liberated, and their luggage in fact restored to their possession: Held, that however the question might be as to the plaintiff's right to recover passage-money upon an implied *assumpsit pro ratâ itineris*, if the ship were restored, yet pending the proceedings against the ship as Prize in the Admiralty Court, no such action could be maintained; for *non constat*, but that the ship might be condemned, and the freight decreed to the captors. *Mulroy v. Backer.*

5 E. R. 316

- 3 A ship bound for *London*, after taking in her cargo, but before breaking ground, was cut out of her port of lading in *Jamaica* by a French privateer; but was afterwards re-captured and carried into another port in the same island, where the cargo was sold by order of the Court of Admiralty, for the benefit of the freighters: Held, that the owners of the ship were not

entitled to any part of the freight, though by the usage of the trade, the ship was freighted at their expense. *Curling v. Long.*

1 B. & P. 634

- 4 An Order of Council permitting the consignee of goods coming from an enemy's country without a license, to land them here, on condition of immediately re-exporting them, does not so legalize the voyage, as to enable the master of the ship to recover his freight. *Muller v. Gernon.*

3 Taunt. 394

- 5 The flag officers of a fleet have no right to any share in the gratuity of one-half *per cent.* which is given to the captains of ships of war for carrying public treasure on board their ships. Nor in the freight received by captains for carrying the treasure of individuals. *Montagu v. Janverin.*

3 Taunt. 442

- 6 It is illegal for the commander of one of his Majesty's ships of war to carry on board her, as freight, the bullion of private merchants, without an order from an authority competent to command him to perform that service. *Brisbane, (Knt.) v. Ducrest.*

5 Taunt. 143

II. HOW PAYABLE BY TERMS OF CHARTER-PARTY.

- 1 In covenant on a charter-party of affreightment in which defendant covenanted to pay so much for freight for "goods delivered at *A.*," the delivery of goods at *A.* being considered as a condition precedent: It was held that freight could not be recovered *pro ratâ itineris* if the ship were wrecked at *B.* before her arrival at *A.*, though the defendant accepted his goods at *B.* *Cooke v. Jennings.*

7 T. R. 381

- 2 Where in a charter-party, freight was to be paid at so much *per ton*, on a right and true delivery of the homeward bound cargo, from Honduras Bay to London, and the ship and cargo, after capture and recapture, having been wrecked at St. Kitts, into which she was carried by the re-captors, a sale of the cargo was directed by the Vice-Admiralty Court there, on the application of the master, acting *bona fide* for the benefit of all concerned, but without orders from any; and the proceeds of the sale were remitted to the ship owners: Held, that the freighter might recover such proceeds in *assumpsit* for money had and received, without allowing freight *pro rata itineris*. For such form of action, for the proceeds of an illegal sale of goods, is only a waiver of any claim for damages for the tortious act; taking the actual proceeds of the sale as the value of the goods (subject to the legal consequences of considering the demand as a debt; which admits of a set-off, &c.) but does not recognize the right of the vendor so to convert the goods. And here, the act of conversion, (for such it must be taken to be), being made by the master, who is the general agent of the ship-owners, (and not, as in *Baillie v. Modigliani*, cited 6 T. R. 421. by the act of a Court of competent jurisdiction), was unlawful, and discharged the claim of the ship-owners for freight *pro rata itineris*. *Hunter v. Prinsep*. 10 E. R. 378
- 3 But the plaintiff could not recover against the ship-owners upon special counts framed upon the bills of lading signed by the master; as well because they contained exceptions of the very perils by which the loss happened; as because the defendants, having expressly contracted with the plaintiff under seal, could not be charged in respect of the same subject-matter by a contract not under seal, and signed by their master only, and not by themselves. 10 E. R. 378
- 4 If a ship freighted to H. under a charter-party, is prevented by restraint of princes from arriving, and the consignees direct the master to deliver the cargo at G., and accept it there, he may maintain *assumpsit* upon an implied contract to pay freight *pro rata itineris*. *Christy v. Row*. 1 Taunt. 300
- 5 And if the master be prevented by the default of the consignees or restraint of princes, from delivering the whole cargo there, he shall be entitled to freight *pro rata* for the part delivered. 1 Taunt. 300
- 6 If a ship be freighted on a single voyage outwards, and be prevented from delivering her cargo, *semble* that she shall be entitled to receive from the owner of the cargo freight for bringing it back. *ibid.*
- 7 And *semble*, that the master would not be entitled, upon losing the delivery, to cast away the residue of the cargo. 1 Taunt. 300
- 8 A. wishing to send goods to B. at X. employed C. to carry and deliver them to B., and engaged to pay C. for the freight: C. on delivering them according to the order, took a bill of exchange from B. drawn on A., which bill was never paid: Held, that A. was liable to pay the amount of the freight to C. notwithstanding the bill of exchange. *Tapley v. Martens*. 8 T. R. 451
- 9 A covenant in a charter-party of affreightment, to pay freight to the owner for the hire of the vessel, is not transferred to the vendee by a bill of sale of the ship, made during the voyage; and such owner afterwards becoming bankrupt, his assignees, and not the vendee of the ship, have the legal right to receive the freight and demurrage due from the freighter upon the charter-party. *Splidt v. Bowles*. 10 E. R. 279
- 10 If a British merchant charter a Swedish ship on a voyage to St. Michael's for a cargo of fruit, and the charter-party contain the usual exception against the restraint of princes, and the ship be prevented from reaching St. Michael's within the fruit season by an embargo laid on Swedish vessels by the British government, the Swedish owner cannot by proceeding on the voyage after the embargo is taken off, entitle himself to recover the freight against the British merchant. *Touteng v. Hubbard*. 3 B. & P. 291
- 11 If A. contract with B. to fetch a cargo of corn from C. and on his arrival there find that the government has prohibited the exportation of corn, and therefore, after staying out his demurrage days, return in ballast, B. is

notwithstanding liable to pay freight; but not demurrage, if *A.* knew of the prohibition before he entered the port of *C.* though demurrage were allowed by the contract. *Blight v. Page.*

3 B. & P. 295, *n.*

- 12 If the owner of a ship, having chartered her for a voyage, assigns her before the voyage, though he afterwards assigns the charter-party to another, if she earns freight, the assignee of the ship is entitled to the freight, as incident to the ship. *Morrison v. Parsons.*

2 Taunt. 407

- 13 But he cannot sue on the charter-party otherwise than in the name of the assignor.

2 Taunt. 407

- 14 Where the master and freighter of a vessel of 400 tons mutually agreed in writing, that the ship, being every way fitted for the voyage, should with all convenient speed proceed to *St. Petersburg*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c.: one-half to be paid on right delivery, the other at three months: Held, that the delivery of a complete cargo was not a condition precedent; but that the master might recover freight for a short cargo at the stipulated rates per ton; the freighter having his remedy in damages for such short delivery. *Ritchie v. Atkinson.*

10 E. R. 295

- 15 Under an agreement in the nature of a charter-party, whereby the plaintiff let his ship on freight to the defendants on a voyage from *Shields* to *Lisbon*, with convoy, the freight to be paid on right delivery of the cargo: The ship having sailed from *Shields* with her cargo, and joined convoy at *Portsmouth*; and after being detained near a month off *Lymington*, her sailing orders being recalled by the convoy, in consequence of the occupation of *Portugal* by the enemy; and the defendants having refused to accept the cargo at *Portsmouth*, to which the ship returned, it was unloaded by the plaintiff, after notice to the defendant, and then was sold by consent of both parties, without prejudice: Held, that the plaintiff could not recover freight *pro rata*, or demurrage. *Liddard v. Lopes.*

10 E. R. 525

- 16 A ship having been let to freight by

charter-party for twelve months, and for such longer period as the freighters should detain her, for which certain proportions of the freight were to be paid at the end of 2, 6, 10, and 14 months, &c.; it is no answer to a breach for non-payment of six months' freight, due at the end of the ten months, that the owner had covenanted to keep the vessel in repair during the time she was freighted, and that she was not in repair when the freighter shipped goods on board her during the 12 months, which made it necessary for him to unload and repair her, whereby she was unserviceable for part of the six months; and that he had paid the freight for all the time she was serviceable; and that she was not in his service for ten months in the whole: for *non constat*, but that after she had been used by the freighter, she wanted repair, without any default of the owner; or that he was guilty of any delay in making the repairs; and the freight would still run on during the time of repair. *Have-lock v. Geddes.*

10 E. R. 555

- 17 The freight being reserved at so much per month, was earned at the end of each month, although the stipulated time of payment were from four months to four months (beginning at the end of two months) and the ship were lost before the end of 14 months.

10 E. R. 555

- 18 An allowance for extra men being covenanted to be paid by the freighter, the residue of which (after part payment) was not to be paid till the ship's discharge, or return from her voyage, and the ship having sailed on a voyage to *St. Domingo* where she arrived, but was burnt before her return: Held, that such loss was a discharge of her from the freighter's employment, as if by the act of the freighter on which such extra-allowance became payable.

10 E. R. 555

- 19 A ship was let to freight for a voyage, to take out a small cargo of lead to *P.* and to bring home a return cargo, for which freight was to be paid at eleven guineas a ton for the whole ship's admeasurement. If from political circumstances she should be unable to discharge her cargo, and consequently to obtain a return cargo, the freighters agreed to pay a gross sum, less than the amount of the

freight *per ton*: the ship being prevented from discharging, and the freighter supplying no homeward cargo, the master took in goods on freight, and brought them home together with the lead: The Court of C. P. held that he was entitled to receive the gross sum stipulated, and also to retain the freight which the ship had earned. *Bell v. Puller*. 2 Taunt. 285

S. C. 12 E. R. 496, n.

20 Where the master of the plaintiffs' ship entered into a charter-party, as agent for the plaintiffs, with the defendant, a partner in the house of *M. and Co.*, for the delivery of goods upon a stipulated freight, and the goods were delivered to *M. and Co.*, who were the consignees named in the bill of lading: Held, that the plaintiffs could not maintain *assumpsit* against the defendant for the freight. *Schack v. Anthony*. 1 M. & S. 573

21 *Semble*, If a master sails under a charter-party, stipulating for a voyage of which a part is illegal, that this does not prevent his insuring on, nor subject him to forfeiture for the part antecedent to the illegal act, for as he cannot be compelled to perform, nor enforce the payment of freight on the illegal part of the adventure, it may be presumed that he will abandon it. *Sewell v. The Royal Exchange Company*.

4 Taunt. 856

III. UNDER BILLS OF LADING.

1 *A. and B.*, merchants abroad, ship tobacco for *Liverpool*, consigned to *A.* himself there, to whose order the bills of lading are made: One of these bills is sent enclosed in a letter from the shippers to *C.* at *Liverpool*, advising him of such consignment to *A.*, and that *A.* intended to proceed to *Liverpool*, but in case he should not arrive in time, desiring *C.* to do the best for them. The tobacco having arrived in a damaged state before *A.*, is required to be landed, and is deposited in the King's warehouse pursuant to the statute; and afterwards *C.* acting as agent for *A.* within the knowledge of the captain, makes an entry of it in his own name in the custom-house, to avoid seizure: Held, that this was not such an acceptance of the cargo by *C.* as would make him liable to the captain for the freight. *Ward v. Felton*.

1 E. R. 507

2 If the master sign a bill of lading, expressing, that upon the delivery of the cargo freight is to be paid by the consignees, he does not thereby renounce his claim for freight against the consignor. *Christy v. Row*.

1 Taunt. 300

3 *Semble*, that the master's right to exact payment of any part of the freight from the consignee, does not arise till the delivery is completed, or determined. 1 Taunt. 300

4 The master of a ship, having contracted by the bill of lading with the shippers to deliver goods to certain persons or their assigns, *he or they paying freight for the same*; the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading, without the freight having been paid, is evidence of a new contract and promise on the part of such purchaser, as the ultimate appointee of the shippers for the purpose of such delivery, to pay the freight; and he is liable for the amount in an action of *indebitatus assumpsit* brought against him by the ship-owner. *Cock v. Taylor*. 13 E. R. 399

5 Where the consignees of a *West India* cargo, deliverable by bill of lading to them or their assigns, he or they paying freight for the same, indorsed it to the defendants, their brokers, for advances made by them, and the cargo on its arrival was landed at the *West India* docks in the names of the consignees, but was entered at the custom-house by the defendants in their own names, and afterwards the defendants obtained delivery from the *West India* docks under an order from the consignees for that purpose, and not under the bill of lading: Held, that the receipt of the cargo by the defendants, under the order of the consignees, was not a sufficient ground to raise an implied *assumpsit* on their part to pay the freight, and the entry at the custom-house made no difference; but, as it appeared from previous dealings, that the defendants had been in the habit of receiving goods in the same manner and paying the freight for them, that was considered sufficient to raise such an implied promise. The lien of the plaintiffs (the ship-owners) for freight, continued after the landing of the cargo at the *West India* docks, although they did

not give notice to the company to retain the cargo until payment of the freight. *Wilson v. Kymer.*

1 M. & S. 157

6 The indorsee of a bill of lading, which directs the goods to be delivered to order or to assigns, paying freight, is liable for the freight, though he be only acting as broker for the consignee; and though twelve months have elapsed since the landing of the goods, without any demand of freight, he is bound not to deliver the goods till he knows that freight has been paid. *Bell v. Kymer.* 1 Marsh. 146

7 Where a ship was chartered on a voyage out and home for a specified time, at a certain rate of payment on the homeward cargo in full for the hire of the ship for the said time to be paid in part by an advance on the ship's clearing for the outward voyage, and the rest on her return, by bills payable at a future day, and on the loading the homeward cargo, a bill of lading was signed to deliver the goods to the charterers, or their assigns, he or they paying freight for the said goods, as per charter-party:

Held, that the indorsees of the bill of lading for valuable consideration were not liable to the ship-owner upon an implied *assumpsit* to pay the freight arising out of the receipt of the goods under the bill of lading. *Moorsom v. Kymer.* 2 M. & S. 303

8 The bill of lading of a cargo, shipped at *Dantzic* on board a *Prussian*, expressed it to be 100 *lasts* in 2092 *bags*. The consignee had purchased it for that quantity, *English* measure, but it did not amount to that quantity by the *Dantzic* measure, which is larger: Held, that the master was entitled to freight according to the measure in the bill of lading, and exceeding the *Dantzic* measure. *Moller v. Living.* 4 Taunt. 102

9 The owner of a vessel and part-owner of the cargo sanctioning a pledge by his partners of the bills of lading, which were signed for the delivery of the goods on payment of freight, pledges the goods and the freight of them together, unless the freight be expressed to be excepted. *Grote v. Milne.* 4 Taunt. 133

FRIENDLY SOCIETIES.

1 It seems that no society is within the intent and meaning of the Friendly Society Act, 33 G. 3. c. 54, so as to require the Justices in Sessions to allow and confirm their rules, &c. in the manner therein provided for, if it ap-

pear that the general objects of such society are not confined to the charitable relief and maintenance of its old, sick, and infirm members, their widows, and children. *Rex v. Staffordshire (Justices).* 12 E. R. 280

GAME.

I. PROPERTY IN WHOM VESTED.

II. QUALIFICATION.

(a) *By Estate.*

(b) — *Degree.*

III. PENALTIES.

(a) *Where they attach.*

(b) *How recoverable.*

IV. CONVICTION.

Form and Requisites of.

I. PROPERTY IN WHOM VESTED.

1 The plaintiff's dogs having hunted and caught, on the defendant's land, a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare, being quite spent, had been caught by a labourer of the defendant for the benefit of the hunters. *Churchward v. Studdy.* 14 E. R. 249

II. QUALIFICATION.

(a) *By Estate.*

- 1 An estate of the value of 150*l.* per ann. holden by the defendant in his own right, under a lease for 99 years to trustees, if the defendant and others should so long live, is a sufficient qualification to kill game, under the stat. 22 & 23 Car. 2. c. 25. s. 3. *The Earl of Ferrers v. Henton.*

8 T. R. 506

- 2 On a question of the qualification of a defendant for killing game, the convicting magistrates may ground their opinion of his not being qualified, on the fact of the defendant's having, on a former day, sworn (under the Income Act) to an estate under 100*l.* a year. *Rex v. Clarke.*

8 T. R. 220

- 3 An estate, the rents of which are reduced under 100*l.* a year, by paying the interest of a mortgage, gives no qualification for killing game. *Wetherill v. Hall.*

8 T. R. 221, n.

(b) *By Degree.*

- 1 A diploma conferring the degree of Doctor of Physic, granted by either of the universities in Scotland, does not give a qualification to kill game under stat. 22 & 23 Car. 2. c. 25. *Jones v. Smart.*

1 T. R. 44

- 2 Neither is a Doctor of Physic of the English universities qualified as such.

1 T. R. 53

- 3 An esquire, or other person of higher degree, as such, is not qualified to kill game under that statute; but the son of an esquire, or the son of other person of higher degree is.

1 T. R. 44

- 4 A commission of captain of volunteers, signed by the Lord Lieutenant of a county, does not confer the degree of an esquire; and, therefore, the eldest son of such captain is not qualified to kill game. *Talbot v. Eagle.*

1 Taunt. 510

III. PENALTIES.

(a) *Where they attach.*

- 1 It is no defence to an action of debt for penalties on the game laws that the defendant acted *bona fide* as game-keeper of the manor in which the offence was committed, under a deputation from a person claiming a right to appoint the

game-keeper, there being no ground for the claim. *Calcraft v. Gibbs.*

5 T. R. 19

- 2 Questions respecting the boundaries of a manor cannot be tried in an action for penalties on the game laws.

Calcraft v. Gibbs. 4 T. R. 681 :

Hankins v. Bailey,

And *Blunt v. Grimes, there cited.*

- 3 In debt for a penalty, under the game laws, if the defendant shew a deputation as game-keeper of the manor from the lord, it may be presumed, if nothing appear to the contrary, that the game killed by him there was for the use of the lord under the stat. 3 G. 1. c. 11. *Spurrier v. Vale.*

10 E. R. 413

- 4 The possession of game by a servant employed to detect poachers, who took it up after it had been killed by strangers on the manor, in order to carry it to the lord, is not a possession within the penalty of the game laws. *Warneford v. Kendall.*

10 E. R. 19

- 5 An unqualified person going out with the qualified owner of greyhounds to course a hare, which was killed by the dogs, is not liable to the penalty of 5*l.*, given by stat. 5 Ann. c. 14., for using a greyhound to kill game; although he took an active part in the sport by beating the bushes in order to find a hare, and took it up after it was killed. *Lewis v. Taylor.*

16 E. R. 49

- 6 The mere fact of keeping a sporting dog is no evidence of keeping it for the purpose of destroying the game, without some evidence of its being used for that purpose. *Read v. Phelps.*

15 E. R. 271

- 7 A groom, attending his qualified master while using dogs for killing the game, and pursuing it by his master's command, is not liable to the penalty of the stat. 5 Ann. c. 14. *Rex v. Taylor.*

15 E. R. 460

- 8 But it does not appear that unqualified persons can be protected by joining qualified persons, without invitation, and taking an active part in killing the game. 15 E. R. 462, n.

(b) *How recoverable.*

- 1 Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute giving the remedy, as well as to that creating the offence and giv-

- ing the penalty; yet a count for a penalty on the stat. 5 Ann. c. 14., stating that the defendant kept a snare to kill game against the form of the statute in such case made, &c. by reason whereof, and by force of the statute in such case made, &c., an action hath accrued, &c. is sufficient; for the first statute mentioned refers to the 5 Ann. c. 14. creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 G. 3. c. 19. whereby the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *Clanricurde (Earl) v. Stokes.* 7 E. R. 516
- 2 The stat. 13 G. 3. c. 80. gives a penalty in case of killing game on a Sunday, and directs that it shall be forthwith paid on conviction; and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall, by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody, until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c.: Held, that such order to detain in custody until the return of the warrant of distress may be by parol. *Still v. Walls & Harris.* 7 E. R. 533
- 3 *Semble*, that a declaration for a penalty on killing game in an action brought for the whole penalty on the statute 2 G. 3. c. 19. s. 5. and prior statutes, need not allege the fact to have been committed within two terms before the action commenced, according to stat. 26 G. 2. c. 2.; the stat. 2 G. 3. having allowed six months. *Lee v. Clarke (in error).* 2 E. R. 333
- 4 A joint action may be maintained against several, to recover a penalty upon the game laws. *Hardyman v. Whitaker.* 2 E. R. 573, *notd.*

IV. CONVICTION.

Form and requisites of.

- 1 A conviction on the 4th section of the stat. 5 Ann. c. 14. for keeping a dog and gun to kill game, without being qualified, must be made within three months after the offence committed;

and if the hearing of the matter be adjourned over that time, though with the consent of the defendant, a conviction afterwards is bad. *Rex v. Tolley.* 3 E. R. 467

- 2 A conviction of the defendant on the stat. 22 & 23 Car. 2. c. 25. as "not being the eldest son of an esquire, or of other person of higher degree," is good. *King v. Utley.*

1 T. R. 45, 8, 51, n.

- 3 A conviction wherein the information does not negative the defendant's qualifications set forth in the statute 22 & 23 Car. 2. is bad. *Rex v. Jarvis.*

1 E. R. 643, n.

- 4 A conviction on the game laws, which, in negating the qualifications of the defendant under the stat. 22 & 23 Car. 2. c. 25. s. 3. only alleged that the defendant had not, at the time of the offence committed, "lands or tenements, or any other estate of inheritance of the clear yearly value of 100l., or for term of life, &c., or was in any other manner qualified," &c. is not sufficient, without also specifically negating that he had an estate of inheritance of the clear yearly value of 100l. in right of his wife. But it is sufficient to state that he kept and used a dog called a lurcher to kill and destroy the game. *Rex v. Earnshaw.* 15 E. R. 456

- 5 It is no objection to an information on the game laws that it is not *qui tam*. *Rex v. Lovet.* 7 T. R. 153

- 6 A magistrate should state all the evidence in the conviction, and not merely the result of it. *Rex v. Lovet.*

7 T. R. 152—8 T. R. 222

- 7 Though it be proper for a magistrate in drawing up a conviction on the stat. 5 Ann. c. 14. to state the particular evidence of the fact on which his judgment is founded; and not merely the legal effect of such evidence, in the words of the statute; yet a conviction in the latter form is valid in law, but the magistrate subjects himself to an information if he endeavour to shelter himself from detection, by mis-stating such legal result when the evidence would not warrant it. *Rex v. Pearse.* 9 E. R. 353

- 8 If the evidence be given on the same day that the defendant appeared and pleaded, it will be intended that the evidence was given in his presence. *Rex v. Lovet.* 7 T. R. 152

9 In a conviction on stat. 5 Ann. c. 14. for killing game, the evidence need not negative every specific qualification under stat. 22 & 23 Car. 2. c. 25. *Rex v. Crowther.* 1 T. R. 125

10 In a conviction on s. 4. of the stat. 5 Ann. c. 14. evidence that "the defendant kept and used a gun to kill and destroy the game," was held sufficient. *Rex v. Thompson.* 2 T. R. 18 But see 7 T. R. 152: and 8 T. R. 222

11 Proof that the defendant "did keep and use a gun to kill and destroy the game," is sufficient evidence to support a conviction on the game laws, though the witness had his reasons for believing it, "that the gun was fired by the defendant, who was walking about a piece of ground at H. with that apparent intent." *Rex v. Davis.* 6 T. R. 177

12 If a conviction before a justice of the peace on the game laws state that the defendant was present at the time when the information was read and the witness examined; and that when called on for his defence, he produced no evidence, and did not require any further time; that is sufficient, without stating that he was previously summoned to answer, &c. *Rex v. Stone.* 1 E. R. 639

13 2u.—Whether it be necessary for the prosecutor to negative by evidence, as well as in the information, the qualifications of the defendant to kill game?—and 2u. Whether the negative of such qualifications must be repeated in the adjudicatory part of the conviction, or whether it be not sufficient to convict the defendant of the offence *aforesaid*, referring to the previous part of the conviction, which sets forth the information in which such qualifications were specifically negatived. 1 E. R. 639

14 On an information on the game laws, charging the defendant with keeping and using a dog and also a gun on the same day, he can only be convicted in one penalty. *Rex v. Lovet.* 7 T. R. 152

15 Two persons cannot be convicted in separate penalties under statute 5 Ann. c. 14. s. 4. for using a greyhound to destroy game. *Rex v. Bleasdale.* 4 T. R. 809

16 A. being convicted of sporting contrary to the game laws, is required to bring his dog to the magistrate, who orders it to be immediately shot: Held, that the magistrate was justified under the 5 Ann. c. 14. s. 4. *Kingsnorth v. Bretton.* 1 Marsh. 106

GAMING.

See *tit. WAGER, post.*

N. B. When money paid on a gaming contract may be recovered back in the action of *ASSUMPSIT*, see *ante* 69.

1 Money fairly lost at play, cannot be recovered back in an action of debt for money had and received not founded on the statute. *Thistlewood v. Cracroft.* 1 M. & S. 500

2 The statute 9 Ann. c. 14. which avoids all securities for goods or money lent at unlawful games, and gives the loser a power to recover back the same within three months, does not make the contract void, but voidable only; and, therefore the loser cannot recover them after three months, though the winner can shew no title to them except what arises from having won them at play. *Vaughan v. Whitcomb.* 2 N. R. 413

3 If the jury, on an indictment on the stat. 9 Ann. c. 14., find that the as-

sault was on account of money won at play, the case is within the statute, though the assault were committed at a subsequent time and place, and after abusive language between the parties in respect of such money won. *Rex v. Hill Darley.* 4 E. R. 174

4 Insuring in the lottery is not gaming within stat. 5 G. 2. c. 30. s. 12, which will prevent a bankrupt's certificate being allowed. *Lewis v. Piercy.* 1 H. B. 29

5 The statute 27. G. 3. c. 1. which takes away the summary jurisdiction of magistrates over offences concerning the lottery, only extends to *State lotteries*; and does not repeal their power over games of chance or lotteries prohibited by stat. 12. G. 2. c. 28. *Rex v. Liston.* 5 T. R. 338

6 For the evidence required to support a charge for keeping a gaming-table. See 5 T. R. 338

7 Where, by the terms of a horse-race, the *entrance-money* is to be given to the *second best horse*, and it is doubtful on the wording of those terms, whether *all* the money paid at the entering each horse, is to be considered as *entrance-money*, the Court of C. P.

will put such a construction on the terms, as will conclude the *whole* in the description of *entrance-money* to be given to the *second best horse*, being most agreeable to stat. 13 G. 2. c. 19. s. 2 & 7. *Dowson v. Scriven*.

1 H. B. 218

GAOL AND GAOLER.

See tit. HABEAS CORPUS,
PRISONER, post.

- 1 The lord of a franchise is not, as such, bound to repair a gaol within it; but he may be subject to such a charge by immemorial usage. *Rex v. The Earl of Exeter*. 6 T. R. 373
- 2 All the prisons in the kingdom are the King's prisons. The House of Correction for the County of Middlesex, built by virtue of stat. 26 G. 3. c. 55, and adapted to the separate reception of felons pursuant to stat. 22 G. 3. c. 64, and other Acts, is a legal prison for the safe custody of

persons under a charge of high treason. *Ex-parte Evans*. 8 T. R. 172

- 3 The hulks and penitentiary-houses are appointed by particular statutes for particular descriptions of convicts. 8 T. R. 172

- 4 A gaoler is bound to receive a prisoner tendered to him after the return-day of the writ on which he is arrested. *Brandling v. Kent*. 1 T. R. 60

- 5 *Qu.*—Whether a gaoler would be answerable for receiving a prisoner tendered to him, where the arrest was illegal on the face of the warrant; like the case of a pound-keeper? 1 T. R. 62

GRANT.

N. B. For the right of Way, by Grant, see tit. WAY, *post*.

- 1 Where there is a grant of a particular thing once sufficiently ascertained by some circumstance belonging to it, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant; but where a grant is in general terms, there the addition of a particular circumstance will operate by way of restriction and modification of such grant: Therefore, where one having customary tenements, compounded and uncompounded, surrendered to the use of his will "all and singular the lands, tenements, &c. whatsoever, in the manor which he held of the lord by copy of court-roll, in whose tenure or occupation soever the same were, being of the yearly rent to the lord in the whole of 4l. 10s. 8¹/₂d., and compounded for:" Held, that the words "and compounded for," restrained the operation of the surrender to that description of copyholds then belonging to the surrenderor. And that the words "being of the yearly rent, &c. of 4l. 10s. 8¹/₂d.," which were not referable to any ac-

tual amount of his rents, either compounded or uncompounded, though much nearer to the whole than to the compounded only, could not qualify or impugn that restriction. *Roe v. Conolly v. Vernon*. 5 E. R. 51 (*And see DEVISE, IX, 1, ante, 271.*)

- 2 *A.* being mortgagee in fee of certain lands, and *B.* the mortgagor entitled to the equity of redemption, by lease and release, *A.* conveys and *B.* releases the lands to *C.* in fee, who by the same instrument covenants with and grants to *B.* that it shall be lawful for *B.* his heirs and assigns at all times to enter upon the lands to search and dig for coal, and to take and carry away the same to his and their own use: this is only a licence, and conveys no interest in the soil, so as to exclude *C.* and those claiming under him from getting coal there nor could it operate as an exception or reservation out of the grant in respect to *B.*, who had not the legal title in him at the time. *Cheatham v. Williams*.

4 E. R. 46

And see *Spyre v. Topham*.

3 E. R. 115. *ante*, 245

A A

A. and B. being severally seised of parcels of woody ground; and B. having other lands adjoining to his woody ground; and intending to make a colliery under his ground; A. grants to B., his heirs and assigns, liberty for him, his heirs and assigns, to carry up a sough or drain through A.'s woody ground into B.'s woody ground, and also liberty for B., his heirs and assigns, to make two little sough pits in A.'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for examining the sough so long as was necessary for that purpose and no longer: and B. covenanted that he, his heirs and assigns, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that A., his heirs and assigns, from time to time, and at all times after, might go down into any pit or pits of B., his heirs or assigns, to discover whether any coals of A., his heirs or assigns, should be gotten; and that B., his heirs and assigns, should repair any injury to A.'s fence, &c.: Held, that by the grant to B., his

heirs, &c. of the liberty of making the sough in A.'s land, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto: and that the use of such sough, for the carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B.; and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered up by mutual consent, was not controlled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in B.'s woody ground and adjoining lands remained to be gotten. *Hodgson v. Field.* 7 E. R. 613

4 A grant of immunity to burgesses, their heirs and successors, was expounded by usage, to be a grant to the burgesses corporators only; and not to the burgrave tenants and their heirs. *Bailiffs of Tewkesbury v. Bricknell.*

2 Taunt. 120

GUARANTIE.

1 The statute 43 G. 3. c. 153. s. 15. having enabled the King by Order in Council to license the importation of certain goods being British or neutral property, from the enemy's country, in neutral ships; a contract made by A. and B., British subjects, (the plaintiff) for the purchase of brandy from a house of trade in France (an enemy), to be shipped from thence in a neutral, on account of A. and B.; which contract was made in contemplation of obtaining a licence for that purpose: which licence was accordingly obtained soon after the making of such contract, and before it was begun to be executed, is a legal contract: and may lawfully be guaranteed in the first instance by C. and D. other British subjects (the defendants). And after such licence obtained, the guarantees are liable in

damages for the non-shipment of the goods by the house in France on board a neutral sent there for that purpose.

Though it were objected to the licence legalizing such trade, that it was not made out to A. and B. by name, but only to C. and D. and other British merchants; and that neither C. and D. nor even A. and B. had any property in the goods: whereas the licence required the goods to be imported to be the property of the said persons or some of them, and until shipment the property continued in the house in France.

For neither the Act of Parliament nor the King's licence, required the owners of the property to be individually named; and even if the licence were to be so construed, as it only required the goods imported to be the property of "the said persons

or some of them as may be specified in their bills of lading ;" and as no bills of lading were made out, which might have been made in the names of C. and D., and if so, would have conveyed to them a legal or special property in the goods: the defendants, C. and D. were still liable to answer in damages upon their guarantie, as for the non-performance of a legal contract. *Timson v. Merac.* 9 E. R. 35

- 2 A. having sent an order to B. for certain goods, C. undertakes to guaranty payment to B., upon an undertaking of D. to indemnify C.; B. accordingly informs C. that the goods are preparing, and afterwards ships them for A. without giving notice to C. that they are shipped: afterwards D. desires to recall his indemnity, upon which C. writes to B., to know whether he had executed the order, to which no answer is given by B. for a considerable time, he having gone abroad in the interim. Upon this C., supposing from the silence of B. that the order was not executed, gives up his indemnity to D.: C. still remains liable to B. on his guarantie. *Orley v. Young.* 2 H. B. 613

- 3 If A. subscribe a guarantie to B. for the honesty of C. who embezzles money, B. may maintain an action on the guarantie, though three years have elapsed without notice having been given of the embezzlement by B. to A. if A. was acquainted with the circumstances from any other quarter, and B. did not conceal it from him industriously. And in such case B. will not be discharged from the guarantie, though B. appear to

have given credit to C. for the amount of the sum embezzled. *Peel v. Tatlock.* 1 B. & P. 419

- 4 A guarantie by the defendant to the plaintiff "for any goods he hath or may supply W. P. with to the amount of 100*l.*" is a continuing or standing guarantie to that extent for goods which may at any time have been supplied to W. P. until the credit was recalled, although goods to the amount of more than 100*l.* had been before supplied and paid for. *Mason v. Pritchard.* 12 E. R. 227

- 5 A paper-writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone) to this effect: "I understand A. and Co. have given you an order for rigging, &c., I can assure you, from what I know of A.'s honour and probity, you will be perfectly safe in crediting them to that amount: indeed I have no objection to guaranty you against any loss from giving them this credit;" which paper was handed over by A. to the plaintiffs, together with a guarantie from another house, which they required in addition, and the goods were thereupon furnished: Held, that the paper did not amount to a guarantie, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guarantie. *Meier v. Richardson.* 1 M. & S. 557

- 6 Upon a contract to guaranty a bill of exchange for a given sum, the guarantee would not be liable to that extent on a bill given for a larger sum. *Philips v. Astling.* 2 Taunt. 206, ante, page 153

HABEAS CORPUS.

I. HOW, AND ON WHOSE APPLICATION GRANTED.

II. RETURNS—HOW MADE.

III. OFFICERS' FEES AND DUTIES.

I. HOW, AND ON WHOSE APPLICATION GRANTED.

- 1 Application for a *habeas corpus* under 43 G. 3. c. 140. ought to be made

to a Judge out of Court. *Gordon's case.* 2 M. & S. 582

- 2 Where application had been made for the discharge of an impressed seaman before the two years of his protection by the stat. 13 G. 3. c. 17. were expired: which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the Court granted a writ of *habeas corpus* for the purpose of libe-

rating him, though the two years were expired. *Bruce ex-parte.*

8 E. R. 27

And see post, tit. IMPRESSMENT.

- 3 The Court, on affidavit suggesting probable cause to believe that a helpless and ignorant female foreigner was exhibited for money against her consent, granted a rule on her keepers to shew cause why a writ of *habeas corpus* should not issue to bring her before the Court; and directed an examination before the coroner and attorney of the Court in the presence of the parties applying and applied against. *Case of the Hottentot Venus.*

13 E. R. 195

- 4 The Court granted a rule *nisi* for a *habeas corpus* on behalf of an officer under military arrest for charges of misconduct on an affidavit complaining that he had not been brought to trial pursuant to the 23d Article of War as soon as a Court Martial could be conveniently assembled; but it being stated upon the affidavit of the Judge Advocate-General in answer, that proceedings were instituted as soon as could conveniently be, and according to the course of office, and that the trial had been postponed partly on account of the absence of the prisoner's witnesses, the Court discharged the rule. *Blake's Case.*

2 M. & S. 428

- 5 The House of Lords having voted the defendant guilty of a breach of privilege, in publishing a libel upon a member of their house, and having sentenced him to pay a fine of 100*l.* and to be imprisoned six months, and until such fine was paid, which commitment was returned into the Court of King's Bench upon a *habeas corpus* sued out by the defendant; that Court refused to discharge him out of custody. *Rex v. Flower.*

8 E. R. 314

- 6 The Court will grant a *habeas corpus* to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force; and this without prejudice to the question of guardianship; which belongs to the Lord Chancellor representing the King in Chancery. *Rex v. Hopkins & Ur.*

7 E. R. 579

- 7 If an apprentice of above the age of

eighteen, having been impressed, afterwards voluntarily enter into the King's service, his master is not entitled to sue out an *habeas corpus* to bring him up to be discharged. *Rex v. Reynolds.*

6 T. R. 497

- 8 So, where the apprentice is protected from being impressed by the statute 13 G. 2. c. 17. but is willing to enter into the King's service. *Ex-parte Lansdown.*

5 E. R. 58

- 9 So, where the apprentice has entered into the King's service, but is as anxious to return, as the master is to have him. *Rex v. Edwards.*

7 T. R. 745

- 10 N. B. It seems therefore from the above cases that without reference to the desire of the apprentice to stay or to return, the Court will not grant the *habeas corpus* on the application of the master; for the object of that writ is the personal liberty of the party.

- 11 A prisoner under criminal process in the House of Correction cannot be brought up by *habeas corpus ad respondendum*, for the purpose of being charged with a declaration on a bailable writ, and re-committed to his former custody so charged; for the Court have no power to make a gaoler of such prison liable for the escape of a prisoner on civil process. *Brandon v. Davis.*

9 E. R. 154

- 12 *Secus* in the case of a sheriff or gaoler of the Court. 9 E. R. 154
And see GAOL AND GAOLER, ante 353.

- 13 The Court of C. P. will not grant a *habeas corpus* to bring up a prisoner in custody upon a criminal matter, in order to have him charged with a declaration in a civil action. *Walsh v. Davies.*

2 N. R. 245

- 14 A *habeas corpus ad testificandum* issued to bring up a prisoner to give evidence before an election committee of the House of Commons, on affidavit of service of a rule to shew cause on the different persons concerned, and no cause shewn. *In re Sir Edward Price.*

4 E. R. 587

- 15 The Court, on the application of the defendant's bail, granted a *habeas corpus* to the sheriff of H., in whose custody the defendant was under a charge of felony, to bring him up, in order that he might be surrendered by his bail. *Sharp v. Sheriff.*

7 T. R. 226

- 16 A lunatic may be brought up by *habeas corpus* from St. Luke's Hospital to

be surrendered in discharge of his bail. *Pillop v. Sexton*. 3 B. & P. 550
 17 One, who was committed to *Newgate* by commissioners of a bankrupt, must, for the purpose of being surrendered by his bail in a civil suit, be brought up by *habeas corpus* issued on the Crown side of the Court, on which side also must be taken the subsequent rule for his surrender in the action, his commitment *pro forma* to the marshal, and his recommitment to *Newgate*, charged with several matters. *Taylor's Case*. 3 E. R. 232

18 The Court on application by the bail of the defendant, who was in custody on a charge of obtaining money upon false pretences, will grant a writ of *habeas corpus* to the gaoler, to bring him up, in order that he may be rendered in discharge of his bail. *Daniel v. Thompson*. 15 E. R. 78

19 The defendant being in custody of a messenger under an order of the Secretary of State for the purpose of being sent out of the kingdom by virtue of the Alien Act, 43 G. 3. c. 155., the Court refused to issue a *habeas corpus* on the application of his bail to bring him up that they might render him in their own discharge, on account of public inconvenience and the probable risk of his passage. *Folkein v. Critico*. 13 E. R. 457

II. RETURNS, HOW MADE.

- 1 Return to an *habeas corpus*, "I had not at the time of receiving this writ, nor have I since had the body of *A. B.* detained in my custody, so that I could not have her, &c." was held a bad return, and an attachment granted against the party who made it. *Rex v. Winton*. 5 T. R. 89
- 2 It seems a sufficient return to a *habeas corpus*, that the defendant is in custody under the sentence of a Court of competent jurisdiction to inquire of the offence, and to pass such a sentence, without setting forth the particular circumstances necessary to warrant such a sentence. *Rex v. Suddis*. 1 E. R. 306
- 3 A return to a *habeas corpus* for the discharge of an apprentice above the age of 21, stating the custom of *London*, that every citizen and freeman of the city may take as an apprentice any person above the age of 14 and under

21, to serve for seven years and more; must shew that the apprentice was within those ages when he bound himself apprentice: for the Court will not intend that from matter *dehors* the return. *Ex-parte Eden*. 2 M. & S. 226

- 4 Where, upon a *habeas corpus* to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 G. 2. c. 19. for a misdemeanour in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself when an infant to serve till twenty-five, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but the Court have no power to discharge an apprentice from his indentures; and are bound, by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party. *Ex-parte Gill*. 7 E. R. 376

III. OFFICERS' FEES AND DUTIES.

- 1 The Warden of the Fleet cannot demand an additional fee for expedition, in returning a writ of *habeas corpus*. *Johnson v. Smith*. 1 H. B. 105
- 2 Service of a demand of a copy of the commitment on the turnkey of a prison is not sufficient to support an action against the gaoler for the penalty incurred by him under the *Habeas Corpus Act*, for not delivering the copy to the prisoner within due time after demand made, if the gaoler himself were in the prison. *Huxley v. Luscombe*. 2 B. & P. 530
- 3 2d.—Whether a commitment in execution for a penalty on conviction before a magistrate for an offence against the excise laws be a commitment for "a criminal matter," within the provisions of the *Habeas Corpus Act*, so as to entitle a prisoner to an action against the gaoler for not delivering a copy of the commitment within a certain time after demand made? 2 B. & P. 530

- 4 The Court will not compel the marshal to affile of record a writ of *habeas corpus cum causâ*, by virtue of which a person is committed to his custody in execution. *Cowper v. Jones*. 2 M. & S. 202

HIGHWAYS.

I. HOW CONSTITUTED.

II. SURVEYORS, HOW APPOINTED.

III. BY WHOM, AND IN WHAT MANNER REPAIRED.

IV. HOW CHANGED OR DIVERTED.

V. ASSESSMENTS, HOW LEVIED.

VI. PRESENTMENT BY MAGISTRATES.

VII. INDICTMENT FOR NON-REPAIR.

VIII. PLEADINGS AND EVIDENCE.

IX. LIMITATION OF ACTIONS.

I. HOW CONSTITUTED.

N. B. For the cases relative to right of way, see *tit. way*.

And see *tit. TURNPIKE, post*.

- 1 The owners of land suffering the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment; such as a bar shut at times to denote the limited dereliction of the soil for the purpose, is sufficient for presuming a general dereliction of it to the public: and six years has been held sufficient. *Rugby Charity v. Merryweather*. 11 E. R. 376, n.
- 2 But if the land had been out in lease all the time, or even for much longer, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge sufficient to presume a grant from him. *ibid*.
- 3 The plaintiff erected a street, leading out of a highway, across his own close, and terminating at the edge of the defendant's adjoining close, which was separated from the end of the street for 21 years (during 19 of which, the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways, and half the horse-way thereof, paved at the expense of the inhabitants), by the defendant's fence: Held, that this street was not so dedicated to the public, that the defendant pulling down his wall might enter

it at the end adjoining to his land, and use it as a highway. *Woodyer v. Hadden*. 5 Taunt. 125

II. SURVEYORS, HOW APPOINTED.

- 1 The magistrates are not bound to appoint surveyors of the highways from the list of persons returned to them under stat. 13 G. 3. c. 78. if in their opinions the persons named in the list are not qualified: but they may appoint other persons of the parish who are qualified. *Rex v. Baldwin*. 7 T. R. 169
- 2 If the magistrates, upon proper lists returned to them, omit to appoint a surveyor of the highways at their first special sessions after the Michaelmas quarter sessions as directed by the stat. 13 G. 3. c. 78. s. 1. they are bound to make such appointment at a subsequent special sessions. *Rex v. Justices of Derbyshire*. 4 E. R. 142

III. BY WHOM, AND IN WHAT MANNER REPAIRED.

- 1 The parish at large are *prima facie* bound to repair all highways lying within it, unless by prescription they can throw the *onus* on particular persons by reason of their tenure. *Rex v. The Inhabitants of Sheffield*. 2 T. R. 106
- 2 If the inhabitants of a township, bound by prescription to repair the roads within the township, be expressly exempted by the provisions of a road Act from the charge of repairing new roads to be made within the township; that charge must necessarily fall on the rest of the parish. 2 T. R. 106
- 3 The commissioners appointed by stat. 6 G. 3. c. 78. (an Act for dividing and inclosing certain lands in the parish of C.) which enacts, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by such person or persons as

they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the Act. *Rex v. The Inhabitants of Cottingham.*

6 T. R. 20

- 4 The stat. 13 G. 3. c. 78. s. 27, 29, authorizing surveyors of highways to take and carry materials for repair of highways, making satisfaction for damage done to the land by carrying away the same, to be ascertained in case of dispute by order of justices; and providing that no damages shall be recovered for any trespass, if tender or payment into Court of amends be made by defendant: Held, that where surveyors had made a new way to carry materials, and after action brought had paid money into Court as amends, the sufficiency of such amends could not be questioned at *nisi prius*; but ought to have been ascertained by justices of peace. *Boysfield v. Porter.*

13 E. R. 200

- 5 But if such new way were made wantonly or unnecessarily, it seems that the plaintiff could not be concluded by such amends tendered or paid into Court. 13 E. R. 200

IV. HOW CHANGED OR DIVERTED.

- 1 That branch of s. 19. of statute 13 G. 3. c. 78. (the General Highway Act) which directs that "when any highway hath been diverted above twelve months, &c. if a new highway hath been made in lieu thereof, and the same hath been acquiesced in, &c. every such new highway shall, from thenceforth, be the public highway," is retrospective only: and it is not extended by s. 7. of 34 G. 3. c. 74, incorporating all the clauses and provisions of the Act 13 G. 3. *Waite v. Smith.*

8 T. R. 133

N. B. Another part of s. 19. of statute 13 G. 3. c. 78. provides for the diverting of highways for the future.

8 T. R. 133

- 2 Under the 19th sect. of the General Highway Act 13 G. 3. c. 78. a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old

one be stopped up, the legality of the order of the justices for diverting the old road and stopping it up, may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. *Welsh v. Nash.*

8 E. R. 894

- 3 Where an order of justices for the diversion and turning of a road, recites that they had viewed the new road and found it to be in good condition and repair: Held to be a sufficient certificate thereof under stat. 13 G. 3. c. 78. s. 19.—If the certificate be deposited with the Clerk of the Peace, that is an enrolment of it within the same section.—Where a road is stopped up by order of justices, and a new one is substituted, partly over the ground of a stranger, and partly over an accustomed road, that is a sufficient compliance with the Act, provided the new road convey the public to the same place as the old one did. *De Ponthieu v. Pennyfeather.* 1 Marsh. 261

See post, tit. TURNPIKE.

V. ASSESSMENTS—HOW LEVIED.

- 1 An application under the Highway Act 13 G. 3. c. 78. s. 47. for a rate to reimburse two inhabitants of a parish on whom a fine for the non-repair of a highway had been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy; before any material change of inhabitants: and the Court of King's Bench refused a *mandamus* to the justices to make such rate after an interval of eight years, though applications had been from time to time made to the magistrates below in the interval, who had declined to make the rate, on the ground that the parish at large had been improperly indicted and convicted, the onus of repair being thrown by immemorial custom on an interior district; and though so lately as the year before this application, the magistrates had ordered an account to be taken of the quantum expended upon the repairs out of the money levied. *Rex v. The Justices of Lancashire.*

12 E. R. 366

And see post, tit. TURNPIKE.

VI. PRESENTMENT.

- 1 A presentment of a road under stat. 13 G. 3. c. 78. s. 24. against a smaller district than a parish, must state expressly *how* they are liable. *Rex v. The Inhabitants of the Hamlet of Penderryn.* 2 T. R. 513
- 2 If it do not, the judgment may be arrested. 2 T. R. 513
- 3 A presentment by a magistrate under the above statute of a nuisance in a highway must expressly allege the offence to be done against the form of the statute. *Rex v. Winter.* 13 E. R. 258

VII. INDICTMENT FOR NON REPAIR.

- 1 If a parish be situate, part in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad. *Rex v. The Inhabitants of Clifton.* 5 T. R. 498
- 2 In such case the indictment must be against the whole parish. 5 T. R. 498
- 3 An indictment against the parish of B. for not repairing a road leading from A. to B., is exclusive of B., and therefore bad; and it is not aided by a subsequent allegation that *a certain part of the same highway situate in B. is in decay, &c.* *Rex v. Gamlingay (Inhab.)* 3 T. R. 513
- 4 If the Commissioners, under an Inclosure Act, set out a *private road* for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, no indictment can be supported against the latter for not repairing it, *it not concerning the public.* *Rex v. Richards.* 8 T. R. 634
- 5 Indictment for non-repair of a highway within certain limits, charging the Corporation of *Liverpool* with a prescriptive liability to repair all common highways, &c. within such limits, "excepting such as ought to be repaired according to the form of the several statutes in such case made," is bad, for want of shewing that the highway in question was not within any of the exceptions. *Rex v. The Mayor, &c. of Liverpool.* 3 E. R. 86
- 6 A count stating the defendant's liability to arise by virtue of an agree-

ment with the owners of houses alongside of the highway, is also bad; for the parish who are *primâ facie* bound to the repair of all highways within their boundaries cannot be discharged from such liability by any agreement with others. 3 E. R. 86

7 To an indictment against the inhabitants of a parish for non-repair of a highway within it, a plea, stating that the parish was immemorially divided into seven townships, the inhabitants of which respectively were immemorially bound to repair the highways within their respective townships; and that *part* of the highway indicted was within the township of G. B. &c. and that the residue, &c. was within the township of L. B. &c.; and that the respective parts ought to be repaired by the inhabitants of the respective townships, &c., is bad: without specifying *what part* of the highway lay within one township, and what part within the other. *Rex v. The Inhabitants of Bridekirk.* 11 E. R. 304

VIII. PLEADINGS AND EVIDENCE.

- 1 It is sufficient in pleading a public highway to allege that it is a common public highway, without shewing *how* it became so, or that it has been such time immemorial. *Aspindall v. Brown.* 3 T. R. 265
- 2 In pleading a public highway, it is not necessary to state *any terminus*. Therefore, a plea of justification in trespass, stating that a public highway led from another highway (leading from A. to B.) *in, through, over, and along*, the *locus in quo*, to a certain other highway (leading from C. to D.), was held by the Court of C. P. (dissent. Loughborough, C. J.) to be well supported by evidence, proving that the way in question led from the *terminus a quo*, viz. the way leading from A. to B. over the *locus in quo*, to a different way called E., and *along that way* into the way leading from C. to D., the *terminus ad quem*. *Rouse v. Bardin.* 1 H. B. 351
- 3 The *terminus ad quem*, being laid to be a *public highway*, is proved by evidence of a *public footway*, though such description of the *terminus* might have been bad on special demurrer, as not being sufficiently certain. *Allen v. Ormond.* 8 E. R. 4

IX. LIMITATION OF ACTIONS.

- 1 Though the General Highway Act, 13 G. 3. c. 78. s. 81. directs that actions against any persons for any thing *done or acted* in pursuance thereof, shall be commenced within three calendar months after the fact committed, and not afterwards; yet

if surveyors of highways, in the execution of their office, undermine a wall adjoining to the highway, which does not fall till more than three months afterwards, they are subject to an action on the case, for the consequential injury within three months after the falling of the wall. *Roberts v. Read.* 16 E. R. 215

HUE AND CRY.

- 1 In following up a writ of execution to its consummation under the Statute of Hue and Cry 8 G. 2. c. 16. which the subsequent statute of the 19 G. 2. c. 34. refers to and adopts as the mode of proceeding in case of a penalty recovered by the executor of a revenue officer, killed in the pursuit of smugglers, against the inhabitants of the hundred, (or of a lath in *Kent*.) it is sufficient for the sheriff to whom the writ had been delivered to return, even after the expiration of 60 days given him by the Act to return the writ, that he had delivered it to the justices of the peace of the hundred,

&c. (who are charged with directing the levy on the inhabitants,) and that they had done nothing upon it; and the Court will not thereupon attach the sheriff for not returning the writ, but the next proceeding is against the magistrates to oblige them to do their duty. *Wright v. St. Augustine's lath (Kent).* 13 E. R. 544

- 2 *Qu.*—Whether, before the statute of hue and cry, the party robbed could have had an action against the hundred to recover damages for not keeping watch and ward? *Jackson v. Calesworth, Inhabitants.* 1 T. R. 72

JEOfAILS.

- 1 If a local action be brought and tried in a wrong county, the defect is aided after verdict by 16 & 17 Car. 2. c. 8. *The Mayor, &c. of London v. Cole.*

7 T. R. 583

- 2 Statute of Jeofails will not assist on a writ of error from an Inferior Court, where one of two counts in a declaration is not laid within the jurisdiction, and the damages are general. *Trevor v. Wall.*

1 T. R. 151

- 3 Where, in debt on bond by an administrator, the declaration alleged that administration was granted by the Bishop of *Litchfield and Coventry*, and the venue in the margin was laid in *London*, but the bond was stated to be made at *Derby*, which is within the diocese, the Court on a general demurrer held that to be sufficient, and that the bad venue in the margin was cured by the Statute of Jeofails. *Mellor v. Barber.*

3 T. R. 387

- 4 In an action on statute 34 G. 3. c. 23. for pirating a pattern for printing callico, the omission of an averment in the declaration, "that the day of first publishing the pattern was printed at each end of the piece of callico," (which, together with the name of the proprietor, is required by that statute, the monopoly being limited for three months from the day of first publishing the pattern), was holden to be aided by verdict; it being stated in the declaration that the defendants pirated the pattern *within the term of three months from the day of the first publishing thereof, and while the plaintiffs were entitled to have the sole right of printing the same, &c.* *Macmurdo v. Smith.*

7 T. R. 518

- 5 The statute 16 & 17 Car. 2. c. 8. which says that judgment shall not be arrested for want of the words *vi et armis*, or *contra pacem*, in actions of trespass, only applies to those cases

that appear on the face of the declaration to have been evidently intended to be actions of trespass; and not to a

case where the memorandum is of "an action of trespass on the case." *Savignac v. Roome.* 6 T. R. 125

IMPRESSMENT OF SEAMEN.

- 1 A seafaring man, serving the office of headborough, is not thereby exempted from being impressed. *Ex-parte Fox.* 5 T. R. 276
- 2 The Freeman and Livery of London are not exempted from being impressed for the sea-service, if in other respects fit subjects for that service. *Rex v. Young.* 9 E. R. 466
- 3 A carpenter belonging to a vessel employed in the coal and coasting trade, is not exempted from being impressed by any statute now in force. *Ex-parte Boggin.* 13 E. R. 549
- 4 It does not appear that the master of any vessel is merely, as such, exempted by law from being impressed; and where it appeared to the Court that a person, whose father was stated to be acting as mate on board a coasting vessel of 53 tons, had been just before appointed to act as master, upon a supposition that he would be thereby exempted from being impressed, the Court refused even a rule to shew cause why he should not be brought up by *habeas corpus* to be discharged from on board a King's ship, where he was placed after having been impressed. *Barrow's Case.* 14 E. R. 346
- 5 The stat. 6 & 7 W. 3. c. 18. s. 19. which allows to the master of every ship, engaged in the coal trade, two seamen free from being impressed, was said by the Court to be still in force. *Ex-parte Dryden.* 5 T. R. 416
- 6 But in a subsequent case the Court determined that this section and others of the Act were merely temporary, and are no longer in force. *Ex-parte Gallite.* 7 T. R. 673
- 7 And it was held that if the master nominate those seamen before the ship sailed, and they were afterwards impressed, the Court would grant a *habeas corpus* to the officer impressing them, to bring them up that they might be discharged. 5 T. R. 416
- 8 *Secus*, if the men were not nominated until after they were impressed. *Ex-parte Atkinson.* 5 T. R. 419, n.
- 9 A keelman, employed in navigating down the river Tyne to the port of Shields, at the mouth of that river, is liable to be impressed, and cannot afterwards bring himself within the protection of the 13 G. 2. c. 17. s. 2. exempting every person, not having before used the sea, who shall bind himself apprentice to serve at sea, from being impressed for three years from such binding. *Ex-parte Sofly.* 1 E. R. 466
- 10 An apprentice in the Greenland fishery is no otherwise exempted from being impressed than under the general Act of the 13 G. 2. c. 17. which exempts all persons from being impressed before the age of 18, and every person who, not having before used the sea, shall bind himself apprentice to serve at sea for the first three years of such apprenticeship. *Ex-parte Brocke.* 6 E. R. 238
- 11 The 50 G. 3. c. 108. s. 2., which exempts certain persons who shall be employed in the fisheries of these kingdoms, from being impressed, extends to a lobster fishery, carried on by British subjects upon the coast of Heligoland for the purpose of supplying the London market with that fish: and therefore, the Court discharged a mariner and an apprentice who had been impressed out of one of the vessels engaged in that fishery. *Payne and Thoroughgood's Case.* 1 M. & S. 223
- 12 The Court discharged a mariner who had been impressed out of a fishing smack; he having had an impress protection granted to him by the Board of Admiralty, under the directions of the stat. 50 G. 3. c. 108. though by the accident of the vessel's sailing before it reached him, he had it not to produce to the impress officer at the time, as he ought to have had, which warranted the officer in impressing him: and though the master had afterwards received a greater number of mariners on board than were described in the Act. *Pratt's Case.* 16 E. R. 167

- 13 A protection from the impress service, granted by the favour of the Board of Admiralty, though for a certain time, may be set aside at pleasure, whenever in their judgment the exigency of the public service requires it: and it matters not that the impress warrant is of a prior date to such protection. *Herbert's Case.* 16 E. R. 163
- 14 A seaman, serving in the merchant service, is not exempt from being impressed because he is a freeholder. *Rex v. Douglas.* 5 E. R. 477

INDICTMENTS.

I. TREASON.

II. FELONY.

- (a) *Burglary.*
- (b) *Forgery.*
- (c) *Incitement to Mutiny.*
- (d) *Larceny and Robbery.*
- (e) *Unlawfully administering Oaths.*

III. MISDEMEANOURS TO THE PERSON.

- (a) *Assault, false Imprisonment, and Rescued.*
- (b) *Challenge.*
- (c) *Conspiracy.*

IV. MISDEMEANOURS TO PRIVATE PROPERTY.

- (a) *False Pretences.*
- (b) *Forcible Entry.*
- (c) *Threatening Letters.*

V. MISDEMEANOURS AGAINST PUBLIC JUSTICE.

- (a) *Perjury.*

VI. MISDEMEANOURS AGAINST PUBLIC AND OTHER OFFICERS.

- (a) *Disobedience of Orders.*
- (b) *Extortion or Fraud.*
- (c) *Refusing Offices.*

VII. MISDEMEANOURS AGAINST PUBLIC TRADE.

VIII. ———— AGAINST THE PUBLIC HEALTH, POLICE, OF ECONOMY.

IX. NUISANCES.

X. FORM OF INDICTMENTS.

XI. DEMURRERS.

XII. WHEN QUASHED.

XIII. JUDGMENTS.

I. TREASON.

- 1 Any intelligence sent to an enemy in order to serve them in shaping their attack or defence, though its object be to dissuade them from an invasion, is high treason. *Rex v. Stone.* 6 T. R. 529
- 2 On indictment for high treason in sending intelligence to the enemy, a letter sent by one of the conspirators in pursuance of the common design, with a view of reaching the enemy, is evidence against all engaged in the same conspiracy. *Rex v. Stone.* 6 T. R. 527

II. FELONY.

(a) *Burglary.*

- 1 Indictment for a burglary, laid in the first count to have been committed in the house of *M. R. B.*, in the second of *J. B.*, and in the third of *W. N.* It appeared that the place where the robbery was committed was the centre of a building, having two wings; that in the centre building the business of *M. R. B.*, *J. B.*, *W. N.* and several other persons was carried on; that in part of one of the wings was the dwelling of *M. R. B.*, and in the other part that of *J. B.*; neither having any internal communication with the centre, except by a window in the dwelling of *J. B.*, which looked into a passage that ran the whole length of the centre, and that the other wing was occupied by *W. N.* from which there was no communication with the centre. *Semble*, that the robbery did not amount in law to a burglary. *Rex v. Eggington.* 2 B. & P. 508
- 2 The servant of three partners in trade had weekly wages, and three rooms assigned to him for lodging, over the bank and brewery office of the partners, with which it communicated by

a trap-door and a ladder; a burglary being committed in the banking-room, it was held that it was well laid to be in the dwelling-house of the three partners. *Rex v. Stock*. 2 Taunt. 339

(b) Forgery.

1 The counterfeit making of any part of a genuine note, which may give it a greater currency, is forgery: Therefore, if a note be made payable at a country banker's, or at his banker's in London, who fails, it is forgery to alter the name of that London banker to the name of another London banker, with whom the maker makes his other notes payable after the failure of the first. *Rex v. Treble*. 2 Taunt. 328

2 If a person engraves a counterfeit stamp similar in some parts, dissimilar in others, to the legal stamp, and cutting out the dissimilar parts, utters the similar parts as genuine, concealing the space whence the dissimilar part is cut out; this amounts to a forgery and uttering. *Rex v. Collicott*. 4 Taunt. 300

3 In describing the offence of forging a stamp, it is enough to describe it as a stamp provided and used in pursuance of an Act of Parliament, without setting out the impression or inscription, or naming the amount of duty denoted thereby. *Rex v. Collicott*. 4 Taunt. 300

4 In an indictment for feloniously disposing and putting away counterfeit bank-notes, it is not necessary to aver to whom the note was so disposed of, for the intent to defraud the Bank constitutes the offence, and it is not done away by the circumstance that the notes were furnished by the prisoner in consequence of an application made by an agent employed thereto by the Bank, and that they were delivered to him as forged notes for the purpose of being disposed of by that agent. *Rex v. Holden*. 2 Taunt. 334

5 An indictment, charging the defendant with having in his possession a bill of exchange, purporting to be directed to one J. King, by the name and description of J. Ring, forged the acceptance of the said J. King, &c. is bad; because purport means what appears on the face of the instru-

ment, and the bill did not purport to be drawn on J. King. *Rex v. Reading*. 1 E. R. 180, n.

S. P. *Rex v. Gilchrist*, ib.

6 So where the indictment charged that the bill purported to be directed to Richard Down, Henry Thornton, John Freer, and John Cornwall, Jun. by the name and description of Messrs. Down, Thornton, & Co. *Rex v. Esdall*. id.

7 An indictment for forgery must set out the forged instrument in words and figures. *Rex v. Mason*. 1 E. R. 180

8 But upon an indictment for publishing a forged receipt for money, with the name Stephen Withers, &c. for the sum of 11. 4s. it was holden sufficient to set forth only the receipt itself as follows: "8th March, 1773. Received the contents above, by me Stephen Withers;" without setting forth the account itself to which such receipt referred, and at the foot of which it was subscribed; that account being only evidence to make out the charge. *Rex v. Testick*. 1 E. R. 181, n.

9 In an indictment for forging a bill of exchange, all the Judges held that it need not be stamped in order to be received in evidence; though in stat. 23 G. 3. c. 49. imposing a duty on such instruments, it is said that no bill of exchange shall be received as evidence unless it be first duly stamped. *Rex v. Hawkswood*. 2 T. R. 606

10 Upon an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may give evidence of other forged notes having been uttered by the prisoner, in order to prove his knowledge of the forgery. *Rex v. Wylie*. 1 N. R. 92

S. P. *Rex v. Tattersall*. 1 N. R. 93, n.

11 A forged bill was found upon A. who then resided in Wiltshire, and had resided there about a year under a false name, but which bill bore date at a time when A. lived in Somersetshire, in the neighbourhood of the person whose signature was forged, and more than two years previous to the bill being found upon him. On an indictment against A. for forgery of the note in Wiltshire, this was held not to be sufficient evidence of the offence having been committed in that county. *Rex v. Crocker*. 2 N. R. 87

(c) *Incitement to Mutiny.*

- 1 In an indictment on 37 G. 3. c. 70. making it felony to endeavour to seduce a soldier or sailor from their duty, it is sufficient to charge an endeavour, &c. without specifying the means employed. *Rex v. Fuller*, (in *Cam. Seac.*) 1 B. & P. 180
- 2 Under a charge that A. endeavoured to excite B. to mutiny, being a soldier, knowledge of B.'s being a soldier is implied. The word *advisedly* in such case is equivalent to *scienter*. 1 B. & P. 181
And see *Rex v. Higgins*. 2 E. R. 12

(d) *Larceny and Robbery.*

- 1 A stockbroker having advised a proprietor of stock as to the proper time of disposing of it, sold the stock for him, and received the proceeds. The principal instructed him to purchase exchequer bills to the amount, but it being too late an hour on that day, the broker lodged the money with his own bankers, and gave the bankers of his principal a check for the amount. On the following day the principal drew a check on his bankers for a larger sum, and gave it to the broker to purchase exchequer bills. The broker received of them bank-bills for the check; with a part he bought exchequer bills for his principal, and delivered them to the bankers of the principal, and with part of the residue he paid for *American* stock and foreign coin, which he had previously purchased with intention to abscond, and paid away the rest in discharge of other debts of his own, and absconded: Held, that this was no felony. *Rex v. Walsh*. 4 Taunt. 258
But see 52 G. 3. c. 63. which now makes the offence felony.
- 2 In an indictment on the 39 G. 3. c. 85. against a servant for embezzling money received on his master's account, it is not sufficient to follow the words of the statute, but there must be a positive allegation that the money was the property of the master as in the case of larceny. *Rex v. McGregor*. 3 B. & P. 106
- 3 If a servant receive money for his master in the county of A., and being called upon to account for it in the county of B., there deny the receipt of it, he may be indicted for the em-

bezzlement in the latter county. *Rex v. Taylor*. 3 B. & P. 596, n.

- 4 Exchequer bills, purchased by the Bank for a good consideration, but signed in the name of the auditor of the Exchequer by a person not legally authorized, are *securities*, or, at least, *effects*, within the meaning of stat. 15 G. 2. c. 13. s. 12.: and if a servant of the Bank embezzle such bills, he may be convicted of felony under that statute. *Rex v. Aslett*. 1 N. R. 1

- 5 If a servant, being solicited to become an accomplice in robbing his master's house, inform his master thereof, who thereupon tells him to carry on the business, and consents to his opening a door leading to the premises, and being with the robbers during the robbery, and also marks his property, and lays it in a place where the robbers are expected to come; this conduct of the master will not amount to a defence in an indictment against the robbers. *Rex v. Eggington*. 2 B. & P. 508

- 6 The defendant, who had been committed for having "with force and arms made an assault upon the prosecutor with intent feloniously to steal, take, and carry away from the person," &c. was bailed, because he was not charged with any offence within the statute 7 G. 2. c. 22. which enacts "that if any person shall make an assault with an offensive weapon, or by menaces, or in a forcible manner, demand money, &c. from any other person, with a felonious intent to rob such person, he shall be guilty of felony." *Rex v. Remnant*. 5 T. R. 169

- 7 Persons receiving any goods, &c. belonging to a vessel in the *Thames*, knowing the same to have been stolen, may be prosecuted for felony under stat. 2 G. 3. c. 28. *Rex v. Wyer*. 2 T. R. 77

- 8 A banker's clerk enters a fictitious sum in the ledger to the credit of a customer, and tells him he has paid that sum to his account; and on the faith of it obtains from the customer his check of the bankers, which the prisoner pays to himself by bank-notes from the till, and enters in the waste-book a true account of the check, drawer, and notes, as paid to "a man." This was held a felonious taking of the notes from the till. *Rex v. Hammon*. 4 Taunt. 304

9 In an indictment against a receiver of stolen goods for a *misdeemeanour*, under stat. 22 G. 3. c. 58, s. 31. it is not necessary to aver that the principal has not been convicted; but such a fact is matter of defence to be proved by the defendant. *Rex v. Baxter.* 5 T. R. 83

(c) *Unlawfully administering Oaths.*

1 The unlawfully administering, by any associated body of men, of an oath to any person, purporting to bind him not to reveal or discover such unlawful combination or conspiracy, nor any illegal act done by them, &c. is felony within the statute 37 G. 3. c. 123., though the object of such association were a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. *Rex v. Marks.*

3 E. R. 157

2 The stat. 37 G. 3. c. 123. makes it felony for any person in any manner or form whatsoever, to administer, &c. any oath purporting or intended to bind the party to engage in any seditious purpose, or to disturb the public peace, or to be of any society, &c. formed for any such purpose, &c. or not to inform or give evidence against any associate, &c. And by s. 4. it shall not be necessary in an indictment for any such offence to set forth the words of the oath, but it shall be sufficient to set forth the purport of it, or some material part hereof: Held, that an indictment charging that the defendants administered to J. H. an oath intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace, for any act or expression of his or theirs, &c. is good without alleging the tenor or purport of the oath to be set forth, and without shewing in what manner the public peace was meant to be disturbed by such society. *Rex v. Moors.*

6 E. R. 419

3 Upon an indictment on the statute 37 G. 3. c. 123. making it felony to administer certain unlawful oaths, where the witness swearing to the words spoken by way of oath by the prisoner when he administered the same, said that he held a paper in his hand at the same time when he administered the oath, from which it was supposed that he read the words;

yet held that parol evidence of what he in fact said, was sufficient without giving him notice to produce such paper. *Rex v. Moors.* 6 E. R. 421

4 And where the oath on the face of it did not purport to be for a seditious purpose; yet held, that evidence might be given to shew that the brotherhood therein referred to was a seditious society. *ib.*

III. MISDEMEANOURS TO THE PERSON.

(a) *Assault, false Imprisonment, and Rescue.*

And see *post, tit. LIBEL.*

1 An indictment for an assault, false imprisonment, and rescue, stated that the Judges of the Court of record of the town and county, &c. of P., issued their writ, directed to T. B. one of the sergeants at mace of the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W., within the jurisdiction of the said Court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest: Held such indictment was bad; it not appearing that T. B. was an officer of the Court; and that there could not be judgment after a general verdict on such a count as for a common assault and false imprisonment, because the jury must be taken to have found that the assault and imprisonment was for the cause therein stated, which cause appears to have been that the officer was attempting to make an illegal arrest of another; which being a breach of the peace, the defendant might, for aught that appeared, have lawfully interfered to prevent it. *Rex v. Osmer.*

5 E. R. 304

(b) *Challenge.*

1 An endeavour to provoke another to commit the misdemeanour of sending a challenge to fight, is itself a misdemeanour indictable, particularly where such provocation was given by a writing containing libellous matter, and alleged in the prefatory part of the indictment to have been done with intent to do the party bodily harm, and to break the King's peace; the sending such writing being an act done towards procuring the commission of the misdemeanour meant to be accomplished. *Rex v. Phillips.* 6 E. R. 464

- 2 If one kill another in a deliberate duel, under provocation of charges against his character and conduct however grievous, it is murder in him and in his second, and therefore the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. *Rex v. Rice.* 3 E. R. 581

(c) Conspiracy.

- 1 An indictment will not lie for conspiring to commit a civil trespass upon property (snaring hares in a preserve) though alleged to be done in the night by persons armed with offensive weapons to resist any persons opposing them. *Rex v. Turner.* 13 E. R. 228
- 2 In an indictment for conspiring to pervert the course of justice by producing a false certificate (under the hands of justices of the peace, that a road indicted is in repair) in evidence to influence the judgment of the Court; it is not necessary to set forth that the defendants knew at the time of the conspiracy that the contents of the certificate were false; it is sufficient that for such purpose they agreed to certify the fact as true, without knowing that it was so. *Rex v. Mawbey, (Bart.)* 6 T. R. 619
- 3 Where an indictment for a conspiracy was laid in *Middlesex*, where acts done by some of the conspirators were proved; acts done by others of the conspirators in other counties were given in evidence against them. *Rex v. Bowes.* 4 E. R. 171, n.

IV. MISDEMEANOURS TO PRIVATE PROPERTY.

(a) False Pretences.

- 1 To constitute an offence within stat. 30 G. 2. c. 24. money or goods must be obtained by the defendant by a false pretence with intent to defraud; and it is no objection that the pretence consists in a representation, as of some transaction to take place at a future time. *Young v. Rex, (in error).* 3 T. R. 98
- 2 Where the pretence is conveyed by words spoken by one defendant in the presence of others who are acting in concert together, they may be all indicted jointly. 3 T. R. 98
- 3 An indictment charging the defend-

ant with obtaining money by false pretences is insufficient, if it do not shew what the false pretences were; and such a defect is a sufficient ground for reversing a judgment against the defendant. *Rex v. Mason.*

2 T. R. 581

- 4 An indictment at common law, charging that the defendant, deceitfully intending by crafty means and devices to obtain possession of certain lottery tickets the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order, &c. purporting to be a draft on a banker for the amount, which he knew he had no authority to draw, and that it would not be paid, by virtue of which he obtained possession of the tickets, and defrauded the prosecutor of the value, cannot be maintained, inasmuch as it does not charge the defendant with having used any false token to accomplish the deceit. *Rex v. Lara.*

6 T. R. 565

- 5 A mere false assertion, unaccompanied by a recommendation, is not indictable. 6 T. R. 565

- 6 In an indictment on the stat. 30 G. 2. c. 24. for obtaining money on false pretences, it is sufficient to allege that the defendant unlawfully, knowingly, and designedly pretended so and so; by means of which said false pretences he obtained the money; afterwards negating such pretences to be true: though it be not in terms alleged that he *falsely* pretended, &c. and it seems it would have been sufficient to allege that he obtained the money by such and such pretences, averring such pretences to be false. *Rex v. Airey.*

2 E. R. 39

- 7 An indictment on 30 G. 2. c. 24. for obtaining money by false pretences, must negative by special averment the truth of the pretences, it is not enough to charge that the defendant *falsely* pretended, &c. setting forth the pretences, by means of which said false pretences he obtained the money, &c. therefore, for want of such averment in the indictment the Court reversed the judgment. *Rex v. Perrott.*

2 M. & S. 379

- 8 Persons appointed by the commissioners, though in an informal manner, collectors of the property-tax under 43 G. 3. c. 122. cannot be convicted

on an indictment charging them with the receipt of duties by colour and pretence of being collectors of duties under that Act, though the monies were fraudulently collected and misapplied; for they were in fact appointed collectors, and in such character they received the money. *Rex v. Dobson.* 7 E. R. 218

- 9 But they ought to have been indicted under s. 19 of the Act. *ib.*

(b) *Forcible Entry.*

- 1 An indictment for a forcible entry may be maintained at common law, though the statutes give other remedies to the party grieved; provided that the indictment charge the defendants with having used such force as constitutes a public breach of the peace. *Rex v. Wilson.* 8 T. R. 357
- 2 If such indictment charge the defendants with having *unlawfully and with a strong hand*, entered the prosecutor's mill, and expelled him from the possession, it is good. 8 T. R. 357

(c) *Threatening Letters.*

- 1 Threatening by letter, or otherwise to put in motion a prosecution by a public officer, to recover penalties for selling Fryar's Balsam without a stamp (which by stat. 42 G. 3. c. 36. is prohibited to be vended without a stamped label), for the purpose of obtaining money to stay the prosecution, is not such a threat as a firm and prudent man may not be expected to resist, and therefore is not in itself an indictable offence at common law, although it be alleged that the money was obtained; no reference being made to any statute which prohibits such attempt. *Rex v. Southerton.* 6 E. R. 126
- 2 But it seems that such an offence is indictable upon the stat. 18 Eliz. c. 5. s. 4. for regulating common informers, which prohibits the taking of money, without consent of Court, under colour of process, or without process, from any person, upon pretence of any offence against a penal law. *ib.*
- 3 But no indictment for any attempt to commit such a statutable misdemeanour can be sustained as a misdemeanour at common law, without at least bringing the offence intended, within, and laying it to be against the statute. 6 E. R. 126

- 4 Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute, which gives the penalty as auxiliary to the revenue and in furtherance of public justice for example sake, might also, upon general principles, have been deemed a sufficient ground to sustain the indictment at common law. *Rex v. Southerton.* 6 E. R. 126

V. MISDEMEANOURS AGAINST PUBLIC JUSTICE.

(a) *Perjury.*

- 1 To found an indictment for perjury, the requisite circumstances are these: *the oath must be taken in a judicial proceeding, before a competent jurisdiction: and it must be material to the question depending, and false.* *Rex v. Aylett.* 1 T. R. 69
- 2 Any person making or knowingly using a false affidavit taken abroad, (though a perjury could not be assigned on it here) in order to mislead our own Courts, and to pervert public justice, is punishable by indictment as for a misdemeanour. *Oneilly v. Newell.* 8 E. R. 364
- 3 Perjury may be assigned on an affidavit of an attorney of the Court made in answer to a charge exhibited against him in a summary way for having in his possession blank pieces of paper with affidavit stamps, and the signatures of a Master extraordinary in Chancery and another person at the bottom of the papers. *Rex v. Crossley.* 7 T. R. 315
- 4 It is no objection to such an indictment that it is not stated where the Court was holden when the original application was made, or when the rule was made, calling on the defendant to answer the charge; a sufficient venue being laid on the act of taking the false oath. 7 T. R. 315
- 5 In the indictment there must be an allegation of *time* and *place*, which are sometimes material and necessary to be laid with precision, and sometimes not. *Rex v. Aylett.* 1 T. R. 69

- 6 Where time is not material, it need not be positively averred, and if under a *videlicet*, may be rejected. *Rex v. Aylett*. 1 T. R. 70, 1
- 7 A complaint having been made *ore tenus* by a solicitor before the Chancellor in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stated that "*at and upon the hearing of the said complaint*," the defendant deposed, &c.; this is a sufficient averment that the complaint was heard. 1 T. R. 70
- 8 The complaint of the defendant being, that he was taken before he got to his own house in the parish of *St. Martin in the Fields*; *immuendo* his house in the Haymarket, in *St. Martin's*, &c. The *immuendo* is only a more particular description of the same house, and good. 1 T. R. 70
- 9 The oath being, that the defendant was arrested upon the steps of his own door; an *immuendo* that it was the outer door is good. *Rex v. Aylett*. 1 T. R. 70
- 10 An indictment for perjury assigned on an affidavit sworn before the Court need not state, nor is it necessary to prove, that the affidavit was filed of record, or exhibited to the Court, or in any manner used by the party. *Rex v. Crossley*. 7 T. R. 315
- 11 In an indictment for perjury committed at the Admiralty Session, where the commission was directed to *A., B., and C.*, and others not named, of whom *A., B., and C.*, were among others to be one; the Court will take it to mean that, if either of the persons named of the *quorum* were present, it would be sufficient. *Rex v. Dowlin*. 5 T. R. 311
- 12 In such case it is not necessary to set out the commission in the indictment. 5 T. R. 317
- 13 But where the prosecutor in perjury undertakes to set out in the indictment more of the proceedings than he need under the stat. 23 G. 2. c. 11. he must set them forth correctly. 5 T. R. 317
- Stating that at a Court of Admiralty Session *J. K.* was in due form of law tried upon a certain indictment then and there depending against him for murder, and that *at and upon the said trial it then and there became and was made a material question* whether, &c. are sufficient averments that the perjury was committed on the trial of *J. K.*
- for the murder, and that the question on which the perjury was assigned was material on that trial. *Rex v. Dowlin*. 5 T. R. 311
- 14 By stat. 23 G. 2. c. 11. the prosecutor need only set forth in the indictment the substance of the offence charged, and by what Court or before whom the oath was taken (averring such Court, &c. to have competent authority to administer the same), &c. without setting forth the commission or authority of the Court, &c. 5 T. R. 317
- 15 It is not necessary to set forth in an indictment for perjury so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; it is sufficient to allege generally that the particular question became a material question. 5 T. R. 318
- 16 One was indicted in *Middlesex* for perjury committed in an affidavit; which indictment, after setting out so much of the affidavit as contained the false oath, concluded with a *prout patet* by the affidavit affiled in the Court of King's Bench at *Westminster*, &c. and on this he was acquitted: after which he was indicted again in *Middlesex* for the same perjury, with this difference only, that the second indictment set out the *jurat* of the affidavit, in which it was stated to have been sworn in *London*: which was traversed by an averment that in fact the defendant was so sworn in *Middlesex* and not in *London*: the Court of King's Bench held that he was entitled to plead *autrefois acquit*; for the *jurat* was not conclusive as to the place of swearing; and the same evidence as to the real place of swearing the affidavit might have been given under the first as under the second indictment; and therefore the defendant had been once before put in jeopardy for the same offence. *Rex v. Emden*. 9 E. R. 437
- 17 Upon an indictment for perjury, in falsely taking the freetolder's oath at an election of a knight of the shire in the name of *J. W.*; it appearing by competent evidence that the freeholder's oath was administered to a person who polled on the second day of the election by the name of *J. W.*; who swore to his freehold and place of abode; and that there was no such person; and that the defendant voted

on the second day, and was no freeholder; and some time after boasted that he had *done the trick*, and was not paid enough for the *job*, and was afraid he should be *pulled for his bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other than the name of *J. W.*: Held, that there was sufficient evidence for the jury to presume that the defendant voted *in the name of J. W.*, and consequently to find him guilty of the charge as alleged in the indictment.

Rex v. Price. 6 E. R. 323

- 18 The punishments directed by the statute 18 G. 2. c. 18. to be inflicted upon perjury in falsely taking the freeholder's oath at an election of a knight of the shire, are *cumulative* under the stat. 5 Eliz. c. 9. s. 6. and 2 G. 2. c. 25. s. 2. to which the first-mentioned statute refers. *Rex v. Price.*

6 E. R. 327

VI. MISDEMEANOURS AGAINST PUBLIC AND OTHER OFFICERS.

(a) *Disobedience of Orders.*

- 1 In an indictment against a public officer, for breach of duty, it is sufficient to state generally that he is such officer, without shewing his appointment. *Rex v. Holland.* 5 T. R. 607
- 2 In an indictment against a servant of the *East India Company* for offences in *India*, it is sufficient to charge him with a *wilful* breach of duty without adding that it was corrupt. 5 T. R. 607
- 3 In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force: if they be not still in force, it is a matter of defence. 5 T. R. 607
- 4 Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver, in an indictment against him, that he had notice of those acts; he is presumed from his situation to know them. 5 T. R. 607
- 5 A charge in an indictment against an officer with a breach of orders in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him. 5 T. R. 607

- 6 Where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as of omission. *Rex v. Holland.* 5 T. R. 607

- 7 Where two sets of magistrates have a concurrent jurisdiction, and one appoints a meeting to grant ale licences, their jurisdiction attaches so as to exclude the other appointing a subsequent meeting: though they may all meet together the first day: and if, after such appointment, the other set of magistrates meet on a subsequent day and grant other licences, their proceeding is illegal and the subject of an indictment. *Rex v. Sainsbury.*

4 T. R. 451

- 8 An indictment against certain commissioners for a contempt of an order of Sessions in not paying the costs of an appeal awarded against them, stating, generally, that the party appealed to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute, and which notice was made, or purported to be made, under the powers given to them by the Act, seems sufficient; for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the Act. *Rex v. Kingston.* 8 E. R. 41
- 9 But counts in the indictment stating an appeal against a notice in writing, signed by *A., B., C., D., and E.*, five of the commissioners, and an order by the Sessions that *the commissioners acting under the statute, and being the respondents in the said appeal*, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging service of the order on *those five and others acting as commissioners, &c.*; and then charging, that at a subsequent meeting held by virtue of the Act, *A., B., (omitting C.) D., and E.*, and also *F. and G.*, commissioners, were present and acting, and formed a majority, a demand of the 10*l.* costs was made on *those six*, which they refused to pay: and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it, were on general demurrer holden by the Court to be bad. And the offence being laid jointly against the several sets of de-

defendants in each count: the Court could not give judgment, on such an indictment even against the four who were parties to the appeal, and on whom service of the order was alleged; there being no one count including those only. *Rex v. Kingston*. 8 E. R. 41

(b) Extortion or Fraud.

- 1 Public officers may be indicted for enabling persons to pass false accounts with the pay-office in fraud of the revenue. *Rex v. Bembridge*.

6 E. R. 136, n.

- 2 A government storekeeper, resident in *Antigua*, transmitting false vouchers to his agent in *London*, who delivered them at the custom-house there, unknowing of the fraud, is indictable in *London*, as if for his own act there. *Rex v. Munton*.

6 E. R. 590, n.

- 3 On an indictment on stat. 17 G. 3. c. 26. s. 7. for taking more than 10s. in the 100l. for brokerage, &c., it is not necessary to prove that the defendant took the exact sum laid in the indictment, though it be not laid under a *videlicet*. *Rex v. Gillham*. 6 T. R. 265
- And on the trial of such indictment, it is to be left to the jury to consider whether the excess were really taken as a fair charge for drawing the writings, &c., or whether it were not so taken as a device to avoid the statute.

6 T. R. 265

(c) Refusing Offices.

- 1 The voluntary absence of a chief officer of a corporation upon the charter day of election of his successor is not indictable upon the stat. 11 G. 1. c. 4. s. 6., unless his presence as such chief officer be necessary by the constitution of the corporation to constitute a legal corporate assembly for such purpose. *Rex v. Corry*.
- 2 An indictment that the defendant was appointed overseer of the poor of the parish of *A.*, "and that he afterwards refused to take the said office of overseer of the parish, to which he was so appointed," was held good on demurrer. *Rex v. Burder*.

5 E. R. 372
4 T. R. 778

VII. MISDEMEANOURS AGAINST PUBLIC TRADE.

- 1 It is not an indictable offence to exer-

cise a trade in a borough, contrary to the bye-laws of that borough. *Rex v. Sharpless*.

4 T. R. 777

- 2 It seems that persons putting on board a ship an unknown article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, is guilty of a misdemeanour. *Williams v. The East India Company*.

3 E. R. 201

- 3 An indictment on the stat. 23 G. 3. c. 13. for enticing artificers to go out of the kingdom, &c. alleged that the defendant contracted with the manufacturer, &c. "to go out of this kingdom of *Great Britain* into a foreign country called *America*, such foreign country not being then within the dominion of or belonging to the crown of *Great Britain*:" And held good after verdict. *Rex v. Myddleton*.

6 T. R. 739

VIII. MISDEMEANOURS AGAINST THE PUBLIC HEALTH, POLICE, OR ECONOMY.

- 1 Taking up dead bodies, even though for the purpose of dissection, is an indictable offence. *Rex v. Lynn*.

2 T. R. 733

- 2 The stat. 26 G. 2. c. 6. s. 1. enacts that all persons going on board ships coming from infected places, shall obey such orders as the King in Council shall make, without annexing any particular punishment; the disobedience of such an order is an indictable offence, and punishable as a misdemeanour at common law. *Rex v. Harris*.

4 T. R. 202

- 3 *Qu.* Whether the penalties in s. 5. attach on any other than the captain, seamen, and passengers? *ib.*

- 4 Indictment lies against one who was clerk to the agent for French prisoners of war, for taking bribes in order to procure the exchange of some of them out of turn. *Rex v. Beale*.

1 E. R. 183, n.

- 5 In an indictment on the 15 G. 2. c. 28. s. 3. it is not necessary to aver that the defendant is a common utterer of false money. *Rex v. Smith*.

2 B. & P. 127

- 6 The exchanging guineas for banknotes, taking the guineas in such exchange at a higher value than they were current for by the King's procla-

mation, is not an offence against the stat. 5 & 6 Ed. 6. c. 19. *Rex v. De Yonge*. 14 E. R. 402

IX. NUISANCES.

See BRIDGES, *ante*, p. 170.

HIGHWAYS, *ante*, p. 369.

1 A great number of persons at Birmingham, (2500) admitting of an extension to 20,000, covenanted by a deed of co-partnership to raise a large capital (20,000*l.*) by small subscriptions of 1*l.* for each share, for the purpose of buying corn, grinding it, making bread, and dealing in and distributing flour or bread amongst the partners, under the name and firm of *The Birmingham Flour and Bread Company*, and under the management of a Committee; and covenanted that no partner should hold more than 20 shares, unless the same should come to him by marriage, &c. or act of law; and that each member should weekly purchase of the co-partnership a certain quantity of bread or flour, not exceeding 1*s.* in value, for each share, as the committee should appoint; and that no partner should assign his share, unless the assignee should enter into covenant with the other partners for the performance of all covenants in the original deed; and that the majority of partners at a public meeting may make bye-laws to bind the whole. *Rex v. Webb*. 14 E. R. 406

2 And upon an indictment against several of the partners, charging them, upon the stat. 6 G. 1. c. 18. s. 18. and 19., as for a public nuisance, with intending to prejudice and aggrrieve divers of the King's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by making subscriptions towards raising, a large sum for establishing a new and unlawful undertaking, tending to the common grievance, &c. of great numbers of the King's subjects in their trade and commerce, *i. e.* making subscriptions towards raising 20,000*l.* in 20,000 shares, for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same; and also with presuming to act as a corporate body and pretending to raise a transferable and assignable stock, for the same purposes; *ibid.*

3 The jury having found specially, that the company was originally, (during the high price of provisions) instituted from laudable motives, and for the purpose of more regularly supplying the town of B. and the neighbourhood with flour and bread, and that the same was originally, and still is beneficial to the inhabitants at large, but is (*i. e.* at the time of finding the special verdict, which does not include the time of the offence charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood in their trades: the Court gave judgment for the defendants, considering the case not to be within the stat. 6 G. 1. c. 18. s. 18 & 19, on which the indictment was framed. For, 1st, The fact of any nuisance is negated by the special verdict, *during the time to which the offences charged relate*. 2^{dly}, Though the defendants are found to have raised a large capital by small subscriptions, which is one ingredient of a nuisance mentioned in the Act; (*i. e.* where referable to undertakings prohibited by the Act;) and though the shares were made transferable to a certain extent, (*but to a certain extent only*;) *i. e.* upon the vendees entering into similar covenants with the original partners; which may be another ingredient of a nuisance in the Act; and though the defendants have assumed certain equivocal *indicia* of a corporation, *i. e.* the taking a common name, (though this was not found by the jury,) having a managing committee, general meetings, and a power to make bye-laws; yet all these things being done for the purpose of buying corn and making it into flour and bread for the supply of the partners, which does not, upon the face of it, appear to be a dangerous and mischievous undertaking, tending to the common grievance, &c. nor is found in fact so to be; and not being one of the specific nuisances prohibited by the statute; namely, the acting or pretending to act as a body corporate; the raising or pretending to raise transferable stock; (even if that be a nuisance *per se* within the Act, without reference to the nature of the undertaking;) the transferring or pretending to transfer any shares in such stock without authority by statute; the acting or pretending to act under

any charter granted for special and different purposes by persons using such charter for raising and transferring stock; or so acting under any obsolete charter, become void or voidable by *non user*, *abuser*, or dissolution; it is not within the terms and intent of the nuisances created by that statute. 14 E. R. 406

4 But the Court of C. P. would not decide the question whether the *Golden-lane Brewery* were a nuisance within 6 G. 1. c. 18. upon a motion to set aside judgment confessed to them. *Brown v. Holt*. 4 Taunt. 587
And see *Rex v. Dodd*. 9 E. R. 516, *post*.

5 A waggoner, occupying one side of a public street in a city, before his warehouses, in loading and unloading his waggons for several hours at a time, both day and night, and having one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded, by cumbersome goods lying on the ground ready for loading, is indictable for a public nuisance; though there were room for two carriages to pass on the opposite side of the street. *Rex v. Russell*. 6 E. R. 427

6 On an indictment for a nuisance in erecting a wall across a road (not for continuing the nuisance), it is not necessary to judge that the nuisance be abated. *Rex v. The Justices of the W. R. of Yorkshire*. 7 T. R. 467

7 But where it is stated in the indictment to be an existing nuisance, there must be judgment to abate it. *Rex v. Stead*. 8 T. R. 143

8 If the Court be satisfied that a nuisance indicted is already effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And they refused to give such judgment upon an indictment for an obstruction in a public highway; which highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate obtained that the new way was fit for the passage of the public, and on affidavits that so much of the old way indicted as was still retained was freed from all obstruction. *Rex v. Incedan*. 13 E. R. 164

X. FORM OF INDICTMENT.

1 Every indictment must contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. But, except in certain cases, where technical expressions, having grown by long use into law, are required to be used, the same sense is to be put on the words of an indictment which they bear in ordinary acceptation: and if the sense of any word be in ordinary acceptation ambiguous, it shall be construed according as the context and subject-matter require it to be, in order to make the whole consistent and sensible. The word *until* may therefore be construed either exclusive or inclusive of the day to which it is applied, according to the context and subject-matter. *Rex v. Stevens and Agnew*. 5 E. R. 244

2 Where an evil intent, accompanying an act, is necessary to constitute such act a crime, the intent must be alleged in the indictment, and proved; though it be sufficient to allege it in the prefatory part of the indictment. But where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecutor. *Rex v. Phillips*. 6 E. R. 464

3 Time and place must be added to every material fact in an indictment. *Rex v. Holland*. 5 T. R. 607

4 Stating the defendant to be late of *W.*, and laying the offence to be *at the parish aforesaid*, was held not to be sufficiently certain. *Rex v. Mathews*. 5 T. R. 162

5 It is no objection in arrest of judgment, that the indictment contains several charges of the same nature in the different counts. *Young v. Rex*, (*in error*). 3 T. R. 98

6 But in the case of felony, if it appear before the prisoner has pleaded or the jury are charged, that he is to be tried for *separate offences*, the Judge in his discretion may quash the indictment. 3 T. R. 106

7 Or if the Judge do not discover it till after the jury are charged, he may put the prosecutor to his election on which charge he will proceed. 3 T. R. 106

8 *Semble*, that if one *endeavour* to comprize two separate offences, a count in an indictment charging that *endeavour* may contain those two offences. *Rex v. Fuller.* 1 B. & P. 181

9 If in the statement of any offence by statute, there be any description in the negative, the affirmative of which would be an excuse for the defendant, the proof of it lies on him, and it need not be stated in the indictment. *Rex v. Baxter.* 5 T. R. 83

10 Plea of *autrefois acquit*, which does not state the record of acquittal, is bad. On writ of error, brought on a judgment of conviction for felony at the General Quarter Sessions, the Court will only look to the record of conviction, although the justices return also the record of a former acquittal. *Rex v. Wilday.* 1 M. & S. 183

11 In an indictment for an offence at common law, a conclusion of *contra formam statuti* may be rejected as surplusage. *Rex v. Mathews.* 5 T. R. 162

XI. DEMURRER.

1 Upon a demurrer to an indictment found in an inferior Court, objections may be taken as well to the *jurisdiction* of such Court as to the *subject-matter* of the indictment. *Rex v. Fearnley.* 1 T. R. 316

2 And where the caption of the indictment stated the Court of Quarter Sessions, where such indictment was found, to have been held on an impossible day, it was fatal. 1 T. R. 316

3 It is no objection, on demurrer, that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment. *Rex v. Kingston.* 8 E. R. 41

XII. WHEN QUASHED.

1 The Court will not quash a defective indictment on the motion of the prosecutor after plea pleaded, before another good indictment be found. *Rex v. Wynn.* 2 E. R. 226

XIII. JUDGMENTS ON.

1 When a defendant in an indictment is brought up for judgment, his acts subsequent to the trial may be considered either by way of aggravating or mitigating the punishment, even though they be separate and distinct offences, for which he may be afterwards punished. But in such cases the Court will take care not to inflict a greater punishment than the principal charge itself will warrant. *Rex v. Withers.* 3 T. R. 428

And *Rex v. Walter.* 3 T. R. 432

2 A defendant in an indictment for a misdemeanour cannot plead over to the charge, after a plea in abatement for a *misnomer*, on which issue is taken and found against him; and if he demur to an indictment whether in abatement or otherwise, the Court will not give judgment against him to answer over, but *final judgment.* *Rex v. Gibson.* 8 E. R. 107, 111

INFANT.

I. PRIVILEGES AND INCAPACITIES.

II. CONTRACTS BY.

(a) *Where binding.*

(b) *When void or voidable.*

III. GUARDIAN, HOW CHANGED.

IV. PLEADINGS AND EVIDENCE.

I. PRIVILEGES AND INCAPACITIES.

1 An infant may consider whoever en-

ters on his estate, as entering for his use. *Per Kenyon, C. J. Doe v. Keene.* 7 T. R. 390

And see *Ex-parte Grace.* 1 B. & P. 376

2 An infant may sue on a contract in part executed by him, and which is for his benefit. *Warwick v. Bruce.* 2 M. & S. 205

3 *Assumpsit* on an account stated does not lie against an infant. *Trueman v. Hurst.* 1 T. R. 40

4 Even though the particulars of the account were for necessities. *Bartlett v. Emery.* 1 T. R. 42, n.

5 A plaintiff cannot convert an action founded on a contract into a *tort*, so as to charge an infant defendant. *Jennings v. Rundall*. 8 T. R. 335

6 An infant cannot pray the parol to demur in any other stage of the proceeding than at the time of pleading. *Derisley v. Custance*. 4 T. R. 75

7 An infant devisee sued by a specialty creditor of the devisor cannot pray the parol to demur by reason of his nonage; such privilege of an heir who is in by descent not being extended to a devisee by the stat. 3 W. & M. c. 14. which charges the land in his hands for the specialty debts of the devisor. *Plasket, Exor. v. Beeby*. 4 E. R. 485

8 The Court of C. P. refused to discharge a defendant on a common appearance on the ground of infancy. *Madox v. Eden*. 1 B. & P. 480

9 The Court refused on motion to discharge an infant, who had sued without *prochein amy* or guardian, and was in execution for the costs. *Finlay v. Jowle*. 13 E. R. 6

II. CONTRACTS BY.

(a) Where binding.

1 It seems that an infant may bind himself by a promissory note given for necessities, and for instructing him in the business of a hair-dresser. *Trueman v. Hurst*. 1 T. R. 40

2 An infant, a captain in the army, is liable to pay for a livery ordered for his servant, as necessities; but not for cockades ordered for the soldiers of his company. *Hands v. Slaney*. 8 T. R. 578

3 If an agreement made by an infant be for his benefit at the time, it shall bind him. *Maddon d. Baker v. White*. 2 T. R. 159

(b) When void or voidable.

1 An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal. *Fisher v. Mowbray*. 8 E. R. 330

2 A warrant of attorney given by an infant was declared by the Court of C. P. to be *absolutely void*, and that Court refused to confirm it; though the infant appeared to have given it,

(knowing that it was not valid) in collusion with another. *Saunderson v. Marr*. 1 H. B. 75

3 An infant slave in the *West Indies* executed an indenture, by which he covenanted to serve B. for a certain term of years as his *servant*, and B. covenanted to do certain things on his part; B. then came to *England* with the slave: In an action against A. who had seduced him from the service of B., A. was not permitted to allege that the contract was void as being made by an infant and a slave, and therefore that the declaration, which stated him to have been retained as a servant for a term of years was not proved; for the Court (of C. P.) held that the effects of such a contract might be the *manumission* of the slave; and consequently that it was for his own benefit, and therefore that it was, at most, only voidable by the infant himself. *Keane v. Boycott*. 2 H. B. 511

III. GUARDIAN, HOW CHANGED.

1 If a guardian is changed pending an action, the fact ought to be stated by an entry on the record. *Davies v. Lockett*. 4 Taunt. 765

IV. PLEADINGS AND EVIDENCE.

1 Where the plaintiff declared that at the defendant's request he had delivered a mare to the defendant to be moderately ridden, and that the defendant, maliciously intending, &c. wrongfully and injuriously rode the said mare so that she was damaged, &c. it was holden that the defendant might plead his infancy in bar, the action being founded on a contract. *Jennings v. Rundall*. 8 T. R. 335

2 In replying to a plea of infancy, the plaintiff must shew enough in his replication to maintain every part of the declaration. *Trueman v. Hurst*. 1 T. R. 40

3 If the plaintiff reply to a plea of infancy, that the defendant after he had attained 21 confirmed his promise, and the defendant rejoined that he did not, the plaintiff need only prove a promise, and the defendant must shew that he was under age at the time. *Borthwick v. Carruthers*. 1 T. R. 648

4 Replication to a plea of infancy, that defendant, since the making of the promises, attained 21, and that he

- fore the exhibiting of the bill he ratified and confirmed the promises, is good after verdict, though it omit to allege that he ratified and confirmed them after he came of age. *Cohen v. Armstrong.* 1 M. & S. 724
- 5 In an action for goods sold to an in-

fant, the issue being *necessaries*, if any part of the articles proved to have been furnished to the defendant, may fall within the description of *necessaries*, the evidence ought to be left to the jury. *Muddox v. Miller.* 1 M. & S. 738

INFERIOR COURT.

N. B. *See tit. costs, ante* 215

JURISDICTION, *post.*

- 1 Wherever a plaintiff cannot sue in an inferior Court, he may sue in the superior Courts for a debt under 40s. *Busby v. Fearon.* 8 T. R. 235
- 2 The Court of Conscience at Newcastle can only hold plea where both the plaintiff and the defendant reside within the jurisdiction. 8 T. R. 235
- 3 The stat. 29 G. 2. c. 37. does not give power to the courts baron of Sheffield and Ecclesall to hold suit against persons residing within the jurisdiction of those Courts in causes arising without. *Rex v. Danser.* 6 T. R. 242
- 4 Where a stockbroker had given bond to the Chamberlain of London in 10l. conditioned for the payment of 40s., being the amount of the duty payable under stat. 6 Anne, c. 16, § 4. annually by brokers in London, and refusing to pay the said duty, was summoned for

the same before the Court of Requests: the Court held that the Commissioners were bound to hear and determine the case, and that the duty of 40s. was not merged in the forfeiture of the bond. *Rex v. London Court of Requests.* 7 E. R. 292

- 5 In an inferior Court the declaration must allege that the money was *had and received* within the jurisdiction, as well as that the defendant *promised to pay* within it. *Trevor v. Hall.* 1 T. R. 151
- 6 But in an action on the case for rescuing a debtor taken upon mesne process sued out of an inferior Court, it was holden not to be sufficient ground for arresting the judgment after verdict that it was not alleged that the cause of action arose within the jurisdiction:—or that it was not alleged that the party below did not appear at the return of the writ. *Bentley v. Donnelly.* 8 T. R. 127

INFORMATION.

I. ON WHOSE APPLICATION AND AGAINST WHOM GRANTED.

II. PLEADINGS AND EVIDENCE.

I. ON WHOSE APPLICATION AND AGAINST WHOM GRANTED.

N. B. *Where the Court will grant an Information against Magistrates. See JUSTICES OF THE PEACE, post.*

- 1 The King may recover a penalty given by statute, by an information filed by the Attorney-General. *Rex v. Hymen.* 7 T. R. 536
- 2 A party applying for an information must waive his right of action; but if the Court, on hearing the whole matter, are of opinion that it is a proper

subject for an action, they may give the party leave to bring it. *Rex v. Sparrow.* 2 T. R. 198

- 3 The defendant on an information on stat. 24 G. 3. c. 25. § 64. respecting *East India* delinquents, must make his application for a *mandamus* for the examination of witnesses, within the four first full days if at all, after plea pleaded. *Rex v. Holland.* 4 T. R. 662

- 4 The Court will not grant a criminal information against the members of a corporation for a misapplication of the corporation money; but it is rather a subject for an application to the Court of Chancery. *Rex v. Watson.* 2 T. R. 199

5 An order made by a corporation and entered in their books, stating that *A. B.*, (against whom a jury had found a verdict with large damages in an action for a malicious prosecution for perjury, which verdict had been confirmed in the Common Pleas) was actuated by motives of public justice, &c. in preferring the indictment, is such a libel reflecting on the administration of justice for which the Court will grant an information against the members making that order. 2 T. R. 199

6 The Court granted an information against a person refusing to take on himself the office of sheriff, because the vacancy of the office occasioned a stop of public justice, and the year would be nearly expired before an indictment could be brought to trial. *Rex v. Woodrow*. 2 T. R. 731

7 Information granted for endeavouring to procure the appointment of certain persons to be overseers of the poor, with a view to derive a private advantage to the party. *Rex v. Jolliffe*. 1 E. R. 154. n.

8 Whether or not the particular schemes denounced by the stat. 6 G. I. c. 18. § 18. as manifestly tending to the common grievance, prejudice, and inconvenience of great numbers of subjects in their trade and other affairs, be in themselves unlawful and prohibited, without reference to the fact of such tendency in a particular instance in the opinion of a Court and jury; such as the raising great sums by subscription for trading purposes, and making the shares in the joint stock transferable; at any rate the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, seems to be an offence within the Act. But as the statute had not been acted upon for a great length of time, and was now sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to an application to the Court, they refused to interfere, by granting an information, though they discharged the rule without costs. *Rex v. Dodd*. 9 E. R. 516

9 A criminal information having been granted against the defendant, he, be-

fore the trial at *Nisi Prius*, distributed handbills in the asize town, vindicating his own conduct, and reflecting on the prosecutor's. This matter being disclosed to the Judge at *Nisi Prius* by an affidavit, was held a sufficient ground to put off the trial; and that affidavit being returned to this Court, they granted another information on it against the defendant for such criminal conduct, considering the affidavit taken at *Nisi Prius* as taken under the authority of this Court. *Rex v. Jolliffe*. 4 T. R. 285

II. PLEADINGS AND EVIDENCE.

1 Where an information on the stat. 33 G. 3. c. 52 § 62. prohibiting officers of the East India Company, residing in India, from receiving presents, charged that the defendants being British subjects on the 1st of January, 1794, and from thence for a long time, to wit, until the 29th of November, 1795, held certain offices under the Company, and during all that time resided in the East Indies; and that whilst they held the said offices as aforesaid, and whilst they resided in the East Indies as aforesaid, to wit, on the 29th of November, 1795, they received certain presents: Held, that the context shewed that the word until was to be taken inclusive of the 29th of November, 1795. But that if it had been incapable of receiving an inclusive construction, the words under the first *videlicet*, "until the 29th of November, 1795," could not have been rejected as surplusage; for that can never be where the allegation is sensible and consistent in the place where it occurs, and not repugnant to antecedent matter, though laid under a *videlicet*, and however inconsistent with an allegation subsequent. *Rex v. Stevens*. 5 E. R. 244

2 An information at common law for a conspiracy between the captain and purser of a man of war for planning and fabricating false vouchers to cheat the Crown (which planning and fabrication were done upon the high seas), is well triable in *Middlesex*, upon proof there of the receipt by the commissioners of the navy of the false vouchers transmitted thither by one of the conspirators through the medium of

the post, and the application *there* of a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he *there* received. *Rex v. Brisac and Scott.* 4 E. R. 164

- 3 An affidavit by *A.* stating that *B.* had brought him a challenge from *C.*, and that *B.* had refused to make an affidavit that *C.* sent him with it, is not evi-

dence in which the Court will grant a rule *nisi* for a criminal information against *C.* for sending the challenge. *Rex v. Willet.* 6 T. R. 294

- 4 Evidence to the character of a defendant is not admissible upon the trial of an information in the Exchequer. *The Attorney-General v. Bowman.*

2 B. & P. 532, n.

INQUIRY—WRIT OF.

I. WHEN NECESSARY.

II. HOW EXECUTED.

I. WHEN NECESSARY.

- 1 Defendant having suffered judgment by default in an action on a bill of exchange, the Court referred it to the Master to see what was due for principal and interest, without executing a writ of inquiry. *Shepherd v. Charter.* 4 T. R. 275
- 2 In the Court of Common Pleas, it is referred to the prothonotary; either on a promissory note or bill of exchange. *Rashley v. Salmon.* 1 H. B. 252; *Andrews v. Blake.* 1 H. B. 529; *Longman v. Fenn.* 1 H. B. 541
- 3 So they will refer a bill of exchange to the prothonotary, to compute principal, interest, *exchange*, *re-exchange*, and costs. *Goldsmid v. Taite.* 2 B. & P. 55
- 4 But not to compute charges and expenses. *ibid.*
- 5 Where judgment has gone by default on a promissory note, no irregularity previous to the judgment can be shewn as cause against referring the note to the prothonotary. *Pell v. Brown.* 1 B. & P. 369
- 6 The Court referred it to the Master to compute what was due for principal and interest on a mortgage, in an action of covenant. *Berthen v. Street.* 8 T. R. 326
- 7 So in covenant for non-payment of rent, the Court referred it to the Master to compute what was due. *Byrom v. Johnson.* 8 T. R. 410
- 8 In covenant upon a deed of indemnity, whereby the plaintiffs covenanted to indemnify the Bank of England against advances to *L.* and *B.* on bills of exchange, to the amount of 100,000*l.*,

and the defendant and others agreed to sub-indemnify the plaintiff to the same amount in certain aliquot proportions, of which the defendant's proportion was 5000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the Bank, and demanded of the defendant his proportion of 5000*l.*; in which action the plaintiffs had judgment upon demurrer; the Court refused to refer it to the Master to compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant, before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiff's demand from securities and effects of *L.* and *B.*, the principals, in their hands. *Denison v. Muir.*

14 E. R. 622

- 9 Where an affidavit stated that the action was brought to recover the amount of a promissory note, but that the cause of action did not appear on the face of the declaration; the Court refused to refer it to the Master, after a judgment by default. *Osborne v. Noad.* 8 T. R. 648
- 10 Where the defendant suffered judgment by default in an action of *assumpsit* on a foreign judgment, the Court refused to refer it to the Master to see what was due, and to give the plaintiff leave to enter up final judgment for such sum, without executing a writ of inquiry. *Messin v. Lord Massarene & Ur.* 4 T. R. 493
- 11 Defendant having suffered judgment by default in an action on a bill of exchange for 200*l.* Irish money, the Court refused to refer it to the Master to see what was due for principal, in-

terest, and costs. *Mauwssell v. Lord Massareene*. 5 T. R. 87

- 12 Where interlocutory judgment was signed, and the plaintiff died on a subsequent day in the Term, the Court granted a rule to compute principal and interest on the bill on which the action was brought. *Berger v. Green*. 1 M. & S. 229

- 13 Upon a motion to refer it to the Master to compute principal, interest and costs upon a bill of exchange drawn in *Scotland* upon and accepted by the defendant in *England*; the Court will not direct the Master to allow *re-exchange*. *Napier v. Schneider*. 12 E. R. 420

- 14 On an interlocutory judgment in debt, on a judgment in an action brought on a bill of exchange, the Court refused to refer it to the Master to ascertain the damages sustained by the plaintiff. *Nelson v. Sheridan*. 8 T. R. 395

- 15 The Court would not direct a writ of inquiry to be executed after judgment by default in an action of debt; but referred it to the Master to ascertain what was due, upon the application of the defendant after execution executed. *Taylor v. Capper*. 14 E. R. 442

- 16 Where the first count in a declaration was on a bill of exchange, to which count there was a demurrer and judgment for the plaintiff; though there was a plea to the other counts on which issue was joined, the Court referred it to the Master to see what was due on the first count. *Duperoy v. Johnson*. 7 T. R. 473

- 17 Leave was given to the plaintiff in debt on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, to execute a writ of inquiry upon the stat. 8 & 9 W. 3. c. 11. § 8. after a writ of error allowed, and to sign a new judgment, on the terms of paying costs, and putting the defendant *in statu quo*, &c. *Hanbury v. Guest*. 14 E. R. 401

And see BOND V. VI. *ante*, 168, 169.

- 18 After judgment by default in an action of debt on a judgment, the plaintiff may have a writ of inquiry to recover interest by way of damages, for the detention of the debt. *Blackmore v. Fleming*. 7 T. R. 446

- 19 The Court may assess the damages

in *assumpsit* upon judgment by default, with the assent of the plaintiff, without the intervention of a jury. *Gould v. Hammersley*. 4 Taunt. 148

II. HOW EXECUTED.

- 1 Notice of executing a writ of inquiry is in future to be given to the agent in town, and not to the attorney in the country. *Hayes v. Perkins*. 3 E. R. 568

- 2 One who was residing at an hotel in *London*, from the time of his arrest till he was served with notice of executing the writ of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence (his home) was above 40 miles from town. *Lloyd v. Hooper*. 7 E. R. 624

- 3 Where the defendant was residing in *London* before and at the commencement of the action, eight days' notice of executing a writ of inquiry is sufficient, though the defendant had in the intermediate time permanently removed above 40 miles from *London*, (to *Tortola*); if he did not give the plaintiff previous notice of such removal. *Rochfort v. Robertson*. 12 E. R. 427

- 4 If notice of a writ of inquiry, to be executed at a particular hour and place, be continued, the notice of continuance need not express any hour or place. *Jones v. Chune*. 1 B. & P. 363

- 5 Notice of executing a writ of inquiry on "*Tuesday* the 14th of *January* instant," when the 14th of *January* fell on a *Thursday*, and on which day the writ of inquiry was executed; the Court of C. P. refused to set aside the execution of the writ of inquiry for this irregularity, but rejected "*Tuesday*" as surplusage, it appearing that the defendant was not misled thereby. *Batten v. Harrison*. 3 B. & P. 1

- 6 If a defendant sued on a bill of exchange, suffer judgment by default, he admits that he is liable to the amount of the bill; and therefore though the bill must be *produced* on executing the writ of inquiry; it need not be *proved*. *Green v. Hearne*. 3 T. R. 301

- 7 The only reason for producing the bill on the writ of inquiry, is to see whether or not any part of it has been paid. 3 T. R. 301

8 At the execution of a writ of inquiry after judgment on demurrer, it is not competent to the defendant to controvert any thing but the sum in demand.

De Gaillon v. L' Aigle. 1 B. & P. 368

9 In estimating the measure of damages in an action for breach of an engagement to replace stock on a given day, it is not enough to take the value of the stock on that day if it have risen in the mean time, but the highest value as it stood at the time of

the trial; there being no offer of the defendant to replace it in the intermediate time while the market was rising. *Shepherd v. Johnson.*

2 E. R. 211

10 If issue be joined on one of three pleas, and judgment be entered by default upon the two others, the plaintiff cannot execute a writ of inquiry on those pleas on which he has judgment, but must award jury process *tam ad triandum quam ad inquirendum.* *Dicker v. Adams.*

2 B. & P. 163

INQUISITION.

WHEN SET ASIDE.

See Gulliver v. Drinkwater. 2 T. R. 261 ante, 126.

1 The Court set aside an inquisition taken on a writ of inquiry because some of the jury were debtors in prison, and taken out of custody for the purpose of attending. *Stainton v. Beadle*

4 T. R. 473

2 The Court will not set aside the inquisition of a jury summoned by the

sheriff to inquire in whom the property of goods seized by him under a *fi. fa.* is vested. *Roberts v. Thomas.*

6 T. R. 88

3 Damages *ultra* the mere loss of service having been given against the defendant for debauching, and getting with child the adopted daughter and servant of the plaintiff, the Court refused to set aside the inquisition. *Irwin v. Dearman.*

11 E. R. 23

INSOLVENT DEBTORS.

I. COMPOSITION WITH CREDITORS.

II. DISCHARGE.

(a) *Who entitled to.*

(b) *On whose Application, and how obtained.*

III. WHEN BROUGHT INTO COURT.

IV. HOW FAR LIABLE AFTER DISCHARGE.

V. WHAT PROPERTY PASSES TO CREDITORS.

VI. PLEADINGS.

I. COMPOSITION WITH CREDITORS.

1 It is sufficient evidence of insolvency that a person has compounded with his creditors. *Reader v. Knatchbull.*

5 T. R. 218, n.

2 An insolvent assigned over his effects for the benefit of his creditors; and in the deed there was a proviso that the shares of those creditors who did not execute it before a given day should be paid by the trustee to the insol-

vent; an agreement made between the insolvent and a creditor, even after that day, that the latter should sign the deed and the former pay the remainder of the whole debt, is fraudulent and void. *Jackson v. Lomas.*

4 T. R. 166

3 By a deed of composition between a trader and his creditors, it was agreed that the trader should give them his bills, accepted by a friend, for 10s. in the pound, payable in certain proportions at fixed periods, and his own promissory notes for 5s. more, and that the creditors should be at liberty to take his own notes only for their full demands if they pleased; one of the creditors who signed the deed, took the bills from the debtor accepted by his friend for the whole 15s. in the pound, payable at the same respective times as the bills agreed to be given by the deed of composition: the payment of these bills was resisted upon the ground that it was a secu-

riety beyond that agreed for, and greater than the other creditors obtained: but the transaction was adjudged fair, the creditor not receiving by it more than the others. *Feise v. Randall*. 6 T. R. 146

- 4 A trust-deed is proposed to the creditors at large of an insolvent, whereby they all engage to accept payment of their whole debts by certain instalments, the four first of which are to be guaranteed by collateral security, the two last to remain upon the single security of the insolvent: several of the creditors refused to sign unless the plaintiffs do; and the plaintiffs stipulate privately with the insolvent as the condition of their signature that he shall procure them collateral security for the two last instalments as well as the prior ones; conceiving that they had collateral security originally to cover their debt; and upon the faith of such private agreement they sign the general trust-deed, which is then signed by the rest of the creditors: Held, that such private agreement is a fraud upon the other creditors, and void; although the effect of it were not to secure to the plaintiffs the payment of more money than the other creditors were to receive, but only further security for the same sum. *Leicester v. Rose*. 4 E. R. 372

N. B. In this case, the preceding case of *Feise v. Randall* was said to have been decided without particular consideration, and on the ground that no fraud was intended against the other creditors.

- 5 If in consequence to a debtor representing to one of his creditors, that if he will agree to accept a composition for his debt, all the other creditors will do the same, such creditor do agree, &c. the agreement is not binding on him if that representation be untrue. *Cooling v. Noyes*. 6 T. R. 263

- 6 *Quare*, Whether an agreement by creditors to take a composition in discharge of their debts be not binding, though no fund be appropriated for the payment of the composition?

6 T. R. 263

- 7 Where plaintiff, the drawer of a bill of exchange, accepted by defendant, agreed with him and the rest of his creditors to take a composition of

8s. in the pound, to be secured by promissory notes to be given by defendant, payable on days certain; and that defendant should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors, except plaintiff, received each their composition and executed the release, and plaintiff might have received his promissory notes if he had applied for them, but it did not appear that defendant had ever tendered them to plaintiff, or that he had ever applied for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange: Held, that he was not precluded by the agreement from recovering. *Cranley v. Hillary*. 2 M. & S. 120

II. DISCHARGE.

(a) Who entitled to.

N. B. When an insolvent is entitled to his discharge for non-payment of weekly allowance. See *tit. PRISONER*, *post*.

- 1 A defendant in execution for the contempt, and costs, on a *quo warranto* information, may be discharged under the Lord's Act. *Rex v. Pickerrill*. 4 T. R. 809

- 2 So may an attorney in custody on an attachment for not paying over money received by him in the course of a suit. *Rex v. Davis*. 1 B. & P. 336

- 3 It is no objection to a prisoner being discharged under the above Act, that his creditor is dead. 1 B. & P. 336

- 4 Where a prisoner had been brought into the Court to be discharged under the Lord's Act, and upon his examination the Court of C. P. had refused to discharge him; that Court would not afterwards discharge him under that Act, though he made affidavit of circumstances in answer to the cause shewn, on his examination, against his discharge, and that those circumstances were not then disclosed, owing to a mistake: that Court also held that the 5th section of 26 G. 3. c. 44. was only meant to remedy a neglect, in not taking the benefit of the Lord's Act, within the time limited by that Act. *Thornton v. Dunphy*. 1 H. B. 101

5 The Court held, that where a prisoner had lost the benefit of the Lord's Act, 32 G. 2. c. 28., by the ignorance or mistake, or even *misconduct*, of an agent, he might afterwards be discharged under 26 G. 3. c. 44., on the ground that that Act provides relief for those who have neglected to take advantage of the former Act through ignorance or mistake. *Pearce v. Taylor*.
4 T. R. 231

6 One convicted upon an indictment for an assault, who, upon reference to the King's coroner and attorney, was directed by his award to pay so much for costs and so much for compensation to the prosecutrix, is entitled to be discharged as an insolvent debtor under the Lord's Act, 32 G. 2. c. 28., without the aid of the stat. 33 G. 3. c. 5. *Rex v. Wakefield*.
13 E. R. 190

7 A prisoner who is taken in execution for a sum greater than that to which the benefit of an insolvent Act (33 G. 3. c. 5.) is extended, and afterwards reduces his debt below that sum, is not entitled to be discharged under that Act in the next Term after he has so reduced his debt, unless it be also the next Term after he was taken in execution. *Ex parte Hubbard*.
1 B. & P. 423

8 A defendant in custody under a writ *de excommunicato capiendo*, for contumacy in not paying a sum for *alimony*, and also for *costs*, in the Ecclesiastical Court, is not entitled to his discharge as an insolvent debtor under the stat. 33 G. 3. c. 5. § 4., which extends only to persons in custody on such writ for non-payment of *costs and expenses only*. *Rex v. Samson*.
11 E. R. 231

9 A prisoner in custody for a contempt of Chancery in not answering, and whom that Court refused to discharge, except on payment of fees, cannot be discharged under an Insolvent Act, 34 G. 3. c. 69.: his contempt not consisting in the non-payment of money. *Ex-parte Lawrence*.
1 B. & P. 477

10 The defendant having been charged in execution for the penalty of 1000*l.* in a bond (which became forfeited for non-payment of the instalment of an annuity secured thereby on the day previous to the 34 G. 3. c. 69.) the Court

refused to order that sum to be reduced in the Marshal's book to the sum actually due for the arrears of the annuity, in order that he might take the benefit of that Act. *Judd v. Evans*.
6 T. R. 399

11 Only those prisoners for debt, who were in custody on the 12th February, 1794, and have continued in the same prison to the time of their being carried to the Sessions to be discharged, are entitled to the relief given by the stat. 34 G. 3. c. 69. *Rex v. Jones*.
6 T. R. 28

12 One who was arrested at the suit of the plaintiff, and liberated on bail prior to 1st March, 1801, and was afterwards committed in execution at the suit of the same plaintiff before the passing of the Insolvent Act of the 41 G. 3. c. 70., is entitled to be discharged by the 6th section of that Act on the conditions thereby imposed. And this, where he was so taken in execution upon a judgment confessed for the amount of the costs as well as for the original debt, for which he had been arrested by writ out of an inferior Court before the first of March; the 34th section providing that no person entitled to the benefit of the Act shall be imprisoned by reason of any judgment for any debt, costs, &c. owing or growing due before the said 1st of March. *Billetts v. McCarthy*.
2 E. R. 148

13 It is not enough in an order for remanding an insolvent debtor by the sessions, to state, that it appeared that he had obtained goods of *A. B.* by false pretences; for either it should be stated in the words of the statute 41 G. 3. c. 70. § 40. (by virtue of which the order was made), that the party *knowingly and designedly* by false pretences obtained the goods; or at least, that he *fraudulently*, by false pretences, obtained them; the description of the offence adopted by the stat. 46 G. 3. c. 108. § 39., with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former Act). And a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of

an insolvent debtor, on due proof of such former offence described in the statute; though he were not a creditor at the time of such former order of remand made. *Rex v. Tomkins*.

8 E. R. 180

- 14 One who was charged in custody on mesne process for a sum exceeding 1500*l.*, on the 1st of *January*, 1804, is not entitled to be discharged under the insolvent debtors' Act of the 44 G. 3. c. 108., though the debt were afterwards reduced by verdict to a sum which, together with the costs, did not amount to 1500*l.* *Ex-parte Chiffench*.

6 E. R. 347

- 15 So also where a prisoner was charged in execution on 1st of *January*, 1804, for a larger sum than the Act extended to, though part of such sum was composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under a commission of bankrupt by a future day posterior to 1st *January*, 1804, and which he had elected so to prove and to abandon his judgment before said 1st *January*, though the prisoner was not discharged by a Judge's order from such execution till long after such day: Held, that he was not entitled to the benefit of the Act. *Ex-parte King*.

7 E. R. 90

- 16 A person in custody by attachment for non-payment of money under 20*l.* found due by an award, made a rule of Court, is not entitled to his discharge under stat. 48 G. 3. c. 123., that Act being confined in its operation to persons in *execution* upon any judgment. *Rex v. Hubbard*.

10 E. R. 408

- 17 Defendant in custody on an attachment for non-payment of money awarded by the master to the prosecutor of an indictment for an assault, of which defendant is convicted, is not entitled to his discharge under 48 G. 3. c. 123. after having been in prison 12 calendar months, although the sum awarded for damages do not exceed 20*l.* exclusive of costs. *Rex v. Dunne*.

2 M. & S. 201

- 18 If one of two defendants taken on a joint *ca. sa.* be discharged under an insolvent debtors' Act, that will not operate as a discharge of the other. *Nadin v. Battie*.

5 E. R. 147

(b) On whose Application, and how obtained.

- 1 The statutes for the relief of insolvent debtors, charged in execution on process issuing out of any of the Courts of law, extend to inferior as well as superior Courts. *Rex v. The Bailiffs of Ipswich*.

7 E. R. 84

- 2 But the application in both cases must be made before the end of the next Term after the prisoner is charged in execution, except the neglect can be shewn to have arisen from ignorance or mistake.

7 E. R. 84

- 3 If a defendant be arrested on a *ca. sa.* and escape, and be afterwards retaken, and committed to prison in the next Term, he may apply in the following Term, to be discharged under the Lord's Act (32 G. 2. c. 28.); for the words in s. 13 of that statute, "*charged in execution*," mean being detained within the walls of the prison. *Vaughan v. Durnell*.

4 T. R. 367

- 4 Notice of applying to a wrong Court for discharge of an insolvent is not cured by the plaintiff's appearing to oppose his discharge. *Scholey v. Powell*.

1 Taunt. 64

- 5 The Court of C. P. will not grant a one-day rule with only one day's notice to discharge an insolvent debtor, though it is prayed for on the last day but one of the Term. *Anonymous*.

4 Taunt. 588

- 6 An order for the discharge of an insolvent under the Lord's Act, (32 G. 2. c. 28. s. 16.) cannot be made by a Judge in Term, though summonses were taken out in vacation, and the order only delayed until the beginning of Term by an irregularity in the affidavits. *Huskins v. Morris*.

1 B. & P. 92

- 7 The stat. 37 G. 3. c. 112. authorized the Justices of the Peace, "at the first or second General Quarter Sessions or General Session to be holden after the passing of the Act, or some adjournment thereof," to discharge insolvent debtors under certain circumstances; the Justices in S at an adjourned session, held just after the Act passed; (the adjournment being of a session holden before the Act passed,) ordered the keeper of the sheriff's prison to discharge an insolvent: Held, 1st, That the adjourned session had no jurisdiction; 2dly, That the officer

was not justified in obeying the order of secession; 3dly, That the sheriff was answerable in damages to the plaintiff at whose suit the insolvent was in custody, for the act of the gaoler in discharging the insolvent. *Brown v. Compton.* 8 T. R. 424

III. WHEN BROUGHT INTO COURT.

- 1 Insolvent debtors petitioning under the Lord's Act, 32 G. 2. and subsequent Acts for their further relief, shall be brought into Court during Term time on *Mondays* and *Thursdays* only. *Reg. Gen. K. B. II 27 G. 3.* 7 T. R. 454
- 2 Insolvents shall be brought up in Term on the days appointed for the *London* sittings, and on *Saturdays* only. *Reg. Gen. C. P. M. 46 G. 3.* 2 N. R. 96
- 3 The Court of C. P. allowed a prisoner to be brought up under the Lord's Act, notwithstanding the body of the notice contained the words "King's Bench" instead of "Common Pleas," the title having been properly altered from King's Bench to Common Pleas, and there not being a sufficient time to give a fresh notice. *Knight v. Fowler.* 2 N. R. 67
- 4 If a prisoner brought up to be discharged under s. 16. of the Lord's Act, 32 G. 2. deliver a false schedule, and is remanded, the Court will not, at the instance of a creditor, even with the prisoner's consent, order him to be brought up a second time, for the purpose of amending his schedule, and assigning over that property which he had before concealed. *Hutchins v. Hesketh.* 1 B. & P. 143
- 5 An insolvent debtor may be brought up after the ordinary time allowed, on affidavit of his ignorance of the creditor's place of abode till recently before his application; within the saving clause of the stat. 33 G. 3. c. 5. s. 5. *Ret v. Wakefield.* 13 E. R. 190
- 6 If an insolvent debtor brought up to the Sessions under the 34 G. 3. c. 69. be remanded on a charge against him of having obtained money by false pretences, under sect. 37., and he give notice that he will disprove the charge at a subsequent adjournment of the Sessions, he is entitled to be brought up to the adjourned Session for that purpose. *Ret v. The Justices of Surrey.* 6 T. R. 76

IV. HOW FAR LIABLE AFTER DISCHARGE.

- 1 The effects acquired by an insolvent after his discharge under 34 G. 3. c. 69. are liable to be taken in execution for a debt due before. *Spalton v. Moorhouse.* 6 T. R. 366
- 2 The Insolvent Act (34 G. 3. c. 69.) does not discharge the person of an insolvent (who is entitled to the benefit of that Act) from the payment of the arrears of an annuity becoming due after his discharge on a covenant made before the Act. *Marks v. Upton.* 7 T. R. 305
- 3 But under the words of s. 31. of that Act, with respect to debts growing due, an insolvent is discharged from the payment of a debt on a promissory note or bill of exchange, given before, but not payable until after the day mentioned in the Act. *Kingaird (Lor.) v. Barrow.* 8 T. R. 49
- 4 A general judgment, signed by virtue of a warrant of attorney given before the passing of an Insolvent Act, of which the defendant is entitled to take advantage by pleading in discharge of his person, &c. will not warrant a special execution under the Act: But the Court will give the plaintiff leave to plead the Insolvent Act for the defendant, and sign a special judgment under it; for the warrant of attorney will preclude the defendant from saying there is no debt. *Buxton v. Mardin.* 1 T. R. 80
And see *Edmonson v. Parker.* 3 B. & P. 185
- 5 The Insolvent Debtor's Act of the 43 G. 3. c. 70. only discharges the person, and not the effects, of the debtor, as appears by s. 38., giving the plea of discharge; though s. 4. in the terms of it includes both, but with reference to the subsequent provision. *Bell v. Saunderson.* 8 E. R. 55
- 6 An insolvent discharged under the 43 G. 3. c. 70., cannot be holden to bail on a bill drawn and indorsed over by him previous to the 1st of *March*, 1803, though not due till after that period. *Shurpe v. Iffgrave.* 3 B. & P. 394
- 7 The grantor of an annuity who is discharged out of custody under the Insolvent Act, 51 G. 3. c. 125. is discharged both as to his person and property from all future payments of the

annuity; but the Act is no discharge of his sureties, or of specific securities. *Cowley v. Bussell*.

4 Taunt. 460

- 3 A person discharged under 51 G. 3. c. 125. is liable to his surety for the arrears of an annuity due since his discharge, which the surety has been obliged to pay. *Page v. Bussell*.

2 M. & S. 551

- 9 The Insolvent Act, 51 G. 3. c. 125 is a bar to an execution against the person of the grantor of an annuity, in covenant for instalments accruing after the defendant's discharge under that Act. *Mence v. Graves*.

4 Taunt. 854

V. WHAT PROPERTY PASSES TO CREDITORS.

- 1 The profits of an ecclesiastical benefice do not pass to the assignees under an Insolvent Act, though included in the schedule of the insolvent. *Arbuckle v. Cowtan*.

3 B. & P. 321

- 2 Creditors under the Lord's Act may compel the debtor to include in his schedule every thing that he can sell for his own benefit; but as the half-pay of an officer is not the subject of sale, the creditors cannot compel him to include it in his schedule. *Flarty v. Odum*.

3 T. R. 681

- 3 A conveyance to a creditor of an insolvent debtor's estate by the clerk of the peace (in whom it is vested upon the order for the insolvent's discharge by the stat. 41 G. 3. c. 70. s. 15. until the subsequent conveyance to the creditor), does not vest the estate in such creditor by relation, either to the date of the order or of the conveyance, but only from the actual execution of such conveyance by the clerk of the peace. Therefore such creditor cannot recover in ejectment upon a demise laid before the execution, though after the estate was out of the insolvent debtor, and the order was made to convey the same to the lessor. *Doe d. Whately v. Telling*.

2 E. R. 257

VI. PLEADINGS.

- 1 To a plea of discharge under an Insolvent Debtor's Act, the plaintiff replied by denying the truth of all the facts collectively, which were sworn to by the defendant in the oath which he took, as required by the statute, in order to obtain his discharge, without singling out any in particular: Held, that although this mode of pleading might be bad on a special demurrer, it did not tender an immaterial issue. *Winstanley v. Head*.

3 Taunt. 237

INSPECTION AND PRODUCTION OF PAPERS.

I. PUBLIC.

II. PRIVATE.

I. PUBLIC.

- 1 See stat. 32 G. 3. c. 58. s. 4. by which members of corporations are entitled to inspect the book of admission of freemen.

- 2 Where a corporation was plaintiff in a civil action, the Court granted leave to inspect their books to the defendant, as of course. *Lynn Corporation v. Denton*.

1 T. R. 689

- 3 In an action by a corporation for tolls against a stranger, the Court gave the defendant leave to inspect such part of the deeds, &c. in the custody of the corporation as related to the question: and the rule was made on the

town clerk to grant such inspection on oath. *Barnstaple Corporation v. Lathley*.

3 T. R. 303

(And see 3 T. R. 305, n.)

- 4 But on consideration, and hearing counsel, Lord Kenyon C. J. and the Court delivered their opinion that such inspection ought not to be considered grantable as matter of course; and in an action by a corporation for tolls, they refused leave to inspect the corporation muniments on the application of the defendant, a stranger to the corporation. *Southampton Corporation v. Graves*.

8 T. R. 590

- 5 Leave to inspect the Court-rolls, &c. of a manor granted on the application of a tenant of the manor, who had been refused that permission by the lord. *Rex v. Shelley*.

3 T. R. 141

6 But in a question between the lord and a stranger, such permission refused. *Talbot v. Villebois*.

3 T. R. 142, n.

7 And the Court said, that even a freehold tenant of a manor has no right to inspect the Court-rolls, unless some cause is depending in which his right may be involved. *Rex v. Allgood*.

7 T. R. 746

8 One who has a *prima facie* title to a copyhold is entitled to inspect the Court-rolls, and take copies of them, so far as relates to the copyhold claimed, though no cause be depending for it at the time. *Rex v. Lucas*.

10 E. R. 235

9 A copyholder claiming an interest, may have inspection of the Court-rolls without proving an interest. *Bateman v. Phillips*.

4 Taunt. 162

10 Where two parties had betted upon a certain event, to ascertain which it was necessary to inspect the public revenue books; and the proper officer was served with a *subpoena duces tecum*; Lord Mansfield, and Mr. Justice Ashurst, severally held at *nisi prius* that the officer was not bound to produce them. *Atherfeld v. Beard*.

2 T. R. 616

11 Where an information was filed by the Attorney-General against an officer of the East India Company on charges of delinquency in India, founded upon the report of a Board of Inquiry there, the Court refused to grant the defendant an inspection of that report, and declared that they had no discretionary power to grant it. *Rex v. Holland*.

4 T. R. 691

12 In cases of criminal prosecutions, and in an action for a penalty against a postmaster on stat. 9 Ann. c. 10. leave to inspect the books denied.

1 T. R. 689, n.

II. PRIVATE.

1 It is not necessary in penal actions to give notice to the defendant himself to produce papers, &c.; notice to his agent or attorney is sufficient. *Cates q. t. v. Winter*.

3 T. R. 306

2 Under a Judge's order to produce papers and give copies, it is sufficient to give extracts of those parts of letters which are relevant to the subject. *Clifford v. Taylor*.

1 Taunt. 167

3 If the part only of an indenture is

executed, the Court of C. P. will compel the party having the custody of it, to produce it for inspection, upon an action commenced against him by the other party. *Blakey v. Porter*.

1 Taunt. 386

4 In trover for a written instrument, it seems that it is not necessary to give the defendants notice to produce it, but that it may be proved by description. *Scott v. Jones*.

4 Taunt. 865

5 The Court of C. P. refused to make a rule on a plaintiff, who brought an action on a bond, to an officer of the stamp-duties to inspect the bond, because the defendant suspected it to be forged. *Chetwind v. Marnell*.

1 B. & P. 271

6 The Court of C. P. will compel the production by a defendant of an unstamped agreement in his custody, to which the plaintiffs claim to be parties in interest, upon the instance of the plaintiffs, in order that they may get it stamped. Although the plaintiff be not an instrumentary party, and although the plaintiff's interest no otherwise appears than upon their own declaration, which proves a claim, but not an interest. *Bateman v. Phillips*.

4 Taunt. 157

7 The Courts will not at a plaintiff's instance compel the production of an instrument to be stamped which is in the hands of the defendant, and to which the plaintiff is neither an instrumentary party nor a party in interest. *Taylor v. Osborne*.

4 Taunt. 159, n.

8 The rule restraining the production of instruments to the application of a party named therein, was much too strict; for suppose a person, though no party to a deed, took an estate by way of remainder, he had nevertheless a strong interest in the deed, and was entitled to compel the production. *Bateman v. Phillips*.

4 Taunt. 161

9 The Court of C. P. will compel a defendant in covenant on a deed which he holds, to produce it to the plaintiff for the purposes of the cause, and it differs not that the plaintiff seeks for inspection for the purpose of discovering some defect in the deed. *King v. King*.

4 Taunt. 666

10 In trover for goods by the assignees of a bankrupt, where the defence was that they were sold by the plaintiff, and defendant moved for leave to

Inspect the bankrupt's sale books; the Court gave him time to plead, in order that he might gain time to ob-

tain a discovery from the Court of Chancery in the mean-while. *Whitten v. Cazelet*. 2 T. R. 683

INSURANCE.

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| <p>I. PARTIES TO THE CONTRACT.</p> <p>(a) <i>Who may be insured.</i></p> <p>(b) <i>Who may be Insurers.</i></p> <p>II. LICENCE TO TRADE.</p> <p>III. SUBJECT-MATTER.</p> <p>(a) <i>Prohibited Goods.</i></p> <p>(b) <i>Trading with an Enemy.</i></p> <p>(c) <i>Property of Master and Mariners.</i></p> <p>(d) <i>Profits.</i></p> <p>IV. INTEREST OF THE INSURED.</p> <p>(a) <i>Qualified or Trust Property.</i></p> <p>(b) <i>Prize.</i></p> <p>(c) <i>Wager Policies.</i></p> <p>(d) <i>Re-assurance.</i></p> <p>V. SHIP.</p> <p>(a) <i>Sea-worthiness.</i></p> <p>(b) <i>Employment and conduct of.</i></p> <p>(c) <i>Carrying simulated Papers.</i></p> <p>(d) <i>Irregular Clearance.</i></p> <p>VI. VOYAGE.</p> <p>(a) <i>Illegal.</i></p> <p>(b) <i>Deviation.</i></p> <p>VII. RISKS.</p> <p>(a) <i>Insured against by Policy.</i></p> <p>(b) <i>Excluded by Memorandum.</i></p> <p>(c) <i>Duration of Risk.</i></p> <p style="padding-left: 40px;">1. <i>On Goods.</i></p> <p style="padding-left: 40px;">2. <i>— Ship.</i></p> <p style="padding-left: 40px;">3. <i>— Freight.</i></p> <p>(d) <i>Changed after subscription of Policy.</i></p> <p>VIII. POLICY.</p> <p>(a) <i>Construction of, and by whom effected.</i></p> <p>(b) <i>Description of Voyage.</i></p> <p>(c) <i>Alteration.</i></p> <p>IX. WARRANTIES.</p> <p>(a) <i>What shall amount to, and how construed.</i></p> | <p>(b) <i>Against Confiscation or Capture.</i></p> <p>(c) <i>To sail with Controy.</i></p> <p>(d) <i>Neutrality.</i></p> <p>X. REPRESENTATIONS.</p> <p>(a) <i>When and how made.</i></p> <p>XI. CONCEALMENT.</p> <p>(a) <i>When material.</i></p> <p>XII. LOSS.</p> <p>(a) <i>By Perils of the Sea.</i></p> <p>(b) <i>— Capture.</i></p> <p>(c) <i>— Detention.</i></p> <p>(d) <i>— Barratry.</i></p> <p>(e) <i>— Average Contributions.</i></p> <p>XIII. ABANDONMENT.</p> <p>(a) <i>Where allowed.</i></p> <p>(b) <i>At what time.</i></p> <p>(c) <i>Effect of.</i></p> <p>XIV. ADJUSTMENT.</p> <p>(a) <i>How made and effect of.</i></p> <p>XV. RETURN OF PREMIUM.</p> <p>(a) <i>Who entitled to.</i></p> <p>XVI. PLEADINGS.</p> <p>(a) <i>Declaration.</i></p> <p>(b) <i>Plea and Replication.</i></p> <p>XVII. EVIDENCE.</p> <p>(a) <i>Mode of Proof.</i></p> <p>XVIII. COSTS.</p> <p>XIX. INSURANCE BROKER.</p> <p>(a) <i>His Rights and Duties.</i></p> <p>XX. BOTTOMRY AND RESPONDENTIA BONDS.</p> <p>XXI. INSURANCE ON LIVES.</p> <p>XXII. ——— AGAINST FIRE.</p> <p style="text-align: center;">I. PARTIES TO THE CONTRACT.</p> <p style="padding-left: 40px;">(a) <i>Who may be insured.</i></p> <p>N. B. When aliens are protected by the Licence to Trade, see post, 389, and subsequent pages.</p> <p style="padding-left: 40px;">See stats. 33 G. 3. c. 27. s. 4.</p> <p style="padding-left: 40px;">34 G. 3. c. 79. s. 17.</p> <p>1 The insurance of an alien enemy's</p> |
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property is illegal, and no action can be sustained upon it.

Brandon v. Nesbitt.

6 T. R. 23

Bristow v. Towers.

6 T. R. 35

- 2 An insurance effected in *Great Britain*, on a *French* ship previous to the commencement of hostilities between *Great Britain* and *France*, does not cover a loss by *British* capture. *Fur-
tado v. Rodgers.* 3 B. & P. 191

- 3 An underwriter on *French* property in time of peace is not liable for a loss occasioned by capture by the King's ships during hostilities which commenced against *Great Britain* and *France* subsequent to the policy being effected, and terminated prior to the action brought. *Gamba v. Le Men-
rier.* 4 E. R. 407

- 4 An insurance on goods from *London* to *Bayonne* in *France*, shipped on board a neutral ship on account and at the risk of *Frenchmen*, before the declaration of hostilities between *Great Britain* and *France*, but exported afterwards, cannot be enforced against the underwriters, even after the restoration of peace, to recover the loss by capture of a co-belligerent (though not stated to be an ally) during the war. For every insurance on alien property by a *British* subject must be understood with this implied exception, that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and the assurer. *Brandon v. Carling.*

4 E. R. 410

And see *Lubbock v. Potts.* 7 E. R. 449
post, page 395.

- 5 A natural-born subject of *Great Britain* may be also a citizen of a foreign country (*America* for example) for the purposes of commerce, and entitled to all the advantages of an *American*, under a treaty with that country: the circumstance of his coming over to *Great Britain* for a temporary purpose, does not deprive him of those advantages. *Wilson v. Marryat.*

8 T. R. 31

(Affirmed in *Cam. Scac.* 1 B. & P. 430)

- 6 An *American*, who is owner of a ship only as trustee, and would not thereby be entitled to the privileges of the *American* flag under the laws of his own country, has a sufficient interest

to maintain an action on a policy. *Rhind v. Wilkinson.* 2 Taunt. 237

- 7 A natural-born subject of this country, domiciled in a foreign country in amity with this, may lawfully exercise the privileges of a subject of the country where he is domiciled to trade with another country in hostility with this; therefore, where plaintiff, a *British*-born subject domiciled in *America*, effected a policy of assurance on ship, freight and goods, at and from *Virginia* to any ports in the *Baltic*, and the ship was captured in her way to *Elsineur* in *Denmark*, *Denmark* being in amity with *America*, but at war with this country: Held, that the plaintiff was entitled to recover. *Bell v. Reid.* 1 M. & S. 726

(b) Who may be Insurers.

- 1 A. B. and C. became partners in insuring ships (contrary to the statute 6 G. 1. c. 18. s. 12.) but it was agreed that the policies should be underwritten in the name of A. only; several policies were effected, and the premiums received by C. and D. who were partners as brokers: Held, that A. could not recover those premiums from C. and D. *Booth v. Hodgson.*

6 T. R. 405

- 2 Where on such a partnership A. had paid the whole of the losses, the Court of C. P. held that he could not maintain an action against his partner to recover a share of the money so paid. *Mitchell v. Cockburne.* 2 H. B. 379
Aubert v. Maze. 2 B. & P. 371
And see *Ex-parte Bell.* 1 M. & S. 751,
post, tit. PARTNERS.

- 3 Where one of two partners underwrites policies of insurance upon ships, &c. in his own name, but upon their joint account, contrary to the 6 G. 1. c. 18. s. 12., no action can be maintained to recover the premiums upon such policies from the assured. *Branton v. Taddy.* 1 Taunt. 6

- 4 If the credit of any Company (except the *Royal Exchange Assurance Company*, and the *London Assurance Company*) be in any event pledged in a contract of insurance, the contract is void by stat. 6 G. 1. c. 18. s. 12. Therefore, where a company of ship-owners engaged to insure each other's ships, and covenanted severally, and not jointly, to pay a certain sum in case of loss in proportion to their re-

spective shares, but in case of the insolvency of any one of the members, all the others were to be responsible: Held, that this contract was void. *Lees v. Smith.* 7 T. R. 338
And see *Harrison v. Millar.*

7 T. R. 340, n.

II. LICENCE TO TRADE.

And see trading with an Enemy, post, 395.

- 1 Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the King's authority; the Court held that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington v. Inglis.*

8 E. R. 273

- 2 If a licence be obtained from the British government by A. to import from an enemy's country in six ships such goods as should be specified in his bills of lading, and goods be imported on board one of the six ships on account of B. C. and D. to whom several bills of lading are sent for their respective goods, and one general bill of lading for the whole cargo be sent to A., the whole cargo will be protected. *Deflis v. Parry.* 3 B. & P. 3
- 3 A licence to export goods to certain places within the influence of the enemy interdicted to British commerce, granted to H. N. on behalf of himself and other British merchants, &c. is sufficient to legalize an insurance on such an adventure, if it appear that H. N. was the agent employed by the British merchants really interested in it to get the licence, though he had no property in the goods himself. *Rawlinson v. Janson.*

12 E. R. 223

- 4 Insurance on goods on board a Spanish ship from *Nassau* to *Campeachy* to continue on the goods till discharged and safely landed. The ship having a licence from the British government

at *Nassau* sailed from *Campeachy*, and having arrived off that port, made signals for launches to come out, into which the goods were put for the purpose of being run ashore. In this situation the goods were seized by two Spanish government brigs, it being contrary to the Spanish laws to import British goods into the Spanish Main. It seems that the goods were protected by the policy while on board the launches, such being the usual method of carrying on that trade. *Matthie v. Potts.* 3 B. & P. 23

- 5 In an action on a policy of insurance on a ship licensed by the East India Company to proceed for one voyage from England to the Cape; from thence to the Pacific Ocean and North-West Coast of America, and there to sell the cargo from London, and trade and traffic and procure and afterwards sell the produce or manufacture of those parts, and to proceed from thence to Japan, Korea, and Canton, and there to dispose of the cargo procured on the North-West Coast of America, and then return to England, which licence was to be in force for three years; the Court of C.P. held, that a ship which was lost in the Pacific Ocean after having abandoned all intention of proceeding to Canton was protected by the licence. *Norrville v. St. Barbe.* 2 N. R. 434

- 6 A licence from the King to T. B. to import in neutrals, from an enemy's country, goods being the property of T. B. cannot be assigned so as to authorize the importation of goods the property of the assignee. *Feise v. Thompson.* 1 Taunt. 121

- 7 Under a licence to A. to import goods, the property of A., as specified in his bills of lading, if the goods be consigned to others with particular bills of lading, a general bill of lading signed to A., without proof of some special interest in A. in the goods, will not entitle the consignment to the benefit of the licence. *Feise v. Waters.*

2 Taunt. 248

- 8 Secus, if A. had had a special property in the goods. *id. ibid.*

- 9 Those ports of St. Domingo which are under the dominion of *Christophe* and the negroes engaged in hostility with France, are neutral ports; and no licence is necessary to legalize a trade with them. *Johson v. Gueares.*

2 Taunt. 3

- 10 A native *Spaniard*, domiciled here in time of war, having been licensed in general terms by the King to ship goods in a neutral vessel from hence to certain ports of *Spain*, such commerce is legalized for all purposes of its due and effectual prosecution, either for the benefit of the party himself or of his correspondents, though residing in the enemy's country; and such goods may, therefore, be insured by him, either on his own account, or as agent for them; and he may sue and recover upon the policy in his own name in case of a loss by capture; and this, though the prize, which was taken by a *French* privateer, (*France* being a co-belligerent with *Spain*,) was afterwards condemned by a *French* Consular Court then sitting in a port of *Spain*, into which the prize was carried; for in respect of the purposes of such licensed trading, the subjects of *Spain* concerned in it are to be regarded as *British* subjects. *Usparchia v. Noble*.
13 E. R. 332
- 11 The statute 42 G. 3. c. 77. has repealed the necessity of a licence from the *South Sea Company* or *East-India Company*, for ships passing through the *Streights of Magellan*, or round *Cape Horn*, and trading in the *Pacific Ocean* from *Cape Horn* to 180 degrees *West* longitude from *London*: whether they combine fishing with their trading or not. *Jacob v. Jansen*.
3 Taunt. 534
- 12 Under a licence to *British* brokers resident here, that a ship bearing any flag may import from an enemy's country, to whomsoever the property may appear to belong; three *British* subjects not named in the licence, one of whom resides in a hostile country, may import from another hostile country to this. *Fayle v. Bourdillon*.
3 Taunt. 546
- 13 And the agent who effected the policy, may recover in trust for three *British* partners, one of whom, at the time of the action, resides in an alien enemy's country. *ibid.*
- 14 A licence to *H. S.*, a *British* merchant, that a ship may go to an hostile port, and bring home a cargo of goods, authorizes the importation of such goods, being the property of an alien enemy, subject of that hostile country; and therefore authorizes him to insure and enforce his contract of insurance in our Courts. *Morgan v. Oswald*.
3 Taunt. 554
- 15 Under a licence to a *British* merchant, by name, on behalf of himself and others, to export to *P.* and to import a cargo thence, an alien enemy may lawfully be interested in the export cargo as well as in the import cargo. *Feise v. Bell*.
4 Taunt. 4
- 16 A wrong description of the person, to whom a licence from the Crown to trade with the enemy is granted, invalidates it. As where he was described to be "*of London, merchant*;" whereas he was resident at the time at *Heligoland*; from whence he passed into *Germany*, intending to return immediately and settle in *London*. *Klingender v. Bond*.
14 E. R. 484
- 17 A licence to trade with an enemy granted to *F. and Co.* and others may be used by the person for whom *F. and Co.* were the acting agents in procuring such licence, and in carrying on the adventure, though the person was a foreigner residing here under an alien licence at the time. *Feise v. Newnham*.
16 E. R. 197
- 18 If a merchant, *British* by domicile, and two neutral merchants, his partners, export goods from *London* to an hostile port under a licence granted to their broker on behalf of several *British* merchants, and insure, although the neutrals become enemies before action brought, the broker may, upon a loss incurred, maintain an action against the underwriters to recover the value of the joint interests of the three. *De Tastet v. Taylor*.
4 Taunt. 233
- 19 A licence to *J. H.* of *London*, merchant, on behalf of himself and other *British* or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in any vessel bearing any flag except the *French*, will protect a ship trading from that port, in which ship *J. H.* and an alien enemy are jointly interested; and therefore such interest was held insurable. *Hagedorn v. Reid*.
1 M. & S. 567
- 20 A licence to import direct from any port in *Norway*, or to sail in ballast from any port *North* of the *Scheldt* to any port in *Norway*, and in either case to import from thence, authorizes by the first clause a sailing from

a British port, whether North or South of the *Scheldt*, to fetch the cargo. *Le Cheminant v. Pearson*.

4 Taunt. 367

21 A licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run, without licence or convoy, for the residue of her voyage, after she has touched at that port. *Wainhouse v. Cowie*. 4 Taunt. 178

22 A licence to *Gibraltar*, will not legalize a voyage to *Palermo*, *Messina*, and *Malta*, touching at *Gibraltar*, and finding there neither licence or convoy. *id. ibid.*

23 An Admiralty licence obtained under the Convoy Act, 43 G. 3. c. 57. for a ship to sail without convoy, describing her as bound on a voyage to *Gibraltar*, when in fact she sailed from hence with instructions to make the best of her way direct to *Palermo*, without touching at *Gibraltar*, unless ordered into the bay by any cruizers which she might meet in passing by it, is fraudulent and void, and will not legalize an insurance by the charterer of such ship sailing without convoy upon goods put on board and insured from hence to *Palermo*, &c. with liberty to proceed to any ports to seek convoy, &c.; and therefore will not cover a loss which happened in the latter part of the voyage; though the ship did in fact go into *Gibraltar*, being compelled to it by stress of weather against the master's intentions; and though no convoy was to be procured there, nor licence to proceed without it. *Ingham v. Agnew*.

15 E. R. 517

24 Though it should be doubtful whether the stat. 48 G. 3. c. 37. empowering his Majesty, by Order in Council, to permit during the war, &c. the importation of such goods as shall be specified therein from any place in which the British flag is excluded in any foreign vessel, authorizes an Order in Council, licensing a British merchant, in general terms, to import a cargo "of such goods as are permitted by law to be imported, (except German linens, stock-fish and oil;)" yet an importation into Great Britain from a port in *Russia*, under such a licence, of such lawful goods in a neutral *Hamburg* ship was held to be authorized by the stat. 49 G. 3. c. 60,

which makes it lawful under any Order of Council already issued or to be issued, to import from any part of *Europe* or *Africa*, in any British or other ship of an alien friend, in any manner navigated, any goods which may be lawfully imported, the growth or produce of any country, on payment of duties, &c.; and therefore an insurance on such goods for the voyage is legal. And such insurance is valid notwithstanding the licence was limited to be in force until the 29th of *September*, and the ship did not sail from the foreign port till the 4th of *October*; it appearing that the goods were loaded on board by the 12th of *September*, and the adventure was then *bond fide* prosecuting under the licence, and the policy attaching at and from her loading port. *Schroeder v. Vaux*.

15 E. R. 52

25 The King having, by Orders in Council, declared certain ports in *St. Domingo* not hostile, which had formerly been, but were no longer in the possession nor under the dominion of *France*; though such declarations were made for collateral and limited purposes, not covering in their terms the trading in question; yet a trading to such ports from parts of the King's dominions, not named in such prior limited orders, was held to be legalized, the same as to neutral ports in general, by such authoritative recognition of those ports in *St. Domingo* not being hostile; and the inference as to the legality of such neutral trade is not rebutted by a subsequent Order of Council opening the trade generally (so as to cover in its terms the particular adventure) to all ports of *St. Domingo* not in the possession of *France*. And such trade to neutral ports, requiring no licence from the Crown, is not restricted by the fact of a British ship carrying a licence for trading to those ports from *Great Britain* with a certain specified cargo; but the British trader may, notwithstanding, carry other lawful goods, and insure his whole adventure, and may recover from the underwriter a loss arising from capture by a British cruiser, though induced by the fact of such trading with goods not covered by the licence which was produced to the captor; for the licence itself not being necessary, the carry-

ing of goods not included in it was no legal cause of seizure, however it might operate upon the question of costs in the Prize Court. *Blackburne v. Thomson.* 15 E. R. 81

- 26 A licence granted by the Secretary of State under an Order in Council by virtue of the stat. 49 G. 3. c. 126. to P., B., and C. (who were in fact *British* merchants residing here, but were not so expressed to be in the licence,) on behalf of *themselves* AND OTHERS, to export goods on board a certain vessel bearing any flag except the *French*, from *London* to any port in the *Baltic*, (of which most were at that time hostile, but some were neutral) will not warrant an export of goods which were the property at the time of the shipment of an alien enemy, a *Russian* subject residing at *Petersburgh*, then a hostile port of the *Baltic*, to which place the cargo was consigned, and at whose desire the licence was obtained by P., B. and C.; and therefore a policy effected on such goods by such ship from *London* to *Petersburgh*, in the names of *British* agents here, who averred the interest to be in the *Russian* alien enemy, was held bad; and that such policy was also unavailable to cover a loss occasioned by the seizure and condemnation of the assured's own government, after the arrival of the ship and cargo at *Petersburgh*. *Mennet v. Bonhain.*

15 E. R. 477

- 27 From a licence to A. & B. (who were in fact *British* merchants residing here) to export goods in a certain ship to any port in the *Baltic*, *not blockaded*, and to whomsoever the property might appear to belong, the majority of the Court did not sufficiently collect the intention of the Crown to cover the property of *enemies'* ships from hence to an enemy's port; some ports in the *Baltic* being neutral at the time, though most of them were hostile. *Flindt v. Crockatt.* 15 E. R. 522

- 28 Whether or not a licence under the stat. 48 G. 3. c. 126. to C., F. and Co. of *London*, merchants, on behalf of *themselves* and *others*, to export on board a certain vessel bearing any flag except the *French*, a cargo of *British* manufactures and colonial produce from *London* to *Archangel*, and to import from thence a cargo on board the said ship of such goods as may

lawfully be imported, would warrant an exportation of the goods licensed by a *Russian* purchaser here; *Russia* being then *hostile*: at all events, if such *Russian* owner and alien enemy insure the goods on the voyage from *London* to *Archangel*, and they be seized and condemned by his own government upon their arrival, he cannot recover, by the opinion of the majority of the Court. *Flindt v. Scott.*

15 E. R. 525

- 29 It is, under 15 Car. 2. c. 7. s. 6., illegal to export manufactures the produce of *Europe* from the *Cape of Good Hope* to any port to the *Eastward* in his Majesty's possession. Nor is the operation of that Act suspended by the Order in Council of 12th April 1809, or 1st October, 1811. *Gray v. Lloyd.* 4 Taunt. 136

- 30 If a licence to trade be limited in duration to a certain day, and the vessel have not completed her voyage before the licence expires, it is incumbent on the plaintiff to prove that such due diligence has been used by the master of the vessel, that the adventure is still protected within the spirit of the licence. But if there has been no default in the conduct of the vessel, the licence, though expired, still protects the adventure till its completion. *Freeland v. Walker.*

4 Taunt. 478

- 31 A voyage legalized in its commencement by a licence for four months which expire during the voyage, may be legally finished, if special circumstances, not in the power of the licensed person to controul, clear of fraud and *laches* on his part, have protracted the voyage. But it is incumbent on the assured to prove the special circumstances; and it is not necessary that the ultimate port of discharge of a licensed ship should be specified in her clearance from *Great Britain*. *Leevin v. Cormac.*

4 Taunt. 483

- 32 A licence to trade to an enemy's country, granted to one set of *British* merchants, cannot be used to cover a trading by other *British* merchants, without connecting them together; as by shewing that the licensees were agents at the time for the others. *Busk v. Bell.* 16 E. R. 3

- 33 If an alien enemy, commorant here under the King's licence to reside

here, purchases goods for exportation, the exportation thereof by him, after his licence to reside has ceased, is not protected by a licence to trade, also obtained after his licence to reside has ceased, and authorizing the exportation of the identical goods by B. and K. or other *British* merchants. *Waring v. Scott.* 4 Taunt. 605

34 A licence to trade, which is to expire on a certain day, will protect the adventure beyond that day, if it be protracted by events which the licensed party cannot controul. And that, even though the cargo be not shipped till after the licence is expired. And where a homeward cargo, shipped without *laches* after the licence expired, was, through perils of the sea, necessarily unladen in the course of the voyage, and destroyed by fire on shore: Held, that the licence protected a cargo of the specified goods, substituted for the cargo burnt. *Siffkin v. Glover.* 4 Taunt. 717

35 Where a licence was granted to the plaintiff on the 25th of *May* 1810, to take a cargo from *London* to *Archangel*, and to return from thence with a cargo of grain and other goods, permitted by law to be imported to any part of the United Kingdom, and the licence was limited to the 29th of *September* following, which time was afterwards extended to the 1st of *January* 1811, and the ship, after taking in a cargo of pitch and tar at *Archangel*, sailed on her homeward voyage on the 13th of *October* 1810, but was driven back to *Archangel*, and there unloaded, and her cargo sold, and the ship laid up for the winter, and did not sail again from thence with a cargo of wheat until the 1st of *August* 1811: Held, that the licence was not exhausted by taking in the first cargo of pitch and tar, but would cover the cargo of wheat also, notwithstanding the time limited for its continuance had elapsed; provided it appeared that the voyage was prosecuted with all reasonable dispatch, which was a question for the jury; and therefore, if it should so appear, an insurance effected by the plaintiff on the 18th of *August* 1811, on wheat at and from *Archangel* to *London*, would be valid, and would attach on the wheat cargo; but an insurance on money advanced to the captain at *Archangel* was void,

and upon that the plaintiff might recover back the premium. *Siffkin v. Allnut.* 1 M. & S. 39

36 Though a state may be in the military possession of one of two belligerents, that will not constitute her subjects enemies to the other belligerent, if the sovereign power of the latter chooses to permit a continuance of commerce with them; therefore, where an insurance was effected on property, shipped in this country on account of persons who were domiciled at *Hamburg*, at a time when that country was in the possession of *French* troops, the Senate continuing to exercise the powers of civil government in the same manner as before: Held, that the assured were entitled to recover for a loss which happened in the course of a voyage permitted by his Majesty's Orders in Council. *Hagedorn v. Bell.* 1 M. & S. 450

37 Although a licence "to plaintiff, of *London*, merchant, on behalf of himself, and other *British* and neutral merchants, to export on board a certain vessel, bearing any flag except the *French*, a specified cargo from *London* to any port in the *Baltic* not under blockade, and to whomsoever the property may appear to belong;" was held not to protect a part of the cargo which was the property of *Russian* subjects at the time of the shipment, *Russia* being then at war with this country, so as to entitle the plaintiff to recover in respect of that part upon a policy effected by him as the agent for and by the orders of those *Russian* subjects, the loss being occasioned by seizure and confiscation in a *Russian* port, by commissioners appointed by the *Russian* government; yet, as the licence was also obtained, and the policy effected by the plaintiff on his own account, and as agent for certain *Hamburgers*, who were respectively interested in separate and distinct proportions of the cargo: Held, that plaintiff was entitled to recover in respect of his own interest, and that of the *Hamburgers*. *Hamburg* being in a state of permissive neutrality with this country. *Hagedorn v. Baxell.* 2 M. & S. 100

38 A licence granted under an Order in Council to H.S. (a *British* resident merchant) permitting a vessel, bearing any flag except the *French*, to proceed in

ballast from any port north of the *Scheldt* to *Archangel*, there to load a cargo of such goods as are permitted by law to be imported, and proceed with the same to a port in the United Kingdom, was considered as not confined personally to *H. S.*, or any particular class of persons; and therefore, where *Russian* subjects at *Archangel*, who were alien enemies, had shipped goods under such licence for the purpose of being brought into this country, it was held that they were protected by it; and an insurance made for their benefit was legal. *Robinson v. Touray.*

1 M. & S. 217

S. P. Same v. Cheesewright.

1 M. & S. 220

39 If a vessel brings hither from an hostile country, under a licence, a cargo of enumerated goods, and also certain other goods not licensed, the insurance on the licensed goods is not thereby vitiated. In 1810, it was lawful for a *Hamburgher* to bring goods to this country from a hostile port under strict blockade. *Pieschell v. Alnutt.*

4 Taunt. 792

40 If a *British* subject, purchasing, by the King's licence, a hostile built vessel, which is not entitled or required to have a *British* register, charts her on a voyage out to the *Azores* and home, and sends her to sea with a crew in which there is not the proportion of *British* mariners required by stat. 12 Car. 2. c. 18. s. 14.: this does not avoid a policy on the outward part of the voyage; because *non constat* that the owners will not obtain a due proportion of *British* seamen before her return. Nor is it an objection to the same policy, that she is foreign built, for held, that the stat. 49 G. 3. c. 60. s. 1. authorizes the ships of any country in amity, by the King's licence, to bring foreign produce to *England*, though not *English*-built or registered, contrary to ss. 3. & 16. of the stat. 12 Car. 2. c. 18.; and that a ship purchased by a *British* subject from an enemy with licence, is the ship of a country in amity; and *non constat* that a licence to import will not be obtained before the act of importation is complete. And for the same reasons, the insurance on the homeward part of the voyage was not illegal. *Scwell v. The Royal Exchange Company.*

4 Taunt. 836

41 A licence by the King in Council, legalizes the prosecution of the intended adventure, after the time specified in the licence has expired, if the delay were caused by unavoidable necessity: Whether the voyage protected commence after the licence expired or before. *Effurth v. Smith.* 5 Taunt. 329

III. SUBJECT-MATTER.

(a) *Prohibited Goods.*

1 If a *Swedish* ship be insured at and from her loading port in the *East-Indies* to *Gottenburgh*, and part of the cargo be laden in a *British* port in the *East-Indies*, the insured cannot recover, the voyage being in contravention of the navigation laws. *Chalmers v. Bell.*

3 B. & P. 604

2 The exclusive right of trading to the *East-Indies*, granted to the *East-India* Company by stat. 9 and 10 W. 3. c. 44. has never been put an end to; and any infringement of it is a public wrong; and though such parts of that Act as inflicted penalties, &c. were repealed by stat. 33 G. 3. c. 52. and though the latter Act says that no Acts or parts of Acts thereby repealed shall be pleaded or set up in bar of any action, &c. it is competent to underwriters who have subscribed policies on ships trading to the *East-Indies* in contravention of the statute of Wm. to avail themselves of the illegality of such trading in an action brought on the policies. *Camden v. Anderson.*

6 T. R. 723

(Affirmed in *Cam. Scut.* 1 B. & P. 272)

3 An *American* ship, the property of *A.* and *B.* both *British* born subjects, but naturalized in *America*, (*A.* before, and *B.*, who was captain, after the declaration of independence) sails to *France* with a cargo of goods, there disposes of them, and with the proceeds, purchases goods for *India*, then sails to *Madeira*, where she takes in the remainder of her cargo, consisting of *English* and *Portuguese* productions, and proceeds on her voyage to the *British* settlements in *India*, without any licence for the ship or the captain: this voyage is legal, and the insurance on it valid, though the trade was not direct between *America* and *India*, although, as far as related to the *British* goods; this was a trading from *Great Britain* to *India*, without a li-

cence; and though C. was still a British subject. *Wilson v. Marryat*.

8 T. R. 31

4 If a ship be insured "at and from A. to B.," and there be any illegality in the traffic during her stay at A. the assured cannot recover on the policy for a loss happening between A. and B. *Bird v. Appleton*. 8 T. R. 562

5 But an insurance on a ship for a particular voyage is legal, though she may have done some act in a former voyage for which she was liable to seizure during the voyage insured. And goods may be insured though purchased with the proceeds of a former illegal cargo. *ib.*

6 Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*; and therefore the same cannot be insured on such a voyage, and it matters not that part of the cargo was shipped at one of the *West India* islands, with liberty to exchange it at another (which would have been legal), if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back. *Lubbock v. Potts*.

7 E. R. 449

7 Where a party insured to a certain amount, in one policy, goods to be thereafter specified; and in the specification afterwards made by him were included some goods, the exportation of which was prohibited under pain of forfeiting the goods themselves and treble their value, and which also induced a forfeiture of the ship: the policy was held to be avoided *in toto*. *Parkin v. Dick*. 11 E. R. 502

8 An insurance cannot be made on provisions sent in a neutral ship to a British colony, while in the hands of the enemy. *Gist v. Mason*. 1 T. R. 84

9 Where an embargo had been laid on provisions in *Ireland*, an insurance on such provisions from thence, laden on board a vessel bound to an enemy's port, was held void. *Dalmady v. Motteur*. 1 T. R. 85, n.

(b) Trading with an Enemy.

See Licence to trade, ante, 389.

1 By the maritime law, trading with an

enemy is cause of confiscation in a subject, provided he is taken in the act, but it does not extend to a neutral vessel. *Gist v. Mason*.

1 T. R. 84

2 The Court of C. P. held that goods purchased in *Holland* during hostilities between that country and *Great Britain* by a British agent resident there, and shipped for *British* subjects, might be lawfully insured in this country. *Bell v. Gillson*.

1 B. & P. 345

3 But the Court of King's Bench, (after hearing a second argument by civilians) determined that all trading with an enemy without the King's licence is illegal: and also that it is illegal for a subject in time of war, without the King's licence, to bring over in a neutral ship goods from an enemy's port, which were purchased by an agent of such subject resident in the enemy's country, after the commencement of hostilities, although it may not appear that they were purchased of an enemy. *Potts v. Bell*. 8 T. R. 548

4 It is legal to trade with the subjects of an enemy's country by the King's licence. But if it be provided in such licence, that the party acting under it shall give bond for the due exportation to the places proposed of the goods intended to be exported to such country, and they are exported without such bond being given, such exportation is illegal, and the owners cannot recover on a policy to protect the goods. *Vandyck v. Whitmore*.

1 E. R. 475

5 If a licence to export and deliver goods to an enemy's country be granted for a limited time, it is not sufficient that the goods were shipped before the expiration of the time, the ship not sailing till afterwards.

1 E. R. 475

6 Where an Act, prohibiting intercourse with *America*, then in a state of rebellion, enabled the *British* commanders to grant licences in a certain form to carry provisions to places in *America* occupied by the *British*, and a licence was granted not following the requisitions of the Act, it was holden void; and consequently the trading being illegal, the goods sent under the licence could not be insured. *Vanharthals v. Hulhed*. 1 F. R. 487, n.

(c) *Property of Master and Mariners.*

- 1 An insurance on the "commission, privileges," &c. of the captain of a ship in the *African* trade is legal. *King v. Glover.* 2 N. R. 206
- 2 A sailor cannot insure either his wages or any thing that he is to receive at the end of the voyage in lieu of wages: (e. g. slaves). *Webster v. De Tastet.* 7 T. R. 157
- 3 Nor can he recover the value of such thing in an action against his agent for negligence in not procuring such insurance. *ibid.*

(d) *Profits.*

- 1 The profits expected to arise from a cargo of goods may be insured. *Grant v. Parkinson.* 6 T. R. 483, n. 3 B. & P. 85, n.
- 2 The profits of a cargo employed in trade on the coast of *Africa* are an insurable interest. *Barclay v. Cousins.* 2 E. R. 544
- 3 So an insurance on *imaginary profits* from *Bourdeaux* to *Hamburg* (which was explained to mean the profit which a cargo of indigo belonging to the assured would produce on the sale thereof at *Hamburg*, if it arrived safe) was holden good. *Henrickson v. Murgelson.* 2 E. R. 549, n.
- 4 Upon an insurance on profits valued at 400*l.* where the plaintiff declared as for a *total loss*, and it appeared that after a shipwreck, by which many of the slaves, on the profits of whom the insurance was made, were lost, but the remainder reached the market, and were sold; and it did not appear what profit was made of them; though it was found that the produce of those who were sold did not give a profit upon the whole adventure: Held, that the plaintiff was not entitled to recover. *Note.*—The whole adventure was a voyage from *Liverpool* to *Africa*, and from thence to the *West-Indies*, but the profits were only insured from *St. Vincent's*, after the ship's arrival there) to her last port of discharge in the *West-Indies.* *Hodgson v. Glover.* 6 E. R. 316
- 5 An insurance may be effected on *profits* generally without more description, and, engrafted upon a policy on ship and goods in the common printed

form for a certain voyage; with a return of premium for short interest: the assured proving an interest in the cargo. *Eyre v. Glover.* 16 E. R. 218

IV. INTEREST OF INSURED.

(a) *Qualified or Trust Property.*

See post, tit. PLEADING, XVI.

- 1 At common law a person might have insured, without having any interest in the subject insured. And the stat. 19 G. 2. c. 37. which prohibits such an insurance, only applies to "ships belonging to his Majesty or any of his subjects." *Craufurd v. Hunter.* 8 T. R. 13
- 2 If a merchant abroad, interested in goods and the freight of a cargo, mortgage them to his correspondent in *England* for payment of money at a certain day, and by letter inclosing the bills of lading direct him to insure; the latter, having accepted the bills of lading, will be liable to an action for not insuring, notwithstanding the mortgage was become absolute before the order was received. *Smith v. Luscettes.* 2 T. R. 187
- 3 Where a bill of lading is indorsed and delivered, but the intention of the parties appears to have been only to bind the net proceeds in case of the arrival of the goods, an insurance made on account of the indorser after such indorsement is good. *Hibbert v. Carter.* 1 T. R. 745
- 4 Two partners purchased a ship under a bill of sale conformable to stat. 26 G. 3. c. 60.; afterwards they took in two other partners, but there was no transfer of the ship to them jointly with the others: Held, that the four partners had not any insurable interest in the freight of the ship. *Cumden v. Anderson.* 5 T. R. 709
- 5 The right of freight results from the right of ownership: and these four partners had neither a legal nor an equitable title to the ship. 5 T. R. 709
- 6 *Semble.* A party cannot insure a hope or expectation, not having any interest in the subject insured. 5 T. R. 709

Commissioners appointed by the Crown under the authority of an Act of Parliament (35 G. 3. c. 80.) which empowers them "to take into their possession and care all *Dutch* ships

and effects detained or brought into the ports of Great Britain, and to manage, sell, and dispose of the same to the best advantage, according to the instructions they should receive from his Majesty and his Privy Council," may insure in their own names such ships and effects, after seizure abroad, and while they are *in transitu* to this country. *Craufurd v. Hunter*. 8 T.R. 18

- 8 So these commissioners were held to have an insurable interest in Dutch ships on their passage to this country, having been taken by a captain of a British man of war, under instructions from the Admiralty to take all ships and cargoes belonging to the subjects of the United States, and to bring them into the ports of this kingdom to be detained provisionally. *Lucena v. Craufurd*. 3 B. & P. 75

- 9 Held also, that they might recover for a loss upon such ships by perils of the sea, though the loss did not happen until after proclamation had issued for general reprisals against the Dutch. *ibid*.

But see the argument in *Lucena v. Craufurd*, (*in error*). 2 N. R. 269

- 10 A. being indebted to B. without any order from him, consigns goods to C to be held for B. and indorses the bill of lading to C. & resolved that B. had an insurable interest in the goods so consigned. *Hill v. Secretan*.

1 B. & P. 315

(b) Prize.

- 1 Captors of a ship seized as prize may insure their interest therein. *Boehm v. Bell*. 8 T. R. 154

- 2 A prize taken by the navy and army conjointly is insurable, on account of the interest of the captors, under the stat. 45 G. 3. c. 72. s. 3. which grants the prize so taken to the conjoint captors after condemnation, subject only to the apportionment of the Crown as to the respective shares. *Stirling, Bt. v. Vaughan*. 11 E. R. 619

- 3 After an order made by the King in Council on the 2d, and gazetted on the 5th Sept., to detain and bring into port all Danish vessels; a hired armed ship of his Majesty took off Lisbon, on the 10th, and carried in thither a Danish vessel; and without instituting any proceeding in the Admiralty

Court there, (though Portugal was an ally with England in the war,) sold her cargo to defray the expense of repairs, and took in a loading on freight for London, with which she sailed on November 3, on which day hostilities were declared against Denmark by another Order of Council: and on November 12, an insurance was made by order of the prize agent appointed by the captors, in consequence of a letter written by him in October, before the declaration of hostilities, directing the plaintiff to insure "for my account the Danish vessel K. T., which has been detained by his Majesty's armed ship B., and for which I am authorized to act as agent; and concluding with expressing the agent's confidence that the plaintiff would do the best for the interest of the concerned: and after such insurance was effected, the King, by another Order of Council, reciting the circumstances, adopted the insurance: Held, that his Majesty, having a lawful possession of the captured vessel through the act of his officers and servants, whose possession was legalized by the previous order to detain Danish vessels, whether known to them or not at the time of the capture, had an insurable interest therein; and that it was competent for him to adopt the insurance made by order of the agent appointed by the captors. *Routh v. Thompson*. 13 E. R. 274

And see *same Parties*. 11 E. R. 428

- 4 The ship *Ross* belonging to the plaintiffs, and the ship *Atlantic*, (on which this question arose) to *Fisher & Co.*, and the cargoes to other persons, were insured on a former voyage, and captured by the Spaniards, and carried into Spain; and the underwriters upon the *Atlantic*, of whom the defendant was one, paid as for a total loss. But while proceedings for condemnation were pending in the Prize Court in Spain, *Cowan* (residing there) having been severally empowered by the different owners to claim restitution, and to enter into compromise with the captors for giving up part of the cargoes on the restitution of the remainder and of the ships, and to defray all costs and charges thereon, and to forward the ships and goods restored to London, and to pay all demands on the ships and goods, agreed with the captors, subsequent to the

cessation of hostilities, (and the captures and subsequent peace were held in the Court of Admiralty here to bind the property captured,) that upon giving up to them part of each cargo, the rest and the ships should be restored for the common benefit of the original owners of both ships and cargoes, in the lump. On which Cowan advised the plaintiffs that he should consign the *Atlantic* to them, with their own ship, the *Ross*, and draw bills on them, (which were afterwards accepted and paid,) for the general expenses of effecting the arrangement with the captors, and for the outfit of both ships, and referred to this information to guide them with respect to insurance: on which the plaintiffs insured the *Atlantic* by a policy, "on ship or on salvage charges, or on any interest as may be hereafter declared by the assured;" and after a subsequent capture of her by the *French*, declared against the defendant, (who had also underwritten this second policy) and averred the interest to be; 1st, in themselves, and, 2dly, in *Fisher and Co.*, the original owners of the ship *Atlantic*. Held, that the plaintiffs had an insurable interest, as well on account of the whole property captured (of which they owned the other ship *Ross*) having been restored at the sacrifice of part of the cargoes, for the common benefit of all; which created in them a *hotchpot* interest in the ship *Atlantic*; and also as representing *Cowan*, who was empowered to act as attorney for all the original owners, and to whom such restitution in *hotchpot* was made for their common benefit, and who had incurred charges and drawn bills on the plaintiffs on account of the common concern, which had been accepted and paid by them; and *Cowan* having had authority to insure from *Fisher and Co.*, the original owners, under their order, on obtaining restitution, to forward the ship to London, and to pay all claims and demands on her: Though the plaintiffs would be amenable out of the money recovered to the several persons interested, in proportion to their several claims on the property in *hotchpot*, and amongst others to the defendant himself, as an underwriter on the first policy, upon

which he had paid as for a total loss to *Fisher and Co.* *Robertson v. Hamilton.* 14 E. R. 522

- 5 If a ship or cargo insured be taken and condemned as prize, it is not necessary for the insured to make any claim or appeal before they call on the underwriters. *Tyson v. Gurney.* 3 T. R. 477

(c) *Wager Policies.*

See *Lucca v. Craufurd* (in error). 2 N. R. 270

Kular Sharpe v. Vigne. 1 T. R. 304

- 1 A wager policy is a lawful contract, except so far as it is prohibited by the statute 19 G. 2. c. 37. *Cousins v. Nantes* (in error). 3 Taunt. 515
- 2 A wagering policy and a policy on interest, are contracts distinct in their nature and incidents. *Cousins v. Nantes.* 3 Taunt. 513
- 3 It must appear on the face of the policy, of which species the contract is. *ibid.*
- 4 If the policy be in the common form, it is a policy on interest. 3 Taunt. 513

- 5 On an insurance on ship and goods valued at so much, on a voyage to *Africa* and the *West-Indies*, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage; although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the first place of the ship's destination, where she arrived a mere wreck, and soon after foundered. *Shaw v. Felton.* 2 E. R. 109
- 6 Where a ship insured, arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterwards she sunk: Held, that the assured might recover as for a total loss, though her cargo was saved and brought to a profitable market. *ibid.*

(d) *Re-assurance.*

- 1 Every re-assurance in this country, by *British* subjects or foreigners, whether on *British* or foreign ships, is void, by stat. 19 G. 2. c. 37. s. 4. unless

the insurer be insolvent, become a bankrupt, or die. *Andree v. Fletcher*.

2 T. R. 161

- 2 *Semb.* that if an underwriter transfers by parol to another, at a higher premium, his subscription to a policy, it is not such a re-assurance as is prohibited by the 19 G. 2. c. 37. *Delver v. Barnes*.

1 Taunt. 48

V. SHIP.

(a) Sea-worthiness.

- 1 A ship is sea-worthy, if she is sufficiently furnished for the service in which she is for the present time engaged. *Annan v. Woodman*.

3 Taunt. 299

- 2 Therefore a ship much out of repair is sea-worthy in harbour, and is protected under the word "at." *ibid.*
- 3 And as a full complement of men is not necessary in harbour, she does not cease to be sea-worthy for want of a crew, till she sails on a voyage without a crew. *ibid.*
- 4 A neutral vessel is not sea-worthy, unless she is provided with documents to prove her neutrality. *Steel v. Lacy*.

3 Taunt. 285

- 5 The assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; and therefore they cannot recover if there be no pilot on board. *Law v. Hollingsworth*.

7 T. R. 160

(b) Employment and Conduct of.

- 1 *Quare*, Whether it be necessary, to the right of the assured to recover, that in navigating up the *Thames*, there should be a pilot on board qualified according to the directions of stat. 5 G. 2. c. 20. ? *Law v. Hollingsworth*.

7 T. R. 160

- 2 The owners of goods insured by the act of shifting the goods from one ship to another, do not preclude themselves from recovering an average loss arising from the capture of that other ship, if they acted for the benefit of all concerned. *Plantamour v. Staples*.

1 T. R. 611, n.

- 3 By stat. 31 G. 3. c. 54. s. 7. for regulating the *African* slave-trade, it is necessary that the certificate of the captain's having served as that act requires, should be attested by the owner

or owners of the ship or ships in which the service was performed; and the assured cannot recover on a policy on a ship whose captain has not such a certificate. *Farmer v. Legg*.

7 T. R. 186

- 4 A *Danish* vessel, prize to *English* captors, purchased by an *Englishman*, having no certificate of *British* registry, trading to *St. Michael's*, is not the subject of *Portuguese* capture, by reason of the fifth article of the treaty between *England* and *Portugal*. *Cohen v. Hannam*.
- 5 Where, in a policy of insurance on a voyage up the *Mediterranean* on the coast of *Spain*, the underwriters stipulated that they would not be liable higher up the *Mediterranean* than *Tarragona*; the assured could not recover where the captain of the ship, through entire ignorance of the coast, when the occasion and the terms of the policy required him to distinguish, went into *Barcelona*, an enemy's port, which is higher up than *Tarragona*: for this was either a deviation without any just cause, (and on this ground the plaintiff was held not entitled to any return of premium;) or there was a failure of an implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage should be provided. *Tait v. Levi*.

5 Taunt. 101

14 E. R. 481

(c) Carrying simulated Papers.

- 1 Where a ship had not leave to carry simulated papers, although without such she would certainly have been seized and condemned as coming from an enemy's country, the underwriters were not liable for the loss which ensued from the act of the assured himself. *Horneyer v. Lushington*.

15 E. R. 46

- 2 An assured upon a policy on ship, not having leave to carry simulated papers, cannot recover for a loss by capture; if it appear by the sentence of the foreign Prize Court that one of the causes stated for the condemnation was the carrying of simulated papers. *Oswell v. Vigne*.

15 E. R. 70

- 3 *American* goods, in an *American* ship, having been insured on a voyage from *America* to the *Baltic*, with liberty to carry simulated papers, and

having been captured and condemned by a *Danish* sentence; which, after suggesting a doubt as to the *English* character of the owner, stated that the positive contradiction which the documents contained concerning the property of the ship and cargo rendered it impossible to acknowledge them as neutral; and the Prize Court of appeal afterwards alleging as grounds of confirmation, 1st, That the ship's documents were not in due order; the *sea passport*, ordering that, before it could be considered of value, the captain must take his oath before the officer appointed for that purpose; but that though the passport was made out as if the captain had appeared before A. B., the notary public, and taken his oath, yet that neither the notary's name or seal of office was under the document; and therefore that the sea-letter was to be looked upon as a blank, and no credit could be given to it as a public document: 2dly, that the ship had *false documents*, (which it exemplified by the journal): 3dly, that the documents disagreed with regard to their contents; which it exemplified by the bills of lading and letters on board: 4thly, that a person on board, who seemed to be interested in the ship and cargo, had been set on shore in *England*: 5thly, that *false French certificates d'origine* were found on board: Held, that, taking the whole together, the ground of condemnation was the having on board *simulated papers*, which, mixed with other circumstances, led to the conclusion that the ship and cargo were hostile *British*, and not neutral *American* property; and that the not having a *sea-passport* on board, verified in the manner stated in the sentence, was only a circumstance to shew that the ship carried simulated papers: even if such a passport were required by any treaty between the *United States* and *Denmark*; which did not appear: and consequently, that the loss was attributable to a cause which the underwriter had sanctioned by the leave to carry simulated papers; and not from the ship's not being properly documented, as an *American* ship ought to be, for which the assured, as owner of the ship, as well as of the goods insured, would have been answerable,

Neither was the condemnation on the ground that the papers had not been properly simulated, so as to attribute the loss to the mere negligence of the assured in the mode of exercising the liberty referred to them; supposing that would have varied the case. *Bell v. Bromfield*.

15 E. R. 384

4 *Quære*. If a neutral vessel be insured on a voyage on which it is notoriously necessary to carry simulated papers, in order to elude one of the belligerents, whether permission to carry them must be expressed in the policy? *Steel v. Lacy*.

3 Taunt. 285

5 Policy of insurance on ship and goods at and from *London*, carrying simulated papers, to any ports in the *Baltic*, with liberty to carry simulated papers and clearances, and until safely warehoused in the warehouses of the consignees, at the port of discharge, at 40 guineas per cent. premium: Held, that the underwriter was liable for a loss, arising from confiscation, by the Prussian Government, notwithstanding the persons in whom the interest was averred were Prussian subjects, Prussia not being at war with this country; it being found that at the time of effecting the policy, all direct commerce between this country and the ports in the *Baltic* was prohibited by the powers possessing ports there; but that, notwithstanding, an extensive course of commerce was carried on between this country and those parts by means of simulated papers and clearances, which was well known to all descriptions of persons, such as plaintiffs and defendant. *Simeon v. Bazett*.

2 M. & S. 94

(d) *Irregular Clearance.*

1 It is no objection to the assured on goods recovering for a loss by a peril within the policy, that after the captain had obtained his manifest and Custom-house clearances, as required by stat. 13 & 14 Car. 2. c. 11. s. 3., goods of the assured were put on board by the packer, who had previously made all the necessary entries at the Custom-house. *Carruthers v. Gray*.

15 E. R. 35

2 If the defence upon a policy be, that the licence requires the date of the ship's clearance from an hostile port to be indorsed thereon, and that it is

not truly indorsed, it is incumbent on the defendant to prove what a clearance is, and the discrepancy between the real date of the clearance, and the date indorsed. *Morgan v. Oswald.*

3 Taunt. 554

3 If the date be indorsed as the 17th, and the real date of the clearance be the 20th, *semble* that it is a substantial compliance with the condition.

ibid.

4 *Quare*, Whether a clearance be any single document, or the collection of all the papers necessary to enable a ship to sail?

3 Taunt. 554

VI. VOYAGE.

(a) *Illegal.*

See LICENCE TO TRADE, *ante*, 389, &c.

1 Under the treaty of amity, commerce and navigation between *Great Britain* and the United States of *America*, confirmed by stat. 37 G. 3. c. 97. (see § 22, 23, of that Act, and also 37 G. 3. c. 117.) it is not necessary that the trade from *America* to the *British* settlements in the *East-Indies* should be direct; it may be carried on circuitously by the way of *Europe*, and of *Great Britain* in particular. *Wilson v. Marryat.*

8 T. R. 31

(Affirmed in *Cam. Scac.* 1 B. & P. 430.)

2 If there be any illegality in the commencement of an *integral voyage*, and an insurance be effected on the latter part of the voyage, which taken by itself would be legal, yet the assured cannot recover on the policy. *Wilson v. Marryat.*

8 T. R. 31; 45, 6.

3 Insurance on provisions "from *London* to *Helsingberg*, the *Sound*, *Copenhagen*, all or either;" which provisions were intended for the supply of the *British* fleet and army then engaged in the expedition against *Copenhagen* (of which they were then in possession, but were about to evacuate it), and were consigned to merchants there, and at *Elseneur*; Held good, although in consequence of expected hostilities with *Denmark*, an order of the King in Council had issued, prohibiting the clearing out of any *British* ships to a *Danish* port, and a clearance was in consequence taken out for *Helsingberg*, a *Swedish* and neutral port in the neighbourhood of *Denmark*, the adventure being legal, and not contra-

vening the spirit of the Order of Council. *Atkinson v. Abbott.*

11 E. R. 135

4 It is no breach of neutrality for a neutral ship to carry enemy's property from its own to the enemy's country; the voyage and commerce not being of a hostile description, nor otherwise expressly or impliedly forbidden by the law or policy of this country; though the neutral thereby subjects his ship to be detained and carried into a *British* port for the purpose of search: And therefore, a *British* underwriter, after condemnation of the enemy's goods found on board, and liberation of the ship and the rest of the cargo, is liable to the neutral owner of goods insured in the same ship, whose voyage was so interrupted; either as for a total loss, if notice of abandonment upon the loss of the voyage be given in reasonable time, or for an average loss, if such notice be given out of time. *Barker v. Blakes.*

9 E. R. 283

And see *Neutrality*, *post*, 417.

5 The stat. 47 G. 3. c. 2. legalizes from *Sept.* 17, 1806, the trading to any places which then were, or should thereafter be, under the dominion of his Majesty. *Buenos Ayres* was taken by his Majesty's troops in the preceding year, and retaken on the 12th *August*, 1806: Held, that an adventure to *Buenos Ayres*, commencing in the first week of *Sept.* 1806, was illegal, and the policy on it void. *Toulmin v. Anderson.*

1 Taunt. 227

(b) *Deviation.*

N. B. See *Description of Voyage*, *post*, 410, &c.

Tait v. Levi. 14 E. R. 481, *ante*, 399

1 If the ship actually sail on the voyage insured, an intention to deviate, not carried into effect, does not vitiate the policy. *Kewley v. Ryan.* 2 H. B. 348

2 If the voyage described in the policy be "from *A.* to *B.* and *C.*," and the ship go to *C.* before *B.*, (though *C.* be nearer to *A.* than *B.* is), it is a deviation, if it be not the regular and settled course of the voyage to go to *C.* first. *Beatson v. Haworth.* 6 T. R. 531

3 *Quare*, Whether such a regular and settled course of voyage will controul such a policy?

6 T. R. 531

And see *Clason v. Simmonds.*

id. 533, *n.*

4 A policy of insurance on goods at and from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports for orders, or any other purpose, does not warrant the assured, after having touched at C. for orders, and gone on to S., a more distant port, in retouching at C. for orders; but if the policy be to any and all ports and places in the *Baltic forwards and backwards, and backwards and forwards*, it is otherwise. *Mellish v. Andrews*.

16 E. R. 312

5 If a ship be compelled by necessity to alter the order of the places, it will be no deviation. *Driscoll v. Bovill*.

1 B. & P. 313

6 Whether an insurance of a ship with or without letter of marque upon a certain voyage and commercial adventure from A. to B., enables her to chase for the purpose of hostile attack, and capture any vessel she may happen to descry in the course of the voyage insured, in whatever direction, or to any limit, and whether known at the commencement of such chasing to be an enemy or not; or whether those words are to be confined to a leave to employ force only for the purpose of defence (including a liberty of attack and chase only as far as they may be fairly supposed to promote ultimate security); must, in the absence of any legal decision as to their construction, depend upon the received practice and known sense of commercial men, if any such received practice there be in the use of them. And therefore, the cause was referred to another trial to ascertain the commercial usage and practice in that respect. But at any rate such words do not appear to authorize direct cruising out of the course of the voyage in search of prize. *Parr v. Anderson*.

6 E. R. 202

7 A policy of insurance on a ship on a certain commercial voyage, with or without letters of marque, giving leave to the assured to chase, capture, and man prizes, however it may warrant him in weighing anchor, while waiting at a place in the course of the commercial voyage insured, for the purpose of chasing an enemy who had before anchored at the same place in sight of him, and was then endeavouring to escape, will not warrant him, after the capture, and in the

course of the further prosecution of the voyage, in shortening sail and laying to, in order to let the prize keep up with him, for the purpose of protecting her as a convoy into port, in order to have her condemned: though such port were within the voyage insured. *Lawrence v. Sydebotham*.

6 E. R. 45

8 A policy of insurance is effected on specific goods on board a certain ship named, on a voyage at and from A. to B., and another policy is also made on any kind of goods as interest should appear, on board ship or ships, on the same voyage, warranted to sail within a limited time; but no circumstance relating to the first policy is communicated to the underwriters of the second, nor do they know that the first was made. Goods, to the full amount of the sum insured in the second policy, are put on board a ship (not the ship named), which sails within a limited time from A. with an intention to touch at C. in her course to B., but is lost before she arrives at the deviating point. The underwriters of the second policy are answerable for the loss. *Kewley v. Ryan*. 2 H. B. 343

9 Policy on goods on board a particular ship from A. to B. "against sea-risk and fire only;" in the course of the voyage from A. to B. the ship was carried out of the course of the voyage by a king's ship; but being afterwards released, she proceeded on the voyage insured, and while so proceeding, the goods insured sustained sea-damage: Held, that the underwriters were liable for this loss. *Scott v. Thompson*.

1 N. R. 181

10 If a ship be driven out of her loading port, and obliged to go into another port, and after fruitless attempts to get back again, she does the best she can to get from thence to the place of her destination, that will not be considered as a deviation. *Delaney v. Stoddart*.

1 T. R. 22

11 Neither does it vacate the policy if such ship complete her loading at the port into which she is so driven. In the principal case, however, there was a custom to warrant this. 1 T. R. 22

12 Insurance on the ship *Friendship* "at and from *St. Kitt's* to *London*, warranted to sail with convoy on or before 1st of August." The ship, after taking in part of her cargo at *St. Kitt's*,

was driven out of her port and obliged to go into *St. Eustatia*. When she was there, she made several efforts to get back to *St. Kitt's* to finish her loading, but not succeeding, was sold by the plaintiff to Mr. Ross of *St. Eustatia*, and completed her loading there; and afterwards sailed on the 1st of August from thence with convoy for London, but was lost in the course of the voyage. It appeared that *St. Eustatia* is in the direct road to London from *St. Kitt's*, and that the convoy from *St. Kitt's* always looked into *St. Eustatia* to take up any ships that might be there; that if the ship had sailed immediately from *St. Kitt's* she must have gone by *St. Eustatia*, but would not have stopped there; and it was also proved to be the custom, that where a captain had not taken in his full cargo at *St. Kitt's*, he should take in the rest at *St. Eustatia*. The Court, under these circumstances, held the going to *St. Eustatia*, and the finishing the loading there, not to be a deviation so as to discharge the policy. *Delaney v. Stoddart*. 1 T. R. 22

13 It is not an implied condition in a common marine policy on ship and freight, that the ship shall not trade in the course of her voyage, if that may be done without deviation or delay, otherwise increasing the risk of the insurers, and therefore, where a ship was compelled in the course of her voyage to enter a port for the purpose of obtaining a necessary stock of provisions, which she could not obtain before in the usual course, by reason of a scarcity at her lading ports; and during her justifiable stay in the port so entered for that purpose she took on board bullion there on freight, which the jury found did not occasion any delay in the voyage; it was held not to avoid the policy. *Raine v. Bell*. 9 E. R. 195

14 A ship from *Stockholm* to *New-York* was by the course of the voyage to touch at *Elseneur* for convoy, and to pay the *Sound* dues; and the owner of sheep on board took in a short stock of provender for them at *Stockholm*, and laid in the rest at *Elseneur* before the *Sound* dues could be paid: the Court held that the voyage not being thereby delayed; though the occurrence was foreseen and intended; the policy was not avoided, but the under-

writers were liable for a subsequent loss of the ship by the perils of the sea. *Cormack v. Gladstone*.

11 E. R. 347

15 An insurance on goods shipped on a certain voyage is not avoided by the ship while lying in a roadstead at anchor under orders of the convoy, and after a signal to prepare for sailing and about the time when the signal for weighing was made, taking in other goods on board: by which it was found that no delay was occasioned, and that the ship got under weigh as soon as she could otherwise have done. *Laroche v. Oswin*.

12 E. R. 131

16 If a ship has liberty to touch at a port, it is no deviation to take in merchandise during her allowed stay there, if she does not by means thereof exceed the period allowed for her remaining there. *Urquhart v. Barnard*.

1 Taunt. 450

17 Upon a policy from London to *Trinidad* or the *Spanish Main*, with liberty to call at all or any of the *West-India* islands or settlements, and with liberty to touch and stay at any ports or places whatsoever and wheresoever, the assured must take all the ports at which he touches, in the same succession in which they occur in the course of the voyage insured. *Gairdner v. Senhouse*. 3 Taunt. 16

18 But if he is lost in steering for an island not in the outward course of his voyage to *Trinidad*, it is a question for the jury to consider, whether he had not abandoned the intention of going to *Trinidad*, and restricted himself to the residue of the voyage only.

id. ibid.

19 Policy of insurance on goods at and from London to the ships discharging port or ports in the Baltic, with liberty to touch at any port or ports for orders or any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever: Held, that the ship having touched at C. for orders, and gone on to S., a more distant port for farther orders, and having received orders at S. Because it was unsafe to land there to return to C., and wait for orders, might so return to C., without being guilty of a deviation; it being found that she went to S. for orders in the prosecution of her voy-

age, and returned to C. to obtain orders as to the farther progress of the voyage, and no fraud being found. *Mellish v. Andrews.* 2 M. & S. 27

20 In a policy of insurance at and from London to *Berbice*, after the clause "beginning the adventure, &c." are inserted the words, *at sea*; and at the bottom of the policy, the words "*on ship*:" the ship, without express leave so to do, stops at *Madeira*, by which means she loses her convoy, and is captured on her way from thence to *Berbice*: Held, that the insertion of the above words does not imply that the risk commenced at sea, so as to justify the deviation: though at the time of effecting the insurance, the underwriters were informed, that the ship had been at *Madeira*. *Redman v. Loudon.* 1 Marsh. 136

21 On a policy at and from *Pernambuco*, or any other port or ports in the *Brazils*, to *London*, "beginning the adventure, from the loading the goods on board the ship, on the 'termination' of her cruize, and preparing for her voyage to *London*." The ship, on the termination of her cruize, touched at *Pernambuco*; but failing to procure a cargo there, she proceeded for *St. Salvador*, and was lost on her voyage thither: Held, that the ship's proceeding for *St. Salvador* was no deviation. *Lambert v. Liddard.* 1 Marsh. 149

VII. RISKS.

(a) *Insured against by Policy.*

1 If a cargo of a perishable nature be insured from A. to B., with the usual memorandum, and in the course of the voyage information be received by the master that the port of B. is shut against the ships of his nation, in consequence of which the commander of the convoy orders the ship to proceed to another port, and the cargo be sold there by orders of the Vice-Admiralty Court for a very small sum of money, the assured cannot abandon as for a total loss. It seems that if the voyage be lost in consequence of the port of destination being shut up against the ship insured, the assured cannot declare upon this as a loss within the policy. *Hadkinson v. Robinson.* 3 B. & P. 388

2 Policy upon the freight of the ship

Stranger at and from *London* to *Jamaica*, with liberty to touch at *Madeira* and discharge and take goods on board there. The plaintiffs had agreed by charter-party that the ship should take in goods at *London*, and proceed to *Madeira*, and there deliver such part of the goods shipped at *London* as their agent should direct, and receive on board wine, and proceed to *Jamaica* and there deliver; and the freighter agreed to pay 135*l.* in full for freight during the whole voyage from *London* to *Madeira*, and from thence to *Jamaica*, such freight to be paid in *Madeira*, on delivery of the goods shipped at *London* for that place by *Madeira* wine at 40*l.* per pipe, to be carried in the said ship to *Jamaica* free of freight; the ship arrived at *Madeira*, and delivered all her *London* cargo, except 33 casks of coals which the captain kept on board to stiffen the ship; having received part of his cargo for *Jamaica*, but not the wine to be paid for freight, a gale of wind arising, the captain was obliged to cut his cables and run out to sea, where he was captured: Held, that the plaintiff was entitled to recover for a total loss. *Atty v. Lindo.*

1 N. R. 236

(b) *Excluded by Memorandum.*

1 If an insurance be effected on fruit, and the policy contain the usual memorandum, "*corn, fruit, &c. warranted free from average, unless general, or the ship be stranded*," and the ship be in fact stranded in the course of the voyage, the underwriters are liable for an average loss arising from the perils of the seas, though no part of the loss arise from the act of stranding. *Burnett v. Kensington.* 7 T. R. 210

2 The memorandum controuls the general words of the policy, as far as it extends; but, upon a *stranding*, the enumerated articles are put in the same situation as any other commodity, and the insurers become liable for all damage sustained by them, though not arising from the stranding. *Bowring v. Elmslie.* 7 T. R. 216, n.

3 Where, after a seizure, the vessel was *stranded*, and part of the cargo (consisting of corn) taken by a mob at their own price, the loss cannot be recovered, as for a general average: but, for such part as in consequence of the

stranding was damaged and thrown overboard, the insured may recover on stating the loss to be by *stranding*. *Nesbit v. Lushington*. 4 T. R. 783

- 4 Policy on fruit from *Cadiz* to *London*, with the usual memorandum. In the course of the voyage the fruit was so much damaged by sea water, that it became rotten and stunk; and on the ship's arrival at an intermediate port, into which she was driven, the government of the place prohibited the landing of the cargo. The ship also being too much damaged to proceed on the voyage, was sold, and the cargo necessarily thrown overboard: Held, that the assured were entitled to recover for a total loss. *Dyson v. Rowcroft*. 3 B. & P. 474

- 5 Rice is not corn within the meaning of the memorandum of a policy of insurance. *Scott v. Bourdillon*. 2 N. R. 213

- 6 Insurance at and from *C.* to *L.* on goods in a ship by name, until the same should be there safely discharged and landed, rice, free of particular average, and the ship with rice and other goods, arrived within the limits of the port of *L.*; but before she could be brought to her moorings, or be at all unloaded, ran aground and was wrecked, and the whole cargo was greatly damaged, and was taken out of her in craft, and carried to the consignees at *L.* and sold, and produced upon the whole little more than sufficient to pay freight and salvage; but the rice did not produce sufficient to pay the freight: Held, that this was a case of particular average only, and therefore, as to the rice, the underwriter was exempted by the warranty. *Glennie v. The London Assurance Company*. 2 M. & S. 371

(c) Duration of Risk.

1. On Goods.

- 1 A ship and goods are insured from the coast of *Brazil* to the *Cape of Good Hope*, beginning the adventure on the goods from the loading thereof on the coast of *Brazil*, from the 17th of *September*, and upon the ship in the same manner. The cargo is taken on board at the *Cape*, the policy never attaches on these goods, though they are goods meant to be insured, and are on board after the 17th of *September* on the

coast of *Brazil*; and the policy not attaching on the goods, does not attach on the ship. *Robertson v. French*. 4 E. R. 130

- 2 Insurance on goods from *A.* to *B.* "until they should be there discharged and safely landed;" on their arrival at *B.* the merchant to whom the goods belonged employed and paid a public lighter to land them, and the goods being damaged in the lighter without negligence, the underwriters were held liable for the loss. *Hurry v. The Royal Exchange Assurance Company*. 2 B. & P. 430

S. P. Rucker v. London Assurance Company. 2 B. & P. 432, n.

And see *Mathie v. Potts*,

- 3 Action on a policy on goods, "until the cargo should be discharged, and safely landed;" on the arrival of the ship the goods insured were put on board a lighter hired in the usual way, and brought to the plaintiff's wharf in the evening, but not landed on account of the rough weather; the plaintiff then undertook to see to the landing himself; but in the night the lighter was by an unavoidable accident sunk, and the goods lost: Held, that the underwriters were discharged. *Strong v. Natully*. 1 N. R. 16

2. On Ship.

- 1 The underwriter is in no instance liable for any loss which happens after the vessel has been moored 24 hours in safety; although such loss should arise from some previous damage sustained during the voyage: Therefore, a ship being insured for a voyage, the underwriter is not liable for any loss arising from seizure, after she has been 24 hours in port; though such seizure was in consequence of an act of bar-ratry, committed by the master, by smuggling during the voyage. *Lockyer v. Offley*. 1 T. R. 252
- 2 Where a ship was insured for six months; and three days before the expiration of the time she received her death's wound, but was kept afloat by pumping till three days after the time, the underwriter was held discharged. *Meretony v. Dunlop*. 1 T. R. 260, n.
- 3 Where immediately upon the arrival of a ship at *Riga*, her papers were taken and her hatches sealed down by

the officers of Government, and so kept till her papers were sent to *St. Petersburg* to be examined; and on such examination immediate orders were issued for the seizure of the ship and cargo, which were afterwards condemned for carrying simulated papers: Held, that this was not a mooring twenty-four hours in safety after her arrival, within those words in the policy. *Horneyer v. Lushington*.

15 E. R. 46

- 4 Insurance on a voyage from *C.* to *D.*, on a representation that the ship was first to sail from *A.* to *B.*, and from *B.* to *C.*; the voyage from *A.* to *B.* was performed, but that from *B.* to *C.* being unavoidably prevented, the ship returned to *A.*, from thence proceeded immediately to *C.*, and in performing the voyage from *C.* to *D.* was lost; and this was held a good commencement of the voyage insured. *Driscoll v. Passmore*.

1 B. & P. 200

- 5 In another case on an insurance on the round voyage (stated in the preceding case), where, after the ship had returned to *A.*, the captain wrote from thence to his broker in *London*, requesting him to obtain the opinion of the underwriters as to his proceeding directly to *C.* if the charterer should insist upon it, and received for answer the broker's opinion, that the policy was at an end. At the instance of the charterer the captain proceeded to *C.*, and on his return from thence to *A.* the ship was captured: the Court of *C. P.* held that the voyage insured was never abandoned. *Driscoll v. Bovil*.

1 B. & P. 313

3. On Freight.

- 1 The assured upon a valued policy on freight is entitled to recover the whole amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped. *Montgomery v. Egginton*.

3 T. R. 362

- 2 Where a ship was chartered from *A.* to *B.*, there to take on board certain goods, and proceed to *C.*, &c. for which the owner was to receive freight at so much *per ton*, a policy of insurance on such freight was held to attach from the sailing of the ship from *A.* *Thompson v. Taylor*.

6 T. R. 478

- 3 *Secus*, If the freight had been on goods, and the loss had happened before the goods were on board.

6 T. R. 478

- 4 Where a ship was chartered from *L.* to *D.* and back to *L.*, and after delivering her cargo at *D.* she was to be provided with a cargo homewards at the current freight: Held, that an insurance by the owner on the freight at and from *D.* to *L.* attached whilst the ship lay at *D.* delivering her outward-bound cargo, and before any of her homeward-bound cargo was shipped. *Horncastle v. Stuart*.

7 E. R. 400

- 5 Freight may be insured from *St. Ubes* to *Portsmouth*, upon a ship which sailed with a cargo from *St. Ubes* for *Gottenburgh*, with intent to proceed first to *Portsmouth*, to take up convoy in her way to *Gottenburgh*; and this, without notice to the underwriters that the ultimate destination of the ship and cargo was *Gottenburgh*. *Taylor v. Wilson*.

15 E. R. 324

- 6 Freighters chartered a foreign ship to take a cargo from *London* to *St. Petersburg*, and to lade a cargo there, and immediately return to *London*, paying so much freight *per ton*: and it was covenanted that if political or other circumstances should prevent the shipping a return cargo, or discharging the outward cargo, the freighters might detain the ship at *St. Petersburg* for forty running days; and if that time elapsed without the outward cargo being delivered, and consequently without the return cargo being put on board, the master should be at liberty to return to *London*, and the freighters should pay him 2500*l.* immediately upon the arrival of the ship at *London*. The freighters then procured a policy of insurance, whereby the underwriters agreed to pay a total loss in case the ship was not allowed by the Russian Government to load a cargo at *St. Petersburg* on the chartered voyage. In fact the Russian Government, when the ship arrived at *St. Petersburg*, presuming that the outward cargo was British, refused permission to unload her, and consequently she could not take in a Russian cargo: on which the master, judging for the best, proceeded immediately to

Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a *Swedish* cargo to *London*, and earned freight thereon : Held :

1st, That the insurance was legal in the terms of it.

2dly, That the refusal of the *Russian* Government to permit the ship to unload her outward cargo, was, in effect, and within the meaning of the contracting parties, a refusal to allow her to load a cargo at *St. Petersburg*; and, consequently, that a total loss within the policy was incurred.

3dly, That the proceeding directly from *St. Petersburg* to *London* was not a condition precedent to the master's right to recover from the freighters the dead freight of 2,500*l.*, but that he was entitled to the same notwithstanding the intermediate voyage to *Stockholm*, under the circumstances; and consequently that the freighters were entitled to recover the same from the underwriters. But,

4thly, That as the freighters would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the cargo from *Stockholm* to *London*; though such intermediate voyage were not originally contemplated by the contracting parties, but was undertaken upon the emergency; therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy in the event which had happened; every contract of insurance being in its nature a contract of indemnity. *Puller v. Staniforth*.

11 E. R. 232

- 7 Where a ship was chartered to take a cargo of lead from *London* to *St. Petersburg*, and there immediately receive a return cargo from the freighter's agent, and bring it to *London*; with a *proviso*, that if political circumstances should prevent a return cargo from being laden, the master, after waiting at *St. Petersburg* forty running days without the outward cargo being unladen, and, consequently, without the return cargo being laden, should be at liberty to return to *London*, or any port in *England*; the ship not having been permitted to unlade at *St. Petersburg* by the *Russian* Government, the master,

after waiting there the forty running days, laded a return cargo for his own benefit upon the outward cargo, both of which he brought home, and earned new freight on the homeward cargo; which freight was adjudged to him by a judgment of the Court of C. P. in an action between him and the freighters, over and above the dead freight stipulated to be paid by the charter-party :

Held, that the freighters were entitled to recover the whole of such dead freight from the underwriters upon a policy of insurance, whereby they agreed to pay a loss in case the master should not be allowed by the *Russian* Government to unlade the outward cargo at *St. Petersburg*; the vessel having sailed chartered by the freighters on a voyage from *London* to *St. Petersburg*, and back : and that the underwriters were not entitled to deduct such return freight earned by the master on his own account, and adjudged to him by the Court of Common Pleas; they having agreed with the assured pending this action and pending the action in C. P., that in case the plaintiffs (to whom they had paid a *per centage* loss) should not be able to obtain so large an allowance as the full return freight paid to the master by reason of any demurrages or expenses being allowed against the said freight, the difference should be paid by the underwriters by a further *per centage*, whether the same were settled between the plaintiffs and the ship by arbitration or by legal decision. *Puller v. Halliday*. 12 E. R. 494

- 8 The valuation upon a freight policy of insurance is calculated upon all the goods the ship is intended to carry upon the voyage insured; and if by a peril insured against, the ship be lost, when part only of the goods, the freight of which was intended to be covered, was on board, the valuation must be opened, and the assured can only recover as for that proportional share. *Forbes v. Aspinall*. 13 E. R. 323
- 9 But if there be a loss by a peril insured against, of the whole subject-matter of the insurance to which the valuation applied, as of all the intended freight, where the insurance is on freight, the valuation in the policy will not be opened. *ibid.*

10 And in an action on a freight policy, it seems sufficient to prove a contract under which the ship-owner would have been entitled to demand freight, if the voyage were not stopped by a peril insured against. *Forbes v. Aspinall*. 13 E. R. 323

11 Where a ship was chartered from *Liverpool* to *Jamaica*, there to take on board a full cargo for *Liverpool* at the current rate of freight, to be paid at one month from the discharge of her cargo at *Liverpool*; and the ship-owners effected a valued policy on the freight at and from *Jamaica* to her port of discharge in the United Kingdom; and the ship arrived at *Jamaica*, and after taking on board one half of her cargo, was lost by storm, the remainder of her cargo being on shore and ready to be shipped: Held, that the assured were entitled to recover as for a total loss. *Davidson v. Willasey*. 1 M. & S. 313

12 Policy on freight valued at and from *R.* and any ports in the *Baltic*, to any ports in the United Kingdom, and the ship was chartered to sail with a cargo from *L.* to some port in the *Baltic*, not beyond *R.*, and from thence to *R.*, there to take in a homeward cargo, &c. and sailed from *L.* and arrived at *R.* where she was detained for five weeks, and prevented from loading by order of the Government, and the freighter never loaded her; and a few days after the detention ceased, the frost set in, which detained her there till the spring, when she procured a freight from other persons, and returned with it to *L.*, but the expenses of her detention exceeded such freight: Held, that the policy had attached at the time of the detention, but that freight having been afterwards earned, the underwriter was not liable. *Everth v. Smith*. 2 M. & S. 278

13 An insurance on the freight of a ship destined for a fishing adventure, in the *South Seas*, is not determined by the arrival of part of the cargo in another ship. *Phillips v. Champion*. 1 Marsh. 402

(d) *Changed after Subscription of Policy.*

1 After an insurance on a ship on a trading voyage the assured applied to the underwriters for leave to take in

guns and a letter of marque, the latter of which was positively refused, notwithstanding which the ship sailed with a general letter of marque: this vacated the policy, though the assured did not in fact make use of the letter of marque for the purpose of cruising, or intend so to do, but merely took it on board for the purpose of cruising on the voyage home. *Denison v. Modigliani*. 5 T. R. 580

2 But it is now held, the assured upon a trading voyage taking out a letter of marque (but without a certificate which is necessary to its validity) unknown to the underwriters, solely with a view to encourage seamen to enter, and without any intention of using it for the purpose of cruising, though the vessel was armed for self-defence, is not such an alteration of circumstances as will avoid the policy. *Moss v. Byrom*. 6 T. R. 379

VIII. POLICY.

(a) *Construction of, and by whom effected.*

1 Policies of insurance are to be construed by the same rules as other instruments, unless where, by the known usage of trade, or the like, certain words have acquired a peculiar sense distinct from their ordinary and popular sense. *Robertson v. French*. 4 E. R. 130

2 A policy on a foreign ship must be understood as containing an exception of all captures made by the authority of our own Government. *Kellner v. Le Mesurier*. 4 E. R. 396

3 The nature of a policy is an insurance on the ship for the voyage. If either the ship, or the voyage, be lost, it is a total loss. *Cazalet v. St. Barbe*. 1 T. R. 191

4 Where a policy described the insurance to be on goods on board the ship "called *The American Ship President*;" this was taken to be all name of the ship, and not a warranty of her being an American ship called *The President*. And where the policy, after such name, had the words, "or by whatever other name the same ship should be called," it was holden to be no variance that the real name of the ship was *The President*; the identity

- of the ship meant to be insured with that name being proved. *Le Mesurier v. Vaughan*. 6 E. R. 382
- 5 *S. P. Hall v. Molineux*. 6 E. R. 385, n.
- Two policies of insurance for different sums are effected on goods on board any ship or ships on a voyage from *A.* and *B.*; goods nearly amounting to the value of both policies are put in different proportions, on board two ships which sail on the voyage, one of which is lost, but the other arrives in safety at *B.* The insured may apply either policy to the ship which is lost. *Henchman v. Offley*. 2 H. B. 345, n.
- 6 Provisions sent out in a ship for the use of the crew are protected by a policy on the ship and furniture. *Brough v. Whitmore*. 4 T. R. 206
- 7 A merchant abroad having effects in the hands of his correspondent in *England* has a right to call upon him to make an insurance for him. *Smith v. Lascelles*. 2 T. R. 187
- 8 If a merchant in *England* has been used to procure insurances for his correspondent abroad in the usual course of trade, the latter has a right to expect compliance with an order for insurance from the former, although he has no effects in his correspondent's hands, unless some previous notice be given to the contrary. *ibid.*
- 9 If a merchant abroad send bills of lading to his correspondent here, and at the same time give directions for procuring insurance, the latter cannot accept the bills of lading without obeying the orders to insure. 2 T. R. 187
- 10 Where a merchant here had accepted an order for insurance, and limited the broker to too small a premium, in consequence of which no insurance could be procured, he was held liable to make good the loss to his correspondent. *Wallace v. Telfair*. 2 T. R. 188, n.
- 11 If a merchant residing in *London*, who has received an order for insurance from his correspondent, does what is usual to get the insurance effected, as if he applies to *Lloyd's* without effect, he is not bound to send to another place for that purpose; though it may be doubtful whether he ought not to apply to the public insurance offices in *London*, if it be customary to make application to them in such cases. *Smith v. Cologan*. 2 T. R. 188, n.
- 12 But if the merchant in such case do not apply to the public offices, but send to *Newcastle* or any other port, and do the best he can, he is not answerable for the subsequent ill conduct of the insurer; and more especially if the principal adopt his acts, even for a moment. 2 T. R. 188, n.
- 13 Where an *English* subject in time of war, who had received orders to effect an insurance for a neutral foreigner, opened the policy with his usual broker in his own name, but informing him at the same time that the property was *neutral*; this is a sufficient indication to the broker that the party acted as agent, and not on his own account; and therefore the broker has no lien on the policy so effected for his general balance against such agent, as between such broker and the principal. *Maans v. Henderson*. 1 E. R. 335
- 14 According to 25 G. 3. c. 44, the name of the party interested must have been inserted in a policy of insurance, otherwise he could not recover upon it. *Cox v. Parry*. 1 T. R. 464 (But see stat. 28 G. 3. c. 56. repealing 25 G. 3. c. 44.)
- 15 If an agent effect a policy without inserting his name as agent, such policy was void by stat. 25 G. 3. c. 44. *Pray v. Edie*. 1 T. R. 313
- 16 2u.—Whether an agent, effecting a policy for his principal residing abroad, must not reside in *England*? 1 T. R. 313
- 17 *A.* having consigned a cargo to *B.* and drawn bills on him to the amount of it in favour of *C.* his general agent, sends these bills, together with the bills of lading to *C.*, desiring him to transmit them to *B.*, "that *B.* may have an opportunity of insuring:" he also draws a bill for 300*l.* on *C.*, which is accepted; *B.* refuses to take to the cargo or accept the bills drawn on him; *C.* then effects a policy in his own name, and informs *A.* thereof, who approves of his conduct. In an action by *C.*, stating himself in the first count to be the agent of *A.*, and averring interest in him; in the second averring interest in himself: Held, first, that the policy was good within 28 G. 3. c. 56.; secondly, that *C.* had an insurable interest to the amount of 300*l.* *Wolff v. Horncastle*. 1 B. & P. 316

18 It is a sufficient compliance with this latter statute if the name of the broker effecting the insurance be inserted in the policy as agent. *Bell v. Gillson.* 1 B. & P. 345

S. P. De Vignier v. Swanson. 1 B. & P. 346, n.

(b) *Description of Voyage.*

See *Dalglish v. Brooke.*

15 E. R. 295, post, pages 422, 430

- 1 Where by a policy of insurance, ship and goods were insured "at and from all and every port, &c. on the coast of Brazil, and after the 17th of September to the Cape of Good Hope, beginning the adventure upon the goods from the loading thereof aboard the said ship at all or every port, &c. on the coast of Brazil and from the 17th of September, 1800; and upon the ship in the same manner," and with liberty to sail to, &c. any places backwards or forwards under the Portuguese government, &c. at a premium of four guineas per cent., to return 3l. 10s. should the ship have arrived, or the risk have otherwise ceased on or before the 17th of September: Held, that the policy only attached on the homeward bound cargo laden on board at the coast of Brazil, and did not cover a cargo originally taken in at the Cape of Good Hope, and which continued on board after the 17th of September, while the ship was on the coast of Brazil, and after she left it on her return to the Cape. Neither did the policy cover the ship itself, which was insured in the same manner as the goods. *Robertson v. French.* 4 E. R. 150
- 2 Policy on freight valued at 500l. on a voyage at and from Demerara, Berbice, and the Windward and Leeward Islands to London; the ship being at Demerara, an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demerara to Berbice, and deliver them there. While proceeding from Demerara to Berbice, with the bricks and planks on board, she met with an accident, and in consequence never earned her freight: Held, that it was not a loss within the policy. *Sellar v. M'Vicar.* 1 N. R. 23

- 3 Under a policy of insurance on goods

from A. to B., C., and D., the risk attached, where the ship, which was captured before the dividing point, failed with intention to proceed directly to D. without first visiting the intermediate places. Though under such a policy, if a ship mean to go to more than one of the places so named, she must visit them in the order in which they stand in the policy. *Marsden v. Reid.* 3 E. R. 572

- 4 If a ship insured for a certain time sail before the time on a different voyage from that insured, the assured cannot recover though she afterwards get into the course of the voyage described in the policy, and is lost after the day upon which the policy was to have attached. *Way v. Modigliani.* 2 T. R. 30

- 5 When a ship is insured from one port to another, the policy does not attach, unless she sail on the voyage insured. 2 T. R. 30

- 6 The assured cannot recover on a policy of insurance, unless they make a full disclosure of all the circumstances of the intended voyage, even with respect to the track the ship intends to take. *Middlewood v. Blakes.* 7 T. R. 162

- 7 A policy upon a homeward voyage from India, upon goods at and from a foreign port of lading, until the ship's arrival in London, beginning the adventure upon the said goods from the lading thereof at the foreign port, and so should continue upon the goods, until the same should be discharged; was held to attach only on the particular cargo taken at the first port of lading. *Grant v. Paxton.* 1 Taunt. 463

- 8 Though the insurance was, to all or any ports and places whatsoever beyond the Cape of Good Hope, in port, and at sea, in all places, at all times, and in all services, with liberty to proceed to, touch, and stay at any port or places whatsoever for any purpose whatsoever. *ibid.*

- 9 Upon an insurance on an East-India voyage, the underwriters are bound to know the course of the East-India Company's charter-parties and trade, and that the ship's destination is liable to be changed after the policy is effected. 1 Taunt. 463

- 10 If the East-India Company permit the voyage of a chartered ship to be altered, though it is at the request and

partly for the benefit of the assured, the altered voyage continues protected by the policy. *Grant v. Parton*.

1 Taunt. 463

- 11 A policy of insurance from *Bristol* to *Monte Video*, or other port in the river *Plate*, where the ship, after arriving off *Maldonado* at the mouth of the *Plate*, was immediately ordered off by the *British* commander there (the enemy having before gotten possession of every other port in the river); will not cover a loss which happened to the goods insured by a peril of the sea after the ship's departure from thence, in her way to *Rio Janeiro*, which was the nearest friendly port, and to which she was under a necessity of going for water and repairs. *Parkin v. Tunno*.

11 E. R. 22

- 12 A ship was insured from *London* to any port or ports in the *River Plate*, until her arrival at her last port of discharge in that river; and the master intending to discharge her cargo at *Buenos Ayres* passed *Maldonado*, but hearing that *Buenos Ayres* was then in the hands of the enemy, he went to *Monte Video* with intent to make a complete discharge there, if the market were favourable; but after discharging a part, and not finding the market there so favourable as he expected, he had not abandoned his original intention of going to *Buenos Ayres* if it should afterwards be practicable; but while he was still discharging part of his cargo at *Monte Video*, a loss happened by a peril of the sea: the Court held, that as *Buenos Ayres*, to which other port only in the *Plate* he had contemplated to go, was at the time of his arrival in the *Plate* (and in fact continued up to the time of the loss) in the hands of the enemy, so that he could not legally go there, *Monte Video* must be taken to be the ship's last port of discharge, and that on her arrival there the policy was discharged. *Brown v. Vigne*.

12 E. R. 283

- 13 Under a policy at and from *Jamaica* to *London*, the Court of C. P. held, that a ship was protected in moving from port to port in that island. *Cruickshanks v. Jamson*. 2 Taunt. 301

- 14 A policy of insurance "at, and from *Lyme* to *London*" does not protect a cargo laden at *Bridport* within

the port of *Lyme*, and nine miles nearer to *London*. *Constable v. Noble*.

2 Taunt. 403

- 15 If a policy describe a voyage at and from a place which is the head of a port, it will not cover a voyage at and from a distinct place which is a member of the same port. *Payne v. Hutchinson*.

2 Taunt. 405, *notd.*

- 16 If a policy be effected on goods on a voyage defined from *A.* to *B.*, the risk to commence "at and from the loading thereof on board," not saying where, it must be intended a loading at the place from which the voyage commenced. *Spitta v. Woodman*.

2 Taunt. 416

- 17 And if the proof be, that the goods were loaded in an earlier part of the ship's course, and before her arrival at the place where the voyage insured commences, the plaintiff cannot recover. *ibid.*

- 18 Though the same underwriter had insured the same goods for the anterior voyage, and knew the second policy was effected thereon. 2 Taunt. 416

- 19 Liberty given in a policy on a fishing voyage, to chase, capture and man prizes, does not authorize the ship to lie by nine days off a port, waiting for an enemy's ship to come out when she should have completed her cargo. Although she lay in wait during that time within the limits of her fishing ground. *Hibbert v. Halliday*.

2 Taunt. 428

- 20 A policy of insurance on goods "at and from *Gottenburgh* to *Riga*, beginning the adventure on the goods from the loading thereof aboard the ship at *Gottenburgh*," will not cover goods previously loaded on board at *London*, which arrived in the ship at *Gottenburgh*. *Horney v. Lushington*. 15 E. R. 46

- 21 Under a policy of insurance of goods at and from *London* to any port or ports, place or places, in the *Baltic*, backwards and forwards; with leave to touch and stay at any ports and places, for all purposes whatsoever; the assured may wait at any port for information as to what port in the *Baltic* the ship might safely proceed to discharge her cargo; that being one of the objects of the adventure arising out of the troubled and shifting state of the different governments on the *Baltic* shores from the pressure of the French

arms: and this liberty, it seems, is not abridged by a subsequent special leave given to wait for information, &c. off any ports and places. *Rucker v. Allnut.* 15 E. R. 278

- 22 The plaintiff was entitled to recover a loss of goods insured at and from *Landscrona* to *Wolgast*; though they were shipped at *Gottenburgh* before the ship arrived at *Landscrona*, and though the policy was declared to be at and from the loading of the goods on board the ship; it appearing that the underwriter was informed at the time that the goods were loaded on board at *Gottenburgh*; and that part of them were landed and reloaded at *Landscrona*, so as to enable the custom-house officers there to ascertain the qualities of the whole, and to adjust the duties; and the policy being free of average. *Nonnen v. Reid.*

The same v. Kettlewell.

16 E. R. 176

- 23 Policy on goods at and from *G.* to any port in the *Baltic*, beginning the adventure from the loading thereof on board the ship, and the policy was declared to be in continuation of a former policy; which was a policy from *V.* to her port of discharge in the United Kingdom, or any ports in the *Baltic*, with liberty to take in and discharge goods wheresoever, to return 12 per cent. if the voyage ended at *G.*: Held, that the assured were entitled to recover, although the goods were not loaded on board at *G.* but at *V.*, and although the defendant was not an underwriter on the former policy. *Bell v. Hobson.*

16 E. R. 240

- 24 Where goods were insured from *Heligoland* to *Memel*, with liberty to touch at any ports, and to seek, join, and exchange convoy, warranted free from capture in the port of *Memel*, and the ship sailed from *Heligoland* with orders to go to *Gottenburgh* to know whether to proceed to *Anholt* or *Memel*, and was captured in her way to *Gottenburgh*, which is in the track either to *Anholt* or *Memel*: Held, that this was to be considered as a voyage to *Memel*, although it was subject to be changed according to circumstances upon the ship's arrival at *Gottenburgh*; and therefore the risk commenced on her leaving *Heligoland*; and the ship never having reached

Gottenburgh, the purpose of going thither for orders was merely an intention to deviate, which did not vacate the policy; neither was it a restraint on the captain's judgment as to the place of seeking convoy, it not appearing that he could have met with convoy before the capture; and consequently the underwriter was liable. *Hesilton v. Allnut.* 1 M. & S. 46

- 25 Where a policy of assurance was on goods at and from *Pernambuco* to *Maranham*, and from thence to *Liverpool*, beginning the adventure on the goods from the loading thereof, on board the ship wheresoever: Held, that it would cover goods previously loaded at *Liverpool*, and which arrived at *P.*, but were not unloaded there, and afterwards sustained a partial loss by wreck in the voyage from *P.* to *M.* *Gladstone v. Clay.* 1 M. & S. 418

- 26 Policy of assurance on goods, at and from *G.* to the ship's port of discharge, beginning the adventure on the said goods from the lading thereof aboard the said ship: Held, that the policy did not cover goods loaded at an interior port, though they were in a loaded state and in good safety at *G.* just before effecting the insurance. *Mellish v. Allnut.* 2 M. & S. 106

- 27 A policy at and from *Martinique* and all and every *West-India* islands, warrants a course from *Martinique* to islands not in the homeward voyage. *Bragg v. Anderson.* 4 Taunt. 229

- 28 A policy at and from *G.* on goods, beginning the adventure from the loading on board the ship, will not protect goods laden on board before the ship's arrival at *G.* *Langhorne v. Hardy.* 4 Taunt. 628

- 29 On a policy at and from *Pernambuco*, or any other port or ports in the *Brazils*, to *London*; "beginning the adventure from the loading the goods on board the ship, on the 'termination' of her cruize, and preparing for her voyage to *London*:" The ship, on the termination of her cruize, touched at *Pernambuco*; but failing to procure a cargo there, she proceeded for *St. Salvador*, and was lost on her voyage thither: Held, that the policy attached at *Pernambuco.* *Lambert v. Liddard.*

1 Marsh. 149

- 30 If liberty be given to touch at a port, the contract not defining for what

purpose, but a communication having been made to the underwriter, that the ship was to touch for a purpose of trade, it shall be intended as a liberty to touch for that purpose. *Urquhart v. Barnard*. 1 Taunt. 450

31 If ports of call are named in a policy in a successive order, the ship must take them in the same succession in which they are named. *Gardner v. Senhouse*. 3 Taunt. 16

32 If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distances. 3 Taunt. 16

33 Liberty to touch at a port for any purpose whatever, includes liberty to touch for the purpose of taking on board part of the goods insured. *Violet v. Allnut*. 3 Taunt. 419

34 Under a liberty to touch and stay at all ports for all purposes whatsoever, the stay must be for some purpose connected with the furtherance of the adventure. *Langhorn v. Allnut*. 4 Taunt. 511

35 Whether the purpose is within the scope of the policy, is a question for the Court. *ib.*

36 The policy not limiting the time of stay, whether a ship has staid an unreasonable time, is purely a question for the jury. 4 Taunt. 511

(c) Alteration.

N. B. When an alteration may be made without a new stamp, see post, tit. STAMPS.

1 If a policy is executed in the printed form, without any specific subject of insurance being inserted in writing, and the subject-matter is afterwards added in writing, and the addition signed by some of the underwriters only, the assured cannot recover against those underwriters who do not so sign, on the contract, as it stands altered by the insertion. *Langhorn v. Cologan*. 4 Taunt. 330

2 A policy of insurance having been underwritten on "ship and outfit," was after the ship sailed declared by consent of all parties, to be on ship and goods, by a memorandum written on a blank space in the body of the policy; but without any new stamps: and it having been decided, in the

case of *Hill v. Patton*, 8 E. R. 373, that, for want of the stamp the plaintiff could not recover as upon a policy on ship and goods, as declared by the memorandum, it was now held that he could not recover upon the policy in its original state, as an insurance on "ship and outfit," by reason of the alteration apparent upon the face of the instrument itself, and which was made by parties interested. *French v. Patton*. 9 E. R. 351

And see *Moss v. Byrom*.

6 T. R. 379, ante, page 408

IX. WARRANTIES.

(a) What shall amount to, and how construed.

1 Whatever is written in the margin of a policy of insurance is a warranty. *De Hahn v. Hartley*. 1 T. R. 345

2 A warranty in a policy of insurance is a condition; and unless it be performed there is no contract. 1 T. R. 345

3 Difference between a representation and a warranty: the former may be substantially, the latter must be strictly complied with. *De Hahn v. Hartley*. 1 T. R. 343

Affirmed in *Cam. Seac*. 2 T. R. 186

4 Goods were insured from the lading of them on board the ship "lost or not lost," and warranted well on a particular day: the ship was lost on that day before the policy was underwritten: and it was holden that the underwriter was liable, for the warranty was complied with by the ship's being safe any time of that day. *Blackhurst v. Cockell*. 3 T. R. 360

5 A ship being insured at and from Surinam, and all or any of the West-India islands, to London; a warranty to sail on or before the 1st of August, is satisfied by the ship sailing from Surinam, her last port of lading, before the 1st of August, and going into Tortola on the 4th, to seek convoy, though she did not sail from Tortola, which is one of the West-India islands, direct for London, till afterwards. *Wright v. Shipner*. 11 E. R. 516

(b) Against Confiscation or Capture.

See *Loss by Capture*, post, 421.

1 A warranty in a policy of insurance, freeing the underwriter from loss by confiscation of the government in the ship's port of discharge, does not apply to a case where, upon the arrival

of the ship in the roads of *Pillau* within the *Prussian* dominions, she was boarded by two different parties, one of *Prussian* soldiers, and the other the crew of a *French* privateer, who disputed the possession of her, but agreed to take her into *Pillau*, in order to settle their claims, upon which the *Prussian* government referred the matter to the *French* government at *Paris*, where the ship was condemned as prize to the *French* captors, and afterwards given up to them. For the terms of the warranty import something more to be done on behalf of the local government at the port of discharge than the mere act of seizure by or with the permission of such local government. *Levy v. Almutt.*

15 E. R. 267

- 2 A policy contained a warranty by the assured against confiscation by the government in the ship's port of discharge. A vessel destined to discharge at *Pillau*, anchored two *German* miles from *Pillau*, three *English* miles without the roadstead, where vessels unload in order to come over the bar into the inner harbour; and was captured at her moorings by soldiers coming off in a boat from *Pillau*: Held, that this loss was not within the warranty. *Levy v. Vaughan.*

Levy v. Buck.

4 Taunt. 387

- 3 If a ship be warranted free of capture or seizure in port or ports, a capture by an enemy's ship while the vessel insured is lying in an open road, outside of an harbour, is not within the warranty. *Brown v. Tierney.* 1 Taunt. 517

- 4 Though a policy of insurance on goods contain a clause of warranty freeing the underwriter from seizure in the ship's port of discharge; yet the assured having declared generally as for a loss by hostile seizure, without negating that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict. *Rucker v. Green.*

15 E. R. 288

- 5 A warranty against capture in the ship's port of discharge, does not include capture in the open sea on the outside of the port, by a force issuing from the port of discharge. *Mellish v. Staniforth.*

3 Taunt. 499

- 6 If a vessel is taken at her moorings, being neither within the *caput portus*, nor within that part of a haven where

ships unload, the underwriter is not discharged by a warranty against "capture in the ship's port of destination." *Keyser v. Scott.*

4 Taunt. 660

- 7 Whether a vessel warranted free of capture in port, be in a port or not at the time of her capture, is purely a question of fact for the jury. *Reynier v. Pearson.*

4 Taunt. 662

- 8 Whether the place where a vessel casts anchor, is within her port of discharge, is a fact for the jury, not a question of law. *Levin v. Newnham.* 4 Taunt. 722

(c) *To sail with Convoy.*

- 1 A policy of insurance is made on a ship, on a voyage from *A.* to *C.*, warranted to depart with *convoy* for the voyage. The *convoy* appointed is to *B.*, a port in the course, and near to *C.* This is a compliance with the warranty, and the underwriters are liable, the ship being captured in the passage from *B.* to *C.* *D'Eguino v. Bewick.*

2 H. B. 551

- 2 The term *convoy* in a policy means such a *convoy* as shall be appointed by government. 2 H. B. 551

- 3 Sailing orders are necessary to the performance of a warranty to depart with *convoy*, unless particular circumstances exempt the insured from that rule. *Webb v. Thompson.*

1 B. & P. 5

- 4 A warranty to depart with *convoy* is not complied with, unless sailing instructions be obtained before the ship leaves the place of rendezvous, if by due diligence of the master they can be obtained. *Anderson v. Pitcher.*

2 B. & P. 164

- 5 If a policy be effected on a foreign built ship *British* owned (which not being required to be registered, may sail without *convoy*), it is not incumbent on the assured to communicate to the underwriter, at the time of making the policy, the circumstance of her being foreign built. *Long v. Duff.*

2 B. & P. 209

The same v. Bolton, ibid.

- 6 A ship cannot legally proceed without *convoy* from port to port to join *convoy*, unless a bond has been given that she shall not sail without *convoy*. *Hinckley v. Walton.*

3 Taunt. 181

- 7 A ship licensed to sail without *convoy*, provided she is armed with a certain

force, must take that force on board before she breaks ground. *Hinckley v. Walton.* 3 Taunt. 181

8 A ship licensed to sail without convoy with a certain force, and clearing out without giving bond to sail with convoy, and without having the force required, cannot legally go round from her port of clearance to a port of convoy. 3 Taunt. 181

9 A vessel which sails with convoy, and is driven back by weather into her port of clearance, may lawfully sail thence again with her cargo on the voyage, without waiting for the next convoy from the same port, or joining convoy from any other port. *Laing v. Glover.* 5 Taunt. 49

10 It is not sufficient to sail with a convoy appointed for another voyage, though it may be bound upon the same course for great part of the way. *Cohen v. Hinckley.* 1 Taunt. 249

11 The sailing with convoy required by the stat. 43 Geo. 3. c. 57. is a sailing with convoy for the voyage. 1 Taunt. 249

12 A ship cannot legally sail from port to port without convoy, unless she is bound from port to port. 1 Taunt. 249

13 The stat. 43 G. 3. c. 57. does not avoid a policy on the ground of the ship sailing without convoy, unless the party interested in the insurance was privy to or instrumental in the sailing without convoy. *Henderson v. Hinde.* 1 Taunt. 250, n.

14 Every person who ships goods on board a vessel which sails without convoy, does it at his own peril of her having a sufficient licence for the voyage, without which all insurances on his goods are void, by the stat. 43 G. 3. c. 57. *Wainhouse v. Cowie.*

4 Taunt. 178

15 Although the owner of the goods supposed and intended that the ship should have a sufficient licence. *ib.*

16 And although he lived at a distance from the port, and had no concern with the management of the ship, or the obtaining for her the necessary documents. *ib.*

17 A licence to sail without convoy to a port which a ship must pass on her voyage, is not a sufficient licence to authorize her to run, without licence or convoy, for the residue of her voyage, after she has touched at that port. 4 Taunt. 178

18 A licence to *Gibraltar* will not le-

galize a voyage to *Palermo, Messina, and Malta*, touching at *Gibraltar*, and finding there neither licence or convoy. 4 Taunt. 178

And see *Ingham v. Agnew.*

15 E. R. 517, ante, 391

19 In order to shew that a voyage without convoy from a foreign port is illegal, it is incumbent on the underwriter to prove that there is convoy occasionally appointed from that port, or some one resident there, authorized to grant licences to sail without convoy. *Wake v. Atty.* 4 Taunt. 493

(d) *Neutrality.*

1 The plaintiff an *American* born, but settled in *England*, and carrying on commerce there, purchases an *American* ship regularly documented in *America*: This ship is not neutral to the purpose of being protected by the *American* flag. *Tabbs v. Bendeluck.*

3 B. & P. 207, n.

2 If goods be insured from *A.* to *B.* in a neutral ship, it is sufficient to charge the underwriters that the ship was neutral when she sailed, though hostilities commence during her voyage. *Tyson v. Gurney.* 3 T. R. 477

3 A sentence of condemnation by a *French* Court sitting in *Spain*, of a prize taken by a *French* privateer and carried in there (*Spain* being then a belligerent ally of *France* in the war against *Great Britain*) is valid; and such condemnation, proceeding on the ground of the property being *enemy's* and *British*, is conclusive in an action on a policy against the underwriter by the assured who had insured it as *Danish*, which in fact it was, *Denmark* being then neutral. *Oddy v. Bovill.* 2 E. R. 473

4 In an action on a policy of insurance on goods warranted *American* on board a ship from *London* to *Virginia*, a sentence of a foreign Court, which after reciting that "forasmuch as the true destination of the vessel was for the *English* islands, having been hired and loaded at *London*, and having on board eighty barrels of gunpowder," declares the ship and cargo a good prize, is not conclusive evidence against a warranty of neutrality; because the special grounds assigned for the sentence, do not necessarily lead to such conclusion. *Culbert v. Bovill.* 7 T. R. 523

- 5 By the sentence of a French Court of Admiralty, it appeared that the ship insured, warranted American, had been condemned as enemy's property for want of having on board a rôle d'équipage or list of the crew, such as is required by a marine ordinance of France, and adjudged by the Court there to be requisite within the meaning of the treaty of commerce between France and America: Held to be conclusive evidence against the warranty of neutrality, in an action on a policy of insurance, though in fact the ship was American. *Geyer v. Aguilar.* 7 T. R. 681
- 6 A warranty in a policy of insurance that the ship is American property, means that the ship is entitled to all the privileges of an American flag; (which is required by treaty between France and America) the warranty is not complied with, and the assured cannot recover against the underwriter; though in fact the ship suffer no inconvenience in the voyage from the want of the passport. *Rich v. Parker.* 7 T. R. 705
- 7 A sentence of a foreign Court of Admiralty is only conclusive here, in an action on a policy of insurance, as to the express ground of the sentence, but not as to any of the premises (noticed in the consideratory part of the sentence) that led to the adjudication. *Christie v. Secretan.* 8 T. R. 192
- 8 A warranty of neutrality is not falsified by a sentence of a foreign Court of Admiralty, condemning a ship for navigating contrary to the ordinances of that belligerent state, to which the neutral country had not assented. *Pollard v. Bell.* 8 T. R. 434
Bird v. Appleton. 8 T. R. 562
- 9 An assured upon an American ship and cargo, provided with such a passport as is required by the treaty between America and France, and with all other usual American papers and documents, is entitled to recover against an underwriter of a policy on such ship and goods, in case of a capture by a French privateer, notwithstanding a sentence of condemnation of the same as lawful prize by a French Court of Admiralty; such sentence proceeding on the ground of a breach of French ordinances, requiring certain particulars to be observed in respect of the ship documents beyond what was necessary by the treaty. *Price v. Bell.* 1 E. R. 663
- 10 Qu. Whether, if a ship be not warranted of any particular country, there be an implied warranty in a policy of insurance that she shall be properly documented according to the laws of that country, and her particular treaties with foreign states? *ib.*
- 11 Policy of insurance on a ship warranted American. To negative this warranty, a sentence of condemnation of a French Court at St. Domingo was given in evidence, which began thus: "condemnation of the English ship Mount Vernon. Extracted from the books of the office of the Provisional Tribunal respecting prizes established at St. Domingo. We F. P., judges," &c.; and after stating the circumstances of papers having been thrown overboard, the captain and supercargo having abandoned the ship, the captain being a Portuguese, without a certificate of his naturalization, and the United States, in their last treaty with England, having suffered to be added to the articles which had before been considered as contraband of war, slaves, &c. were sufficient motives to condemn the said ship, condemned the same as property belonging to the captor: Held, that this sentence was conclusive evidence that the ship was not American. *Baring v. Clagett.* 3 B. & P. 201
- 12 Qu. Whether, if a ship be warranted American, the assured does thereby undertake that she shall be owned and navigated according to all the regulations of the American Navigation Act? *ib.*
- 13 The 25th article of the treaty of February, 1778, between France and America, which requires the vessels of the two allies, in case either is at war, to be furnished with a passport expressing (*inter alia*) the place of habitation of the commander of the vessel, is not complied with by a passport, granting leave to G. D. commander of the ship called the *M. V. of the town of P.*, of the burden of, &c. such description of place being applicable only to the ship, and therefore the plaintiff was holder not entitled to recover upon a policy of insurance on such ship, warranted Ame-

rican, which had been captured by the French, and condemned as prize. *Baring v. Christie*. 5 E. R. 398

- 14 Policy of insurance on board the *Catherine*, an American vessel. After the policy was effected, doubts having arisen, whether the policy contained a warranty, the underwriters signed an agreement, that in case of capture or seizure, the assured, before they claimed for a loss, must produce proofs of the ship being American bottom, and by bills of lading shew that the cargo had been shipped on account and risk of A. B., upon which they would settle, by granting bills at four months for the amount of their subscriptions, in full dependance that the insured would use their best endeavours to recover the property as for account of the shippers: Held, that on proof being produced that the ship was American bottom, and the cargo shewn by bills of lading to have been shipped on account and risk of A. B., the assured were entitled to recover, on a loss by capture, notwithstanding the production by the underwriters of any French sentence of condemnation to falsify the warranty. *Lothian v. Henderson*. 3 B. & P. 499
- 15 Where a foreign Court of Prize professes to condemn a ship and cargo on the ground of an *infraction of treaty* in not being properly documented, &c. as required by the treaty between the captors and captured; such sentence is conclusive in our Courts against a warranty of neutrality of such ship and cargo in an action upon a policy of insurance against the underwriter; although inferences were drawn in such sentence from *ex-parte* ordinances in aid of the conclusion of such infraction of treaty. *Baring v. The Royal Exchange Assurance Company*. 5 E. R. 99
- 16 A sentence of a foreign Court of Prize is conclusive evidence in an action upon a policy of insurance upon every matter within the jurisdiction of such Court upon which it has professed to decide: Therefore, where a Danish ship, warranted neutral, was captured by a French ship of war, (Denmark being at peace with France), and the Court in which she was libelled as prize, professing to consider that the *built* of the vessel was unknown, that she was sold to a neutral subject only since the declaration of

war, that the bill of sale does not mention her *place of built*, or her original owner, that the mate and third officer were naturalized Danes only since the declaration of war, and that the greater part of the crew were subjects of hostile powers, condemned the ship as good and lawful prize; such condemnation is conclusive against the warranty of neutrality in an action on the policy against the underwriter: And no evidence can be received to falsify the facts affirmed by such sentence, nor to shew that the conclusion was unfounded: although the sentence proceeded to refer to certain ordinances of France, containing rules to direct the judgment of its Courts in the consideration of the question of neutrality; by which rules the Prize Court appeared to have regulated their judgment in the conclusion they had drawn. *Bolton v. Gladstone*. 5 E. R. 155

- 17 A warranty of Danish property, (Denmark being then a neutral power) in a policy of insurance on ship and goods, was holden to be conclusively disproved by a sentence of a Court of Admiralty, condemning the ship and cargo, because the master and crew had broken their neutrality in the course of the voyage insured, by forcibly rescuing the ship, which had been seized and carried into port by a belligerent power for the purpose of search. *Garrelsv. Kensington*. 8 T. R. 230
- 18 Any forfeiture of neutrality, by the wilful act of the assured, or of the master, &c. after the commencement of the voyage insured, is a breach of such a warranty. 8 T. R. 230
- 19 But the ship must not forfeit its neutrality by the misconduct of the parties on board. 8 T. R. 234
- 20 If a neutral be brought into port, having enemy's property on board, and while detained there, her port of destination be blockaded, this is a loss of the voyage, for which the underwriters on neutral goods are liable. *Barker v. Blakes*. 9 E. R. 293
- 21 If a neutral American ship, insured here, be captured by a French ship, and condemned in a French Court as prize, upon the express ground stated in the sentence of condemnation, (which is evidence for this purpose), that the ship was not properly documented according to the existing treaty between France and the United States

of *America* (conjointly with the suppression of papers by the captain after the capture; on which no opinion was given by the Court); the neutral assured cannot recover their loss against the *British* underwriter, although there was no warranty or representation that the ship was *American*; the neglect of the ship-owners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason; such assured of the goods being implicated in the same neglect in their character of ship-owners. But it is otherwise in the case of a mere assuree of goods, who is not answerable for the proper documenting of the ship, without a warranty or representation of her national character. *Bell v. Carstairs*. 14 E. R. 374

22 A neutral vessel is not sea-worthy, unless she is provided with documents to prove her neutrality. Although the production of those documents would, if she had been captured by one particular belligerent, have rendered her liable to condemnation under an ordinance of that power. *Steel v. Lucy*. 3 Taunt. 285

23 An *American* bound from *London* to *Riga*, was taken by the *Danes*, and condemned for circumstantial reasons, and, amongst others, the want of a sea-passport and muster-rolls; she was provided with false clearances from *Bergen*, but they were not produced. Her sea-passport would have proved she had come from *London*, which, under the *Berlin* decree, would be a ground of condemnation by the *French*. Held, that although it would subject her to this risk, she ought not to be without those documents which would prove her neutrality with respect to other belligerents. 3 Taunt. 285

24 A sentence of condemnation of a neutral, by a *British* Vice-Admiralty Court abroad, is sufficient evidence, from which to presume that the ship condemned had been engaged in some illegal transaction; though the ground of condemnation do not appear in

the sentence. A neutral meeting by agreement a *British* vessel, for the purpose of receiving gunpowder and arms, is illegal, though the latter should have had a licence to export them for the purposes of trade. *Gibson v. Mair*. 1 Marsh. 39

25 A neutral ship meeting by agreement a *British* vessel, in order to receive prohibited goods from her, is a sufficient ground of condemnation of the neutral, though the *British* ship should have a licence to export them for the purpose of trading with them. *Gibson v. Service*. 1 Marsh. 119

X. REPRESENTATIONS.

(a) When and how made.

N. B. See INSURANCE BROKER, *post*. *Bell v. Carstairs*. 14 E. R. 374, *supra*.

1 Goods being insured on board a ship which was in fact an *American*, but not represented to be so at the time of the policy subscribed, though the broker had before said she was an *American* when the slip was subscribed, but the insurance being ultimately effected on her generally by her name: Held, that she need not be documented as an *American*, and therefore, in case of a capture and condemnation by a foreign power for want of the documents required by treaty between that state and her own, the owners of the goods were entitled to recover against the underwriters. *Dawson v. Atty*. 7 E. R. 367

2 How far a representation made to one underwriter on a policy shall be taken to extend to subsequent underwriters, and what shall be evidence of it. *Vide Marsden v. Reid*. 3 E. R. 572

3 Where an insurance was ordered by the principal to be made as soon as a letter was received from his agent; and that agent, when he wrote the letter, knew nothing of the loss of the vessel, but had an opportunity by the course of the post of contradicting the contents of it, and transmitting intelligence of the loss before the insurance was effected, and neglected to do so; the policy is void on the ground of misrepresentation, though the assured himself knew nothing of the loss. *Fitzherbert v. Mather*. 1 T. R. 12

4 A representation to the underwriters at the time of effecting a policy by the owner of goods on board a ship,

as to the time of her sailing, being made *bona fide* upon probable expectation, does not conclude him. *Bowden v. Vaughan*. 10 E. R. 415

- 3 A mere representation that the cargo was Swedish, and neutral, which was true in fact, though contradicted by the French sentence of condemnation, was no objection to the plaintiff's recovery; nor the want of documents as Swedish property, required only by French ordinances. The exclusion of the British flag from Swedish ports, not appearing to be by French control, and Sweden not being a co-belligerent with France, was held not to be within the prohibition of the Order in Council of the 7th of January, 1807. *Nonnen v. Reid*. The same v. *Kettlewell*. 16 E. R. 176

XI. CONCEALMENT.

(a) When material.

See *Long v. Duff*. 2B.&P. 209. ante 414.

- 1 Any person acting by the orders of the insured, or his agent, and who is any-wise instrumental in procuring the insurance, is bound to disclose all he knows to the underwriter before the policy is effected; and where any misrepresentation arises from his fraud or negligence, even without the privity of his employer, the policy is void. *Fitzherbert v. Muther*. 1 T. R. 12
- 2 Action on a policy on goods from *Berdygge* to *London*, effected by the consignees on the 13th of December, without communicating a letter received by them the day before, but dated the 30th of November, informing them that the captain would sail the next day, and directing them, if he should not be arrived, to effect the insurance as low as possible: Held, a material concealment, though the ship did not in fact set sail until the 24th December. *Willes v. Glover*. 1 N. R. 14
- 3 Where the plaintiffs effected a policy of assurance on wines, from *Oporto* to *London*, on the 12th of November, at which time they were in possession of two letters from their correspondents at *Oporto*; the first of which, dated 11th of October, stated thus: "We are loading the wines on the Stag, Captain Wheatley, who pretends to sail after tomorrow;" the other, dated the 13th of October, inclosed the bills of lading, which were filled up "with convoy;" which letters the plaintiffs

did not communicate to the underwriters: Held, that it was a material concealment. *Bridges v. Hunter*.

1 M. & S. 15

- 4 In effecting a policy on the 8th of January at *Whitehaven*, on a ship at and from *Barbadoes* to *Liverpool*, a broker's letter was produced, stating that the ship insured was not coppered, but a slow sailer; was expected to have sailed on 28th of November; and that the *Barton*, a coppered vessel, and very fleet, which had sailed the 24th from *Barbadoes*, had arrived on the 5th of January; but no notice was taken of the *Agreeable*, another coppered and fleet vessel, which sailed 29th of November, having also arrived on the same day as the *Barton*. After verdict for the plaintiff, the Court of C. P. refused to grant a new trial on the ground of concealment. *Littledale v. Dixon*. 1 N. R. 151
- 5 As an assured impliedly warrants the ship insured to be sea-worthy, whatever forms an ingredient in sea-worthiness is not necessary to be disclosed by the assured to the underwriters in the first instance, unless information upon the subject be particularly called for, and then the assured must disclose truly what he knows in the respect required; therefore, where the assured of a ship had received a letter from his captain, informing him that he had been obliged to have a survey on the ship at *Trinidad* on account of her bad character; but the survey which accompanied the letter gave the ship a good character: Held, that the non-disclosure of such letter and survey to the underwriters did not vacate the policy; though it appeared in evidence that such circumstance, if known, would have enhanced the premium of insurance. *Hayward v. Rodgers*. 4 E. R. 590
- 6 A ship on an *African* voyage, the common duration of which is several months, and sometimes extends to a twelvemonth or more, arrived on the coast in August, 1799; and in February, 1800, her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and of a fever, the crew were reduced to five, and all those sickly, and not a

man to be procured at hand: that they had been plundered of their clothes, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st April, 1800, from *Gaboon River*, mentioned their arrival there on the 24th March; that the natives finding them weakly handed, and their goods taken from them, did as they pleased; that they had then nine men on board; but their provisions run very low; that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest, and to sail at the end of the next month. An insurance was effected in September, 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of Africa," &c. The Court held it sufficient that the last letter truly stated the then condition, and circumstances of the ship; which, though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances; the second letter, both in its terms and contents, referring to a former letter; which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk: and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship on the coast was only on the 24th of March, when she was stated to have arrived in *Gaboon River*, and to have had much of her homeward bound cargo on board on the 21st of April, and was expected to sail with the remainder by the end of May. *Freeland v. Glover*. 7 E. R. 457

7 An insurer is bound to communicate to the underwriters any intelligence he has, which may affect his choice whether he will insure at all, and at what premium he will insure: Whether in fact true or false. *Lynch v. Hamilton*. 3 Taunt. 37

8 If a ship is advertised to be in danger, and the insurer effects a policy on ship or ships, knowing that the ship in danger is one of them, without stating the ship's name, this is a con-

cealment which avoids the policy, although the rumor was false. 3 Taunt. 37

9 If an insurer effects a policy on ship or ships, knowing their names, but not communicating them, *semble* that the policy is void; such an insurance being tantamount to a representation that he does not know by what ships the goods will come. 3 Taunt. 37

10 It is not necessary to disclose to the underwriter on a policy at and from London, whether the ship has sailed or not. *Fort v. Lee*. 3 Taunt. 381

11 An insurance was effected on goods on board ship or ships from the *Canary Islands to London*, and at the time the assured's agent, who effected the policy, knew that one of the ship or ships was named the *President*; and at the same time there was a paper of communication stuck up at *Lloyd's*, that "the *Howard, Marsh*, arrived off *Dover* from *Teneriffe*; sailed 24th ult.; on the 27th, off the *Salvages*, fell in with the *President, Owens*, from *Lanzaretto*; deep and leaky;" but the agent did not communicate his knowledge of the ship's name to the underwriters: Held, that the policy was thereby avoided, though the intelligence afterwards turned out to be false. *Lynch v. Dunsford* (in error). 14 E. R. 494

12 If a ship be insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval, (but the fact is not communicated to the underwriters, who do not call for information on the subject;) it is a question for the jury, whether the delay which intervened materially varied the risk: and they held it did not in a case where the insurance being effected on the 13th of August in London, on goods at and from *Heligoland to the Baltic*, and the vessel did not sail from the *Thames* till the 27th, to which was to be added the further time for reaching *Heligoland*. *Hull v. Cooper*. 14 E. R. 479

13 Where the plaintiff, on the 25th of October, 1811, effected an insurance on ship at and from her port of loading to her port of discharge, and it appeared that on the 25th of July preceding, the ship, whilst in her port of loading, was driven on a rock by a storm, but got off without appearing to have suffered material damage; and the captain afterwards wrote a letter

to the plaintiffs without communicating the accident; which letter reached them on the 5th of October; and the ship afterwards arrived at her port of discharge, where the captain made a protest, detailing the accident, and stating that the planks of her bottom must have been chafed, and her bottom otherwise injured, by striking on the rock: Held, that the plaintiffs could not recover as for an average loss arising from the accident; for the captain was bound to communicate the accident, and for want of such communication, the antecedent damage was an implied exception out of the policy: and the policy not being made void, the plaintiffs could not recover back the premium. *Gladstone v. King*. 1 M. & S. 35

14 Where it was known at *Lloyd's* that the *Sophia* of Bristol was at sea without convoy, and the broker inquired of the plaintiff at Bristol, whether that was the ship insured, and was informed it was, and that the plaintiff supposed she had been prevented by adverse winds from joining convoy at *Falmouth*; but the broker got the policy altered without disclosing this answer to the underwriters: Held, that this concealment vacated the policy. *Sawtelk v. Loudon*. 5 Taunt. 363 S. C. 1 Marsh. 99

15 The time of a ship's sailing is not, in general, a circumstance necessary to be communicated to the underwriters, except in the case of a missing ship. *Foley v. Moline*. 1 Marsh. 117

XII. Loss.

(a) By Perils of the Sea.

1 In moving a ship from one part of an harbour to another it became necessary to send two of the crew on shore to make fast a new line and cast off the rope by which the ship was made fast; these two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore; the Court of C. P. held this to be a loss by perils of the sea within the policy. *Hodgson v. Mulcolm*. 2 N. R. 336

2 If a ship hove down on a beach within the tide-way, to repair, by thereby bilged and damaged, it is not a loss occasioned by the perils of the sea. *Thompson v. Whitmore*. 3 Taunt. 227

3 A loss occasioned by another ship running down the ship insured through gross negligence, is a loss by perils of the sea. *Smith v. Scott*. 4 Taunt. 126

4 Upon an insurance on slaves against perils of the sea, their death by failure of sufficient and suitable provision occasioned by extraordinary delay in the voyage from bad weather, is not a loss within the policy, but a loss by natural death, which cannot be insured against since stat. 30 G. 3. c. 33. s. 8., and 34 G. 3. c. 86. *Tatham v. Hodgson*. 6 T. R. 656

(b) By Capture.

And see Warranties against Capture, ante, 414.

1 An American ship, insured from New York to London, warranted free from American condemnation, having, for the purpose of eluding her national embargo, slipped away in the night, was by force of the ice, wind, and tide, driven on shore, where she sustained only partial damage, but was seized the next day, and afterwards, with great difficulty and expense, got off and finally condemned by the American government for breach of the embargo: Held, as there was ultimately a total loss by a peril excepted out of the policy, the assured could neither recover for a total loss, nor for any previous partial loss arising from the stranding, &c. which in the event became wholly immaterial to the assured. *Livie v. Jansan*. 12 E. R. 648

2 British goods on board a neutral ship, being insured from London to any ports or places of discharge on the continent, &c. with liberty to carry simulated papers, &c. free of capture or seizure in her port or ports of discharge; and the ship, having received instructions to proceed to the river *Jalde* with a supercargo, who, when arrived there, was to go to *Varel*, which lies 30 miles up the river, and there give notice to a correspondent of the ship's arrival, and receive directions where the goods might most safely be landed; *Varel* and the whole adjacent country being then occupied by the enemy: Held, that a seizure by the enemy in boats from the shore, while the ship was lying on and off in the middle of the river, 15 miles up, where it is two miles wide, waiting

for directions from the supercargo, who had gone up to *Varel* to get instructions where to land the cargo, was a seizure in a port of discharge within the exemption in the policy: for the intention of the contracting parties was plainly to exempt the underwriters for land risks in any such sea-port of discharge, leaving them subject only to sea risks; and therefore the word *port* must be taken in its general and most extensive sense as contradistinguished from the *high seas*, with reference to the subject-matter. *Jannau v. Coape*.

13 E. R. 394

- 3 Under a policy of insurance on goods from *London* to any ports or places in the *Baltic*, backwards and forwards, &c.; with leave to touch, stay, and trade at all places for all purposes, and to take in and discharge goods wheresoever the ship might touch at; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, &c. until he found a port which he could enter with safety: the insurance to continue until the ship and goods arrived at as above; upon the ship until moored at anchor 24 hours in safety, and upon the goods until the same should be there discharged and safely landed; at a premium of 14 guineas, to return 7l. per cent. for arrival: with warranty of the goods free from capture or seizure in the ship's port or ports of discharge: Held, that the ship having arrived in the outer road of *Pillau*, which is a bar harbour, where large ships like this are obliged to discharge part of their cargoes into lighters to enable them to go over the bar into the inner harbour, where they discharge the remainder; and the captain having anchored two miles and a quarter further out than ships usually lie for this purpose; (but which difference was negated by the verdict of the jury as material to the object of inquiry;) and having gone on shore to report his ship and cargo, and obtain permission to discharge his cargo, and to give directions for it; and having returned in five or six days, when he was accompanied by *Prussian* soldiers and a pilot, who took possession of the ship and cargo, and discharged

part of it into a lighter in the place where the ship remained at anchor, and afterwards carried her over the bar into the inner harbour, where the goods were finally confiscated: this was an arrival in the captain's elected port of discharge, so as to discharge the underwriters from the loss by seizure there, within the meaning of the policy. *Dalglish v. Brooke*.

15 E. R. 295

(c) *By Detention.*

- 1 If an armed force board a ship, and take part of the cargo, the underwriters are not liable on a count stating the loss to be by a seizure by people to the plaintiffs unknown: for "people" in the policy means "the governing power of the country." *Nesbitt v. Lushington*. 4 T. R. 783
- 2 A policy of insurance on a ship and stores "at and from a port" in a foreign country, in the common form against arrests of princes, people, &c. extends to an embargo laid on by the government of that country in the loading port. *Rotch v. Edie*. 6 T. R. 413
- 3 And if the embargo continue, the assured may abandon and recover as for a total loss. 6 T. R. 413
- 4 *Qu.* The effect of an embargo by this country laid on a ship insured here? 6 T. R. 412
- 5 A British ship insured from *Hull* to *St. Petersburg*, having sailed under convoy to the *Sound*, was afterwards stopped in her course by a King's ship in the *Baltic*, from an apprehension of hostilities, for eleven days; and then proceeded to a point of rendezvous for convoy, where she waited seven days longer, and then sailed under convoy, till the King's officer received intelligence that a hostile embargo was laid on British ships at *St. Petersburg*, when he ordered the fleet back to the place of rendezvous, from whence the ship returned to *Hull*: Held, that this loss of the voyage was not attributable to the arrest or detainment of kings, &c. but immediately to the fear of the hostile embargo in the port of destination, and therefore not within the policy; though if the ship had not been detained in the first instance by the King's officer, she would have arrived in time at *St. Petersburg* to

have delivered her cargo before the embargo. *Forster v. Christie*,

11 E. R. 205

(d) By Barratry.

- 1 Barratry is any fraudulent or criminal conduct against the owners of ships or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. And, therefore, where a master had general instructions to make the best purchases with dispatch; this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous. *Earl v. Rowcraft*.

8 E. R. 126

- 2 A deviation of a vessel from the voyage insured, through the ignorance of the captain or from any other motive not fraudulent, though it avoids the policy, does not constitute an act of barratry. *Phyn v. The Royal Exchange Assurance*.
- 3 If a captain, contrary to the instructions of his owner, cruise for and take a prize, and the vessel be afterwards lost in consequence of it, it is an act of barratry; although the captain libelled the prize for the benefit of his owner as well as himself. *Moss v. Byrom*.
- 4 Barratry can only be committed by the master or mariners against the owner of the ship, and without his consent. *Nutt v. Bourdieu*.
- 5 The owner of the ship cannot commit barratry; he may make himself liable to the owner of the goods by his fraudulent conduct, but not as for barratry. Therefore, where any of the owners of the ship are concerned in the fraud of the master or mariners, it is no barratry in them, and the underwriter is not liable.
- 6 Where the voyage insured was from *Jamaica to New Orleans*, which lies up the river *Mississippi*, and the captain proceeded on his voyage as far as the mouth of that river, and then dropped anchor, and went up the river in his boat for a fraudulent pur-

pose of his own, it was held that the dropping of his anchor with such fraudulent intent was an act of barratry, and not merely a deviation. *Rosse v. Hunnic*.

4 T. R. 33

- 7 If a ship be insured by the terms of the policy in any lawful trade, and the barratry of the master be mentioned as one of the risks to be borne by the underwriters, they are liable for a loss which happens by the barratry of the master by smuggling. *Havelock v. Hancill*.
- 8 The stipulation respecting the employment of the ship in a lawful trade, must be applied to the trade in which the owners employ her.

3 T. R. 277

And see *Lockyer v. Offley*.

1 T. R. 252, post, page 424

(e) By Average Contributions.

- 1 A ship is obliged by necessity to put into a port to repair: the expenses of this repair are not a general average; the owner being bound to keep the ship in repair during the voyage. *Jackson v. Charnock*.
- 2 The owner of a ship may maintain an action against the owner of goods on board, to recover a contribution for sacrifices of the ship's tackle, and expenses incurred, to save the goods. *Birkeley v. Presgrave*.
- 3 A ship being captured by a privateer, afterwards escapes by using a press of sail, but in doing so, she suffers material damage: this was held not to be a general average, but a partial loss for which the underwriters were liable. *Corington v. Roberts*.
- 4 Where a ship is obliged to put into port for the benefit of the whole concern, the charges of loading and unloading the cargo, and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. *Da Costa v. Newnham*.
- 5 Freight must contribute to general average.
- 6 *Semble*, Where a ship has been forced by a storm to enter a port in order to repair, and cannot continue her voyage without apparent risk of being lost, the wages and provisions of the crew are to be brought into an average from the day it was resolved to seek such port to the day of departure from it, with all the charges of loading

2 T. R. 407

2 T. R. 408

2 N. R. 378

1 T. R. 323

1 T. R. 323

2 T. R. 407

2 T. R. 408

and every other expense incurred by that necessity. *Da Costa v. Newnham.*

3 T. R. 408, 414

- 7 Where repairs are ordered by the underwriters, for the payment of which a bottomry bond is given, and they refuse to pay it on the arrival of the ship, in consequence of which she is sold, they are liable for all the damage which shall accrue to the owner in consequence of that refusal.

2 T. R. 407

- 8 Where a ship has been repaired, the underwriters are not entitled to the usual deduction of one third, new for old, unless the ship has been put into the free possession of the owner again.

2 T. R. 407

- 9 Action on a policy on ship at and from *London* to the *East-Indies*, until her arrival at her port of discharge on the outward voyage. Loss by perils of the seas. Ship was chartered from *London* to the *East-Indies*, there to deliver her outward cargo, and return thence with a cargo for *England* into the *Thames*, and there make a true delivery, &c.; and it was agreed that the charterers should, upon condition that the ship performed her voyage and arrived at *London* and not otherwise, pay freight for every ton of goods that should be brought home at so much per ton; the ship sailed on the voyage insured, and in the course of her outward voyage incurred an average loss, but was repaired, and afterwards performed her voyage, and the freight was received: Held, that the freight was liable to contribute to general average, and that the underwriter was entitled to deduct in respect of such contribution. *Williams v. The London Assurance Company.*

1 M. & S. 318

- 10 Where goods are shipped on an invoice, an average loss upon a policy must be calculated upon the invoice price, and not upon the price of the market at which the damaged goods are arrived. *Waldron v. Coombe.*

3 Taunt. 162

- 11 The liability of the underwriter is not restricted to the single amount of his subscription, but he may be subject either to several average losses, or to an average loss and total loss, or to money expended and labour bestowed about the defence, safeguard, and recovery of the ship, to a much greater amount than the subscription; and it

shall be recoverable as an average loss. *Le Cheminant v. Pearson.*

4 Taunt. 367

- 12 Where a ship is seized and condemned by a foreign state, and purchased by the master on behalf of his owner, the owner can only recover as for a partial loss; for the property in the ship is not divested out of him. *Wilson v. Foster.*

1 Marsh. 425

XIII. ABANDONMENT.

(a) Where allowed.

- 1 On a wagering policy the assured cannot abandon. *Kulen Kemp v. Vigne.*

1 T. R. 304

- 2 Owners of ships are not entitled to abandon, unless at some period of the voyage there has been a total loss; and where the jury have found only an average loss, occasioned by the perils of the sea, the Court are precluded from saying there has been a total loss. *Cazalet v. St. Barbe.*

1 T. R. 187

- 3 Where the voyage is lost, but the property is saved, the owners may abandon. *Mitchell v. Edie.*

1 T. R. 608

- 4 Where a neutral ship bound from *America* to *Havre* was detained and brought into a *British* port: and pending proceedings in the Admiralty the King declared *Havre* in a state of blockade, by which the further prosecution of the voyage was prohibited; this was held a total loss of the voyage, which entitled the neutral assured to abandon. *Barker v. Blakes.*

9 E. R. 283

- 5 Where an act of barratry has been committed during the voyage, as by smuggling, which subjects the vessel to forfeiture.—2*u.* How far the assured may abandon? *Locker v. Offley.*

1 T. R. 252

- 6 A ship insured from *Jamaica* to *Liverpool*, was captured in the course of her voyage, and recaptured in a few days: and the assured having received intelligence of the capture, but not of the recapture, gave notice of abandonment: and soon after receiving intelligence of the recapture, and that the ship was safe in the possession of the recaptors, in a port in *Ireland*, but without any further knowledge of her state and condition, he persisted in his notice of abandonment: but the ship was afterwards restored to his

possession without damage, and arrived at *Liverpool*, and earned her freight; the salvage and charges of the recapture amounting only to 15*l.* 4*s.* 8*d.* per cent. the Court held, that he was not entitled to abandon; it appearing in the result that at the time when the notice of abandonment was given, it was in fact only a partial and not a total loss, as the assured supposed; and there being no subsequent circumstances, such as the loss of voyage, high salvage, &c. to continue it a total loss. And *quare*, whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought; the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss. *Bainbridge v. Neilson*. 10 E. R. 329

7 The like point was ruled on the freight policy, on which there was a partial loss of 13*l.* 11*s.* 5*d.* per cent.

10 E. R. 329

8 But at any rate if the underwriters accept the offer of abandonment, made upon such temporary total loss, both parties are bound by it.

10 E. R. 329

9 A foreigner insuring in this country his ships or goods on a voyage, is not entitled to abandon on an embargo laid on the property in the ports of his own country, as his assent is virtually implied to every act of his own government, and makes such embargo his own voluntary act. And goods having been consigned by such foreigner on his own account and risk to *British* merchants here, who in consequence of such consignment made advances to the foreigner, and made insurance upon the goods on his account, debiting him with the premiums; and the goods were afterwards abandoned in consequence of such embargo: Held, that as the foreigner could not recover against the underwriters, his consignees could not recover their advances under a policy made for the benefit of the foreigner, though made in their names, as interest might appear; however they might have insured their separate interests by a policy made on their own account. *Conway v. Grey*.

10 E. R. 536

10 See also *Maury v. Shedden*, 10 E. R. 540, where the point was similar.

11 See also *Conway v. Forbes*, *id.* p. 539, a similar action on another policy of insurance on cotton on board the same ship.

12 Policy of assurance on goods (copper and iron) at and from *L.* to *2.*, warranted free of particular average, and the ship, owing to sea-damage in the course of her voyage, was obliged to run into port and undergo repair, and some part of the goods were damaged; and the repairs detained her so long, as to prevent her reaching *2.* that season, and no other ship could be procured at that or a neighbouring port to forward the cargo in time, so that the voyage was abandoned, and the ship afterwards sailed on another voyage: Held, that this was not a total loss of the goods, and that the assured could not abandon. *Anderson and Another v. Wallis*. 2 M. & S. 240

(b) At what time.

1 When the assured receive intelligence of such a loss as entitles them to abandon, they must make their election in the first instance; and if they abandon, they must give the underwriters notice in a reasonable time; otherwise they waive their right to abandon, and can only recover for an average loss. *Mitchell v. Edie*. 1 T. R. 608

2 If the insured, hearing that his ship is much disabled, and has put into port to repair, express his desire to the underwriters to abandon, and be dissuaded from it by them, and they order the repairs to be made, they are liable to the owner for all the subsequent damage occasioned by that refusal, though it should amount to the whole sum insured. *Da Costa v. Newnham*. 2 T. R. 407

3 Where a vessel sailing with corn from *Waterford* to *Liverpool*, under a policy with a memorandum to be free from all but general average, was stranded near *Waterford* on the 28th of January, and continued under water at times for near a month, during which time the assured at low water were employed in saving the cargo for their own benefit, and the whole of the cargo being damaged but some recovered, and no notice of abandonment was given to the underwriters in *London*, till the

18th of *February*, the Court held, that this was not notice in such a reasonable time as to entitle the insured to abandon as for a total loss. *Anderson v. Royal Exchange Assurance Company.* 7 E. R. 38

- 4 The blockade of *Havre* having been publicly notified here on the 6th of *September*; and no notice of abandonment given till the 14th of *October*, nor any excuse substantiated for not giving it sooner for want of competent authority before, nor any authority shewn for giving it then: Held, that the notice was out of time: and this, though the plaintiff's agents in this country had no notice till the 17th of *October* of the decree for restoration of the ship and goods in question, which had been pronounced on the 8th of *October*. *Barker v. Blakes.*

9 E. R. 283

- 5 An *American*, properly licensed to export saltpetre from *Calcutta* to *America*, having insured it for the voyage, the ship was seized by the captain of a *British* ship of war at the *Cape of Good Hope*, and the cargo condemned, unshipped, and sold by order of the Court of Admiralty there, whose sentence was afterwards reversed on appeal here, and the property ordered to be restored, or its value paid to the owner, though upon payment of the captor's costs. The Court held that the assured might recover as for a total loss, without notice of abandonment; the thing insured being wholly lost to the owner by the unshipping and sale of the commodity at the *Cape*, under the order of the Court there: and that such loss was recoverable against the underwriters, on a count alleging it to have happened by the *unlawful seizure and detention of a British ship of war*: and that the Court of Appeal allowing the captor his costs, on the reversal of the sentence of condemnation, did not the less shew the original seizure and detention to be *unlawful*, as alleged in the count. *Mullett v. Shedden.* 13 E. R. 304

- 6 The assured of goods having received intelligence on the 8th of *January*, 1811, that the ship's papers were taken away on the 7th of *December* preceding by the *Swedish* Government, within whose port she was, did not give notice of abandonment to the

defendant underwriter till the 17th of *January*: but though such notice was too late, supposing an abandonment to be necessary; yet, as the goods were finally seized and unladen by orders of that Government on the 30th of *April* following; it was held that the ineffectual notice of abandonment before given did not preclude the assured from recovering as for a total loss, without any abandonment. *Mellich v. Andrews.* 15 E. R. 13

- 7 Where the ship was wrecked, but the goods were brought on shore, though in a very damaged state, so that they became unprofitable to the assured: Held, that the underwriters on the goods, who were freed by the policy from the particular average, could not be made liable as for a total loss by a notice of abandonment. *Thompson v. Royal Exchange Assurance Company.*

16 E. R. 214

- 8 Insurance on a ship, and the ship during her voyage, while loading her homeward cargo, was seized by the crew and carried away to a distant country, and her cargo plundered and the ship deserted, but was afterwards retaken by another ship, and was brought, with a small remaining part of her cargo, to an *English* port (not the port of her destination) and part of her rigging was gone, and she could not be made fit for a voyage again without considerable expense in providing a crew and stores: Held, that this was not a total loss, so as to entitle the assured to abandon after notice of the recapture. *Falkner v. Ritchie.* 2 M. & S. 290

(c) Effect of.

- 1 A ship-owner having first insured his ship with *A.*, &c. and his freight with *B.*, &c. for a certain voyage, and having notice of an embargo laid on the ship in a foreign port, abandons the ship and freight to the respective underwriters, and receives from them the whole amount of their subscriptions as for a total loss of both; first undertaking, by a memorandum on the ship policy, to assign to the underwriters thereon his interest in the ship, and to account to them for it; and afterwards undertaking, by a similar memorandum on the freight policy, to assign to those underwriters all right of recovery, compensation, &c. The ship being af-

terwards liberated, and earning freight, which was received by the assured: Held, that however the question of priority as to the title to the freight might have been as between the different sets of underwriters litigating out of the same fund, and however the weight of argument might preponderate more in favour of the underwriters on the ship; yet that the assured, who had received the freight from the shippers of goods, was at all events liable on his express undertaking to pay it over to the underwriters on freight; and that, without deducting the expenses of provisions, wages, &c. which were charges on the owner before the abandonment, and on the underwriters on ship afterwards. *Thompson v. Rowcroft*. 4 E. R. 34

S. P. *Leatham v. Terry*. 3 B. & P. 479

- 3 Upon a hostile embargo in a foreign port, the owner, who had separately insured *ship* and *freight*, abandoned them to the respective underwriters, which was accepted by them; after which the embargo was taken off, and the ship completed her voyage, and earned freight: Held, that the assured could not recover as for a total loss of freight, the freight having been in fact earned; or, supposing it to have been in any other sense lost to the assured by the abandonment of the ship to the underwriters, thereon it was so lost, not by any peril insured against, but by the voluntary act of the assured, in making such abandonment. *McCarthy v. Abel*. 5 E. R. 388

- 3 While a ship was forcibly detained in a foreign port, the owner abandoned first the ship, and then the freight, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, re-shipped her cargo which had been taken out, and returned home, earning freight, which was received by the assured: Held, that each set of underwriters were respectively entitled to the benefit of salvage, subject to the deductions of the necessary expenses of saving, it applicable to each underwriter. *Sharp v. Gladstone*. 7 E. R. 24

- 4 A vessel chartered to *Oporto*, *St. Ubes*, and *Gottenburgh*, being taken at *Oporto* by the enemy, was liberated on payment by the master of a sum of money,

and on condition of his bringing home in her to *England* *English* prisoners, to be exchanged for an equal number of *French*. Upon the news of the capture, but after the time of the ship's liberation, the owners abandoned the ship to the insurers. Upon her arrival at *Portsmouth*, the captain refused to deliver her, unless on re-payment of the ransom, which the owner refused. The Court of C. P. held, that the owner being entitled to re-take his ship which was safe at *Portsmouth*, the loss of the voyage did not enable him to recover upon a policy on the ship as for a total loss, nor could he recover, as for an average loss, the sum which had been paid by the master for the ship's ransom, and which, being an illegal payment, the plaintiff was not bound to repay to the master. *Parsons v. Scott*.

2 Taunt. 363

- 5 A ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea-peril; if the owner do not abandon, but merely apply to the underwriters for directions how to proceed upon an estimate of the expenses of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expenses of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress; though the sale was directed by the assured to be made on account of all concerned. *Martin v. Crockatt*.

14 E. R. 465

- 6 Upon a policy of insurance on *flax*, valued at so much, and warranted *free of particular average*, if the vessel be wrecked, and the assured do not abandon, but labours to save the cargo, and in fact saves a part (1-16th), though much damaged, they are entitled to recover as for a total loss of that part which was in fact totally lost, but not for the rest which was saved to them in specie, though deteriorated. *Davy v. Milford*.

15 E. R. 559

- 7 Freight is insured from *A.* to *B.* The ship sails, but is obliged to put back from stress of weather, when she is found to be incapable of complete repair, and the cargo is accordingly unloaded, and the ship sold.—In an ac-

tion on the policy for a total loss: Held, that there was no necessity for an abandonment of the freight; but that the insured was bound to use all reasonable endeavours to repair the ship, so as to have carried the cargo, or part of it, which would have operated as a salvage. *Green v. The Royal Exchange Assurance Company.* 1 Marsh. 447

XIV. ADJUSTMENT.

(a) *How made, and effect of.*

- 1 The rule by which to calculate a partial loss on a policy on goods by reason of sea-damage, is the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds: it being settled that the underwriter is not to bear any loss from fluctuation of market or port duties, or charges after the arrival of the goods at their port of destination. *Johnson v. Sheddon.* 2 E. R. 581
- 2 A partial loss on a policy on goods by reason of sea-damage, is to be calculated by ascertaining the difference between the respective gross proceeds of the same goods when sound and when damaged, and not the net proceeds. *Hurry v. The Royal Exchange Assurance Company.* 3 B. & P. 308
- 3 The rule for estimating any loss of goods insured by an open policy is to take the invoice price at the lading port, together with the premium of insurance and commission, as the basis of the calculation of the value of the goods; and the rule for estimating a partial loss in the like case, is (the same as upon a valued policy) by taking the proportional difference between the selling price of the sound, and that of the damaged part of the goods at the port of delivery, and applying that proportion (be it half, a quarter, an eighth, &c.) with reference to such estimated value at the lading port, to the damaged portion of the goods. *Usher v. Noble.* 12 E. R. 639
- 4 Goods insured upon a valued policy, having been seized, confiscated, and sold, by order of the enemy's Government, on their own account, but the necessary documents to verify the loss not having arrived here, the underwriters, on application to pay their subscriptions, agreed to adjust and pay

immediately 50l. per cent. on account, but no abandonment was made by the assured; and in the mean-time the foreign consignees of the goods, in consequence of remonstrances to the enemy's Government, obtained a restoration of half the proceeds of the goods which had been so seized and sold, which half amounted to more than the whole sum at which they were valued in the policy: yet held, that the underwriters were not entitled to recover back the 50l. per cent. they had paid on account; the assured having in fact sustained a loss of half his goods, for which he was no more than indemnified by the 50l. per cent. he had received; and there having been no abandonment to the underwriters; and the superior value of the other half of the proceeds arising from the benefit of the market, in which the underwriters had no concern. *Tunno v. Edwards.* 12 E. R. 488

- 5 A ship was insured, warranted free of capture in port. A letter announcing her capture stated it to be in port, on which the underwriter and assured adjusted, the former returned, and the latter received back, the premium. It afterwards appeared the capture was not in port: Held, that the assured was not precluded by the adjustment and repayment from recovering on the policy. *Reynier v. Hall.* 4 Taunt. 725

- 6 Whether the underwriter's name had been struck off the adjustment only; or off the policy also. 4 Taunt. 725
- 7 A cargo insured by a valued policy was confiscated and sold; but the enemy permitted the foreign consignee to retain from the proceeds the amount of his acceptances; the assured not having abandoned, the loss became partial only, and the assured was entitled to recover from the underwriter a sum bearing the same proportion to his subscription as the loss ultimately sustained bore to the whole value in the policy. *Goldsmid v. Gillies.* 4 Taunt. 803

XV. RETURN OF PREMIUM.

(a) *Who entitled to.*

See *Gladstone v. King.* 1 M. & S. 35, ante page 421. *Tait v. Levy.* 14 E. R. 481, ante 399

- 1 Where captors of a ship, seized

prize, insure their interest therein, they are not entitled to a return of premium, though it be afterwards adjudged to be no prize, and restitution be awarded to the owners by the Court of Admiralty. *Boehm v. Bell*.

8 T. R. 154

2 The premium paid on an illegal insurance to cover a trading with an enemy, cannot be recovered back, though the underwriter cannot be compelled to make good the loss. *Vandyck v. Hewitt*.

1 E. R. 96

3 A foreigner cannot recover back the premium paid by him upon a policy of insurance, if the voyage be in contravention of the British laws: Therefore, where a policy was effected upon a Danish ship at and from Bengal (where there are Danish settlements) to Copenhagen, and the ship loaded at Calcutta contrary to 12 Car. 2. c. 18. s. 1. the Court of C. P. held the assured was not entitled to recover back the premium, even though it appeared that the practice of loading foreign ships at Calcutta had prevailed for a length of time, and had been authorized by Act of Parliament soon after the shipment in question. *Morck v. Abel*.

3 B. & P. 35

S. P. Lubbock v. Potts. 7 E. R. 449

4 In an action on a policy of insurance, with account for money had and received, if the defendant pay no money into Court, but establish as a defence that the risk never commenced, the plaintiff is entitled to a verdict for the premium, though no demand of premium was made by his counsel in opening the case. *Penson v. Lee*.

2 B. & P. 330

5 In an insurance of a ship at and from Hull to Bilbao, warranted to depart from England with convoy, the voyages from Hull to Portsmouth where she meets with convoy, and from thence to Bilbao, may be considered as distinct; and in case of a loss between the two latter places, an apportionment and return of premium may be demanded. *Rothwell v. Cook*.

1 B. & P. 172

6 Policy on the *Ceres* "at and from Oporto to Lynn, with liberty to touch at any ports on the coast of Portugal to join convoy, particularly at Lisbon; at 12 guineas per cent. to return six pounds if she sail with convoy from the

coast of Portugal and arrive;" the *Ceres* sailed from Oporto with a sloop and cutter appointed to protect the trade of that place to Lisbon, from whence it was to proceed with the Lisbon trade under a larger convoy for England; in the way from Oporto to Lisbon the fleet was dispersed by a storm, and the *Ceres*, judging for the best, run for England, and arrived: Held, that the assured was entitled to a return of premium. *Audley v. Duff*.

2 B. & P. 111

7 So where the words were "if she depart with convoy from Portugal and arrive." *Everard v. Hollingworth*.

2 B. & P. 111, n.

8 The insurer on freight agreed to return part of the premium "if the ship sailed with convoy and arrived:" Held, that the insured were entitled to that return, the ship having sailed with convoy and arrived, though she had been captured and re-captured, and the assured had been obliged to pay for salvage. *Aguilar v. Rogers*.

7 T. R. 421

9 A clause in a ship policy at and from Lisbon to Cadiz and at and from thence to Flushing, at a premium of 20l. per cent., to return 8l. per cent., if the ship insured sailed with convoy from Cadiz for England, and 2l. per cent. more for convoy from England to Flushing, or 10l. per cent. if with convoy for the voyage, and arrived, does not entitle the assured to a return of premium of 8l. per cent. in consequence of the ship's arrival merely in England with convoy from Cadiz, being afterwards captured before her arrival at Flushing: for arrival means at the ultimate port of destination. *Kellner v. Le Mesurier*.

4 E. R. 396

10 An insurance having been made on goods at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country but before the knowledge of it here, and after the ship had sailed and been seized and confiscated: Held, that the policy was void in its inception; but that the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities. *Oom v. Bruce*.

12 E. R. 245

11 As the King cannot license the importation of enemy's property the produce of a foreign country into this realm, in neutral vessels contrary to the navigation laws, a licence in fact granted for such purpose will not legalize an insurance upon the property so imported. And if a policy be made upon the supposed efficacy of such a licence for the purpose of covering the importation of *British* as well as enemy's property in that manner, the underwriters cannot at any rate recover the premiums for more than the amount of the *British* interest insured; the assured not resisting their claim to that extent. *Shiffner v. Gordon*.

12 E. R. 296

12 Under a policy of insurance on goods from *London* to any ports or places in the *Baltic*, backwards and forwards, &c.; with leave to touch, stay, and trade at all places for all purposes, and to take in and discharge goods where-soever the ship might touch at; and in case it should be found dangerous to enter such ports and places, or the captain was not allowed to discharge the cargo, with leave to return, &c. until he found a port which he could enter with safety: the insurance to continue until the ship and goods arrived at as above; upon the ship until moored at anchor twenty-four hours in safety, and upon the goods until the same should be there discharged and safely landed, at a premium of 14 guineas, to return 7l. per cent. for arrival; with warranty of the goods free from capture or seizure in the ship's port or ports of discharge: Held, that the assured were entitled to a return of 7l. per cent. premium "for arrival," under circumstances which discharged the underwriters from any loss. *Dagleish v. Brook*.

15 E. R. 295

13 If a ship, sea-worthy to lie in port, sails without being rendered sea-worthy for the voyage, upon a policy "at and from," there can be no return of premium. *Annan v. Woodman*.

3 Taunt. 299

14 Where a total loss is recovered, there cannot also be a return of premium for convoy, because the total loss includes the entire premium added to the invoice price. *Langhorn v. Allbutt*.

4 Taunt. 511

15 If a policy be avoided by a misrepresentation made without fraud, the assured is entitled to a return of the premium. *Feise v. Parkinson*.

4 Taunt. 640

16 *Quare*, Whether upon a stipulation to return five per cent., if a ship sails with convoy for *Gottenburgh*, and arrives, and five per cent. more if she sails for her port of delivery, and arrives, a return of premium be due for her arrival at *Gottenburgh*, though she never arrives at her port of delivery. *Leevin v. Cormac*.

4 Taunt. 483

17 After a proclamation by the King in Council to detain and bring into port all *Danish* vessels, a hired armed ship of his Majesty took and carried into *Lisbon* a *Danish* vessel, and sold her cargo there towards defraying in part the expense of necessary repairs, but without the authority of a Court of Admiralty; and afterwards took in a cargo on freight for *England*, and sailed on the 3d of *November* from *Lisbon*; on which day hostilities were declared against *Denmark* by another proclamation of the King in Council; after which an insurance was made on the ship and freight by order and on account of the captors: Held, that a statement in a case reserved, that the insurance was on account of the captors, precluded the consideration whether a count in the declaration could be sustained, averring the interest to be in the Crown, and the insurance to be made on account of his Majesty; and that the captors had no insurable interest, as they could claim nothing of right, but only *ex gratia* of the Crown; the *Dane* having been seized and detained before any declaration of war against *Denmark*, and the captors having no claim to prize under the prize Acts. But as there was no fraud in the captors in effecting the policy, nor any thing illegal in the voyage or insurance: Held, that the assured were entitled to recover back the premium, which had not been paid into Court. *Routh v. Thompson*.

11 E. R. 428

XVI. PLEADINGS.

(a) Declaration.

See *Routh v. Thompson*, *supra*.

1 In a declaration on a policy of insurance, the plaintiff averred that Messrs. H., at the time of effecting the policy,

and at the time of the loss, were interested in the cargo which was the subject of the insurance "to a large amount, to wit, to the amount of all the money ever insured thereon;" at the trial it appeared, that previous to effecting the policy Messrs. H. had admitted another mercantile house to a joint concern in the cargo insured: Held, that the averment was supported by the evidence. *Page v. Fry.*

2 B. & P. 240

2 If A. and B. declare upon a policy of insurance, and aver that they were interested until and at the time of the loss, and it be proved that C., after the policy was effected, but before the loss, became a partner with A. and B. in the goods insured; it seems that the variance is not fatal, for the averment of interests relates to the time of making the policy. *Perchard v. Whitmore.*

2 B. & P. 155, n.

3 Commissioners for the care of foreign ships and goods seized by the King, may insure in their own names, and declare on their own interest. *Crawford v. Hunter.*

8 T. R. 13

4 A declaration on a policy of insurance on a foreign ship need not aver any interest in the assured: though there be no such words as "interest or no interest" in the policy. *Nantes v. Thompson.*

2 E. R. 385

5 Declaration on a policy on ship and goods at and from London to Amsterdam, "beginning the adventure on the goods from the loading thereof on board the said ship;" with a memorandum that the insurance was on 15 hogsheads of tobacco, marked B. No. 51 and 65.: special demurrer, first, because the goods were not averred to have been put on board at London; secondly, because they were not alleged to have been marked or numbered as in the memorandum, but only thus, "15 hogsheads the goods in the said policy mentioned;" thirdly, because the plaintiff was stated to have been interested until and at the time of the loss, without shewing that he was interested at the time of the policy being made; fourthly, because the allegation of the loss was without a venue *Semb.* that the declaration was bad. *De Symonds v. Shedden.*

2 B. & P. 153

6 Commissioners were authorized, by a commission granted in pursuance of a statute, to take into their possession ships and goods belonging to subjects of the United Provinces, which had been or might be detained in or brought into the ports of this kingdom, and to manage, sell, and dispose of the same to the best advantage, according to such instructions as they should receive from the King in Council; before any declaration of war against the United Provinces, one of his Majesty's ships took several Dutch East Indiamen, and carried them into St. Helena: The commissioners, with the assent of the lords of the treasury, insured them at and from St. Helena to London. War was soon after declared against the United Provinces, and the ships were finally condemned as prize to his Majesty, "as having belonged, when taken, to subjects of the United States, since become enemies." Upon a loss happening, the commissioners declared on the policy, and averred the interest to be in the King; and held, that the action well lay. *Lucena v. Crawford (in error).*

1 Taunt. 325

And see S. C.

2 N. R. 269

N. B. For an abstract of the record in this case, see

3 B. & P. 75

7 A count stating the nature of their trust, and averring the interest to be in themselves as commissioners; and another count to the like effect, but with an averment that the said ships, or any of them, were not belonging to his Majesty, or any of his subjects. (with a view to stat. 19 G. 2. c. 37 s. 1.) were both held good upon demurrer. *Crawford v. Hunter.*

8 T. R. 13

8 A declaration, stating that the plaintiffs (M. and another) caused to be effected a policy, containing that J. G. and Co. did make assurance, and averred the interest in F. W. S., with a promise by the defendant to plaintiffs, in consideration of the premium paid by them; was held good, after verdict; for it must be intended that the plaintiffs insured under the names of J. G. and Co., and that they were proved to be within one or other of the descriptions of persons in the stat. 28 G. 3. c. 56. in whose names, or usual

style or firm of dealing, insurance may be made. *Mellish v. Bell.*

15 E. R. 4

9 Joint owners of property insured for their joint use and on their joint account, cannot recover upon a count on a policy, averring the interest to be in one of them only. *Bell v. Ansley.*

16 E. R. 141

10 If a British subject has an interest in any part of a cargo on a valued policy, he may recover to the extent of the policy on a count averring interest in himself, if he proves some interest, although alien enemies may be interested in other parts of the cargo. *Feise v. Aguilar.*

3 Taunt. 506

11 A declaration upon a policy effected upon an interest in the thing insured, must aver in whom the interest is vested, whether it be on a foreign or British ship. *Cousins v. Nantes.*

3 Taunt. 513

12 No averment of interest is necessary on a wagering policy.

3 Taunt. 513

13 Where the plaintiffs declared on a policy of insurance, and averred that they were the persons residing in Great Britain who received the order for and effected the insurance; this was considered as a material averment, and not sustained by evidence of a letter received by them after the policy was effected, directing them to make assurance; although the policy was originally on goods on board the *Ann*, or ships, or by whatever other name the ship should be named; and the plaintiffs, upon the receipt of the letter, procured a memorandum to be made on the policy, signed by the defendant, declaring the interest to be on board the *Herald*, the ship mentioned in the letter. *Bell v. Janson.*

1 M. & S. 201

14 Where plaintiff effected an insurance on ship, as well in his own name as for and in the name of all and every other person, &c. in the usual form, for the benefit of S. an alien enemy, and procured a licence to legalize the voyage, and a loss happened; and two years afterwards S., by letter to the plaintiff, adopted the insurance: Held, that the plaintiff might recover

against the underwriter, averring the interest in S. *Hagedorn v. Olofferan.*

2 M. & S. 485

15 It is necessary in a declaration on a policy, truly to describe the interest on which the policy is effected: therefore, if A. and B., jointly interested, effect an insurance; and there be two counts, the one averring interest in A., and the other averring interest in B., the plaintiff can recover on neither count. *Cohen v. Hannam.*

5 Taunt. 105

16 A. and B. trading under the firm of A. and Co., engage in an adventure, and afterwards receive C. and D. as sharers therein: a policy is effected on account of A. and Co., and a loss having happened, the interest is averred, in the declaration, to be in A. and B. with other counts stating it to be in the other parties respectively, which a Judge at Chambers directed to be struck out. It was left to the jury, to say, Whether all the adventurers were intended to be included, which they found in the affirmative: Held, that the plaintiff was entitled to recover accordingly. *Carruthers v. Shedden.*

1 Marsh. 416

17 *Quare*, Whether, if no interest be averred, it is not sufficient under the stat. 19 G. 2. c. 87. s. 2., to state that the ship was foreign when the policy was under-written and the loss happened, without stating the ship to be such when the risk commenced. *Kellner v. Le Mesurier.*

4 E. R. 396

18 The plaintiff having shipped goods on an adventure to St. Petersburg on board a vessel chartered for the purpose, made insurance on ship and goods in the common printed form in blank; and by a written memorandum in the policy, "the underwriters agreed to pay a total loss in case the ship *Anne* should not be allowed by the Russian Government to discharge her cargo at St. Petersburg, on which voyage the vessel had then sailed, chartered by the plaintiffs." The Court of K. B. held that the assured were entitled to recover upon this policy on an allegation that the vessel on her arrival at St. Petersburg, was not allowed by the Russian Government to discharge her

cargo, but was obliged to return back with it, by which the value of the cargo was reduced below the amount of the invoice price, together with the charges paid thereon, and the premium of insurance, &c. *Puller v. Glover.*

12 E. R. 124

19 A declaration on a policy of insurance on goods at and from *L.* by land carriage to *H.*, and at and from thence by a packet to *G.*, beginning the adventure on the goods from the loading on board the ship, and averring that the goods were delivered at *L.*, to carriers to be carried from *L.* by land carriage to *H.*, and by the fraud and negligence of the servants and persons employed by the carriers were wholly lost: Held, that this was a loss within the meaning of the policy, which was the usual printed form of marine policy, containing the usual printed enumeration of risks; and that it was not necessary to aver that the goods were loaded at *L.*, to be carried to *H.* *Boehm v. Combe.*

2 M. & S. 172

20 On a policy at and from *Pernambuco* or any other port, or ports, in the *Brazils* to *London*, beginning the adventure, from the loading the goods on board the ship, on the "termination of her cruise, and preparing for her voyage to *London*." The ship, on the termination of her cruise, touched at *Pernambuco*, but failing to procure a cargo there, she proceeded for *St. Salvador*, and was lost on her voyage thither: Held, that the voyage was well described in the declaration, as from *Pernambuco* to *London.* *Lambert v. Liddard.*

1 Marsh. 154

21 Policy on indigo and bale goods; the declaration alleged that "divers goods, &c. of 3,000*l.* value were put on board," and afterwards averred that "the said writing or policy of insurance was made on the said goods," &c.: Held good on special demurrer. *De Symons v. Johnston.*

2 N. R. 77

22 Money having been expended in reclaiming a cargo on board a ship captured, was insured by the owners upon the event of the ship's arrival at *Marseilles*; the ship being captured, and restored upon appeal, relinquished her voyage and was afterwards lost; pending the appeal, the goods were ordered to be sold, and the expenses of the appeal were afterwards defrayed therewith; an averment of a loss

by capture was held bad, because the ship might, notwithstanding the capture, have afterwards arrived at *Marseilles.* *Kulen Kemp v. Vigne.*

1 T. R. 304

23 If a declaration on a policy of insurance aver the goods to have been seized in a hostile manner by enemies to the plaintiff unknown; the averment is not supported by evidence that they were seized by the Spanish Government as about to be imported contrary to the laws of Spain. *Mathie v. Potts.*

3 B. & P. 23

24 Though a policy of insurance on goods contain a clause of warranty, freeing the underwriter from seizure in the ship's port of discharge, yet the assured having declared generally as for a loss by hostile seizure, without negating that it was in the ship's port of discharge, is no cause for arresting the judgment after verdict. *Rucker v. Green.*

15 E. R. 288

25 A loss by barratry is well alleged, though the proof be, that it happened by the act of an enemy and by barratry jointly. *Toulmin v. Anderson.*

1 Taunt. 277

26 If it be alleged that a loss happened by the fraud and negligence of the master; this is a sufficient allegation of barratry. *Knight v. Cambridge.*

8 E. R. 135, n.

(b) Plea and Replication.

1 The *British* agent effecting a policy of insurance on behalf of alien enemies, who became enemies after the loss happened, but before the action commenced, is entitled to recover against the underwriter, who had only pleaded the general issue: for such temporary suspension during the war of the assured's right of suit upon a contract, legal at the time, and liable to be enforced upon the return of peace, cannot be taken advantage of under a plea of a perpetual bar; there being no legal disability in the plaintiff on the record to sue. *Flindt v. Waters.*

15 E. R. 260

2 A plea of alienage to an action on a policy of insurance brought in the name of an *English* agent for his principal, (an alien) such interest appearing on the record, is a good plea; and a replication to such a plea, that the alien is indebted to the agent (the

plaintiff) in more money than the value of the property insured, cannot be supported. *Brandon v. Nesbitt*.

6 T. R. 20

XVII. EVIDENCE.

(a) Mode of Proof.

N. B. When a foreign judgment shall be conclusive in our Courts, see *WARRANTY, Neutrality, ante, page 415, &c.* And see *post, tit. WITNESS*.

1 A sentence of condemnation in a French Court of Admiralty, is admissible evidence in an action here between the assured and underwriters of a policy of insurance containing a warranty of neutrality. *Lothian v. Henderson*.

3 B. & P. 499

2 It seems that the sentence of a foreign Court of Admiralty, condemning a ship warranted neutral, in which the consideration leading to the judgment proceeds on the want of a document not required by the law of nations, but which adjudges "lawful prize all the goods and effects which compose the cargo of the said ship, since the whole, (owing to the captain not being provided with proper and regular dispatches and papers,) is to be deemed the property of the enemies of the French republic," is conclusive evidence against the warranty of neutrality.

3 B. & P. 499

3 In an action on a policy, the property of the ship may be proved by parol evidence of the possession of the assured, unless disproved by the production of the written documents of the ship under the Register Acts. And held, that such parol evidence of ownership, arising from possession at particular period, was not disproved by shewing a prior register in the name of another, and a subsequent register to the same person. *Robertson v. French*.

4 E. R. 130

4 The plaintiff's agent shewed to the defendant, an underwriter, the captain's protest, containing an account of the loss of the ship insured, demanding payment: Held, that this did not entitle the defendant to read the protest in evidence in an action on the policy. *Senat v. Porter*.

7 T. R. 158

5 The insured cannot recover upon a policy, unless the loss be a direct and immediate consequence of the peril insured; so that slaves who die by any

other means than by wounds or bruises received in the very act of quelling a mutiny, are not within that provision of an African policy, which insures against loss by mutiny. *Jones v. Schmoll*.

1 T. R. 130, n.

6 An averment of interest at the time of effecting the policy is immaterial; and need not be proved; it is sufficient if the plaintiff be interested at the commencement of the risk. *Rhind v. Wilkinson*.

2 Taunt. 237

7 Seamen's wages and provisions are not covered by an insurance on the body of the ship. *Robertson v. Ewer*.

1 T. R. 127, 132, n.

And see *Brough v. Whitmore*.

4 T. R. 206

8 In an act by the assured of goods against the underwriters for a loss by the barratry of the master, proof that the person described in the policy as master, and who was treated with and acted as such, carried the ship out of her course for fraudulent purposes of his own, is *prima facie* sufficient to entitle the plaintiff to recover, without shewing negatively that he was not the owner, or affirmatively that any other person was. *Ross v. Hunter*.

4 T. R. 33

9 If an insured declare upon a total loss by capture, and after proving a capture shew a recapture, upon which proceedings were had in an Admiralty Court, he cannot recover without proving the proceedings in the Admiralty Court under seal, though he only claim the amount of the loss sustained by the salvage, proceedings, and sale. *Thellusson v. Shedden*.

2 N. R. 228

10 Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the

witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book, for the private information of himself and the governor; which book was not produced; for such book, if in Court, would not have been evidence *per se*; but could only have been used by the witness to refresh his memory. *Kensington v. Inglis*. 8 E. R. 273

11 If a licence to trade be lost, the next best evidence is the register of it in the books of the Secretary of State. *Rhind v. Wilkinson*. 2 Taunt. 237

12 Where an assured, a *British* merchant, in an action on a policy of insurance, on goods bound to an enemy's port in *Holland*, seeks to protect the adventure under the King's licence to trade with the enemy, it is not sufficient to give in evidence at the trial, and to prove his possession in fact before the voyage commenced, of a *general* licence dated three months before, licensing *six neutral vessels* under certain neutral flags, to pass unmolested to or from any port of *Holland*, from or to any port of this kingdom, with certain goods (including the goods insured), which licence was directed to *R. S. and other British merchants*, with a condition annexed that they should cause the licence to be delivered up to them or their agents when the ship should enter any port of this kingdom; without also giving probable evidence to account for his possession of the licence, and to shew that his use of it was lawful; as by shewing from whom and when he received it, and then, by connecting his own particular adventure with such general licence. *Barlow v. McIntosh*. 12 E. R. 311

13 A sentence condemning as enemy's property a cargo which the master had barratrously carried into an enemy's blockaded port, although it may be conclusive evidence that the cargo was enemy's property at the time of the capture and condemnation, does not disprove the allegation that the cargo was lost by the captain's barratrously carrying the cargo to places unknown, whereby the goods became liable to be and were confiscated. *Goldschmidt v. Whitmore*. 3 Taunt. 508

14 If the defendant on a policy would impugn the plaintiff's right to recover for a loss by capture, on the ground that the condemnation appears by the sentence of a foreign Court to have proceeded on the want of certain documents, which the plaintiff ought to have provided, it is for the defendant to shew by evidence, the foreign law or treaty which renders such documents necessary. *Le Cheminant v. Pearson*. 4 Taunt. 367

15 The original certificate of a ship's registry is no evidence for the plaintiff upon a policy of insurance, that the interest in the ship is in the persons in whom it is averred, and for whom he effected the insurance as agent. *Pirie v. Anderson*. 4 Taunt. 652

16 Property in a ship must be proved by evidence of possession in the plaintiff; his vendors, or bailees, accompanied with a certificate of registry. 4 Taunt. 652

17 No evidence can be received of representations made by the insurance broker to other underwriters than the defendant, subsequent to the first underwriter; and evidence of representations to the first underwriter is received more on precedent than on reason. *Brine v. Featherstone*. 4 Taunt. 869

18 Parol evidence of what passed at the time of effecting a policy of insurance is not admissible to restrain the effect of the policy. *Weston v. Enes*. 1 Taunt. 115

XVIII. costs.

1 If an underwriter be held to bail for the amount of his subscription to a policy of insurance, the Court of C. P. will order the bail-bond to be cancelled, and the plaintiff to pay the costs. *Lear v. Heuth*. 5 Taunt. 201 S. C. 1 Marsh. 19

2 If the plaintiff recover a verdict for a loss on a policy, and endeavour, on a rule *nisi* being obtained for a nonsuit, to support his verdict to the extent, although he be held entitled to a return of premium, he is not entitled to the costs of the rule; nor to any costs except of the count for money had and received, and of such parts of the brief and evidence as apply thereto. *Spitta v. Woodman*. 3 Taunt. 406

XIX. INSURANCE BROKER.

(a) *Rights and Duties.*And see *post. tit.* SET-OFF.

1 The broker effecting a policy, being the common agent of the assured, and of the underwriter, while the premium remains in his hands for the one party, and the policy for the other, and having received notice of events which entitled the assured to a return of premium before action brought by the underwriter to recover the full premium, is authorized to deduct such return, and only to pay over the difference to the underwriter. *Shee v. Clarkson.* 12 E. R. 507

2 In an action by the assignees of a bankrupt, underwriter, against defendants, insurance brokers, for the balance of an adjusted account between the bankrupt and defendants, and also for premiums of insurance on policies underwritten by the bankrupt with them as brokers, before the bankruptcy, the brokers are not entitled to deduct for returns of premium due on policies, the premiums of which policies formed a part of the adjusted account, but where the events entitling them to such returns were not known till after such adjustment; nor can they deduct for returns of premium on some of the policies, for the premiums of which the action is brought; the events entitling them to which returns happened before the bankruptcy, but the returns were not adjusted; nor can they deduct for returns on other policies for the premiums of which the action is brought, the events entitling them to which returns happened since the bankruptcy, but before the commencement of the action: the brokers not having a commission *del credere*, nor being personally interested in any of the insurances. *Parker v. Smith.* 16 E. R. 382

3 Although generally an underwriter, having subscribed a policy, and thereby confessed the receipt of the premium, is estopped from afterwards claiming the premium against the underwriter; yet, where by the fraud of the assured, the underwriter is induced to give credit for the premiums to the broker, and the broker to give credit to the assured, the underwriter is entitled to receive the premium from the assured. *Foy v. Bell.* 3 Taunt. 498

4 An underwriter, after executing a policy, and giving credit to the broker for the premium, may recover the premium against the underwriter, if it appear that the assured, (to cover a balance due from the broker to himself,) procured him to effect the insurance, debiting the assured in account with the premiums, and lodging the policies in the hands of the assured, to enable him to receive the losses. *Mavor v. Simcon.* 3 Taunt. 497

5 A broker who has neglected to insure the premium according to the directions of his principal, cannot set up as a defence, that he was directed also to insure against *British* capture; for that is not a crime so as to render the whole insurance illegal, though it would be void *pro tanto*. *Glaser v. Cowie.* 1 M. & S. 52

6 A broker, in pursuance of instructions previously received from *Sunderland*, effected a policy at *Lloyd's* at a time when a letter lay on his table at the coal exchange unopened, announcing the ship's loss: Held, the jury were warranted in finding this was no such want of diligence as avoided the policy. *Wake v. Atty.* 4 Taunt. 493

7 If an insurance broker state, by way of inference and computation, that a ship is at a certain place, at the time of effecting a policy, it is not a ground of avoiding the policy, though the broker was utterly mistaken; the underwriter not taking the pains to inquire what were the facts on which the broker formed his conclusion. *Brine v. Featherstone.* 4 Taunt. 869

XX. BOTTOMRY AND RESPONDENTIA.

1 An assured on bottomry cannot recover against the underwriter, unless there has been an actual total loss of the ship: for if the ship exist in specie, in the hands of the owners, though under circumstances that would entitle the assured on the ship to abandon, it will prevent its being an utter loss within the meaning of the bottomry bond. *Thomson v. The Royal Exchange Assurance Company.* 1 M. & S. 30

2 It would seem that a *respondentia* bond for money lent by a *British* subject, upon goods on board an *American* ship on a voyage from *Bengal* to

Rhode Island, is void. *Sumner v. Green*.

1 H. B. 301
And see *Busk v. Fearon*. 4 E. R. 319

XXI. INSURANCE ON LIVES.

See *Gillett v. Mauman*. 1 Taunt. 187
And *Mauman v. Gillett*. 2 Taunt. 325, n.

- 1 On an insurance on a life for a year, if the person die after the expiration of it, though in consequence of a mortal wound received before, the insurer is discharged. *Lackyer v. Offley*.

1 T. R. 260

- 2 A creditor may insure the life of his debtor to the extent of his debt; but such a contract is substantially a contract of indemnity against the life of the debtor; and therefore, if, after the death of the debtor, his executors pay the debt to such insuring creditor, the latter cannot afterwards recover upon the policy: although the debtor died insolvent, and the executors were furnished with the means of payment by a third person. *Godsall v. Baldere*.

9 E. R. 72

- 3 Where one, as a member of a life insurance society for the benefit of widows and female relations, entered into a policy of assurance with the society, for a certain annuity to his widow after his death, in consideration of a quarterly premium to be paid to the society during his life: and the society covenanted to him and his executors, &c. that if he should pay to their clerk the quarterly premium on the quarter days during his life, and if he should also pay his proportion of contributions which the members of the society should, during his life, be called on to make, in order to supply any deficiency in their funds; then, on due proof of his death, the society engaged to pay the annuity to his widow: and by the rules of the society, if any member neglected to pay up the quarterly premiums for 15 days after they were due, the policy was declared to be void, unless the member (continuing in as good health as when the policy expired) paid up the arrears within six months, and 5s. per month extra: The Court held, that a member insuring, having died, leaving a quarterly payment over-due at the time of his death, the policy expired; and that a tender of the sum by his executor, though made within 15 days after it became

due, did not satisfy the requisition of the policy, and the rules of the society which required such payment to be made by the member in his lifetime, continuing in as good health as when the policy expired. *Went v. Blunt*.

12 E. R. 183

It is not to be concluded that a disorder with which a person is afflicted before he effects an insurance on his life, is a "disorder tending to shorten life" within the meaning of the declaration required by the *Equitable Insurance Office*, from the mere circumstance that he afterwards dies of it, if it be not a disorder which generally has that tendency. *Watson v. Mainwaring*.

4 Taunt. 763

XXII. AGAINST FIRE.

- 1 A deed-poll containing an insurance against fire, may refer to conditions in a printed paper, without stamp, seal, or signature; and it may be a part of those conditions, that the insured shall procure a certificate of his character, and that the loss happened without fraud. *Routledge v. Burrell*, (Bart.)

1 H. B. 254

- 2 By the proposals of the *Phoenix Company* it is stipulated that "persons insured shall give notice of the loss forthwith, deliver in an account, and procure a certificate of the ministers and churchwardens, and some reputable householders of the parish, importing that they knew the character, &c. of the assured, and believed that he really sustained the loss and without fraud; on the question, whether the procuring of such a certificate were a condition precedent to the right of the assured, to recover on the policy, the Court of C. P. were divided, and gave judgment *pro forma* for the plaintiffs; but the Court of King's Bench on a writ of error reversed the judgment, holding this to be a condition precedent; and that it was immaterial that the minister, &c. wrongfully refused to sign the certificate. *Wood v. Worsley*.

2 H. B. 574;

And *Worsley v. Wood* (in error).

6 T. R. 710;

And see *Oldman v. Bewicke*.

2 H. B. 577, n.

- 3 A certificate of some reputable householders alone is not sufficient.

6 T. R. 710

- 4 In a policy of insurance against loss

by fire from half a year to half a year, the assured agreed to pay the premium half yearly, "as long as the insurers should agree to accept the same," within 15 days after the expiration of the former half year; and it was also stipulated that no insurance should take place till the premium was actually paid; a loss happened within 15 days after the end of one half year, but before the premium for the next was paid: it was held, that the insurers were not liable, though the assured tendered the premium before the end of the 15 days, but after the loss. *Tarleton v. Staniforth.*

5 T. R. 695

[Affirmed in *Cam. Scac.* 1 B. & P. 470.]

- 5 By a policy under seal, referring to certain printed proposals, a fire office insured the defendant's premises from 11th of Nov. 1802 to 25th Dec. 1803, for a certain premium which was to be paid yearly on each 25th Dec. and the insurance was to continue so long as the insured should pay the said premium at the said times, and the office should agree to accept it. And by the printed proposals it was stipulated, that the insured should make all future payments annually at the office within 15 days after the day limited by the policy, upon forfeiture of the benefit thereof, and that no insurance was

to take place till the premium were paid. And by a subsequent advertisement (agreed to be taken as part of the policy), the office engaged that all persons insured there by policies for a year or more, had been and should be considered as insured for 15 days beyond the time of the expiration of their policies; yet held, notwithstanding this latter clause, the assured having, before the expiration of the year, had notice from the office to pay an increased premium for the year ensuing, otherwise they would not continue the insurance, which the assured had refused; that the office was not liable for a loss which happened within 15 days from the expiration of the year for which the insurance was made, though the assured, after the loss and before the 15 days expired, tendered the full premium which had been demanded. The effect of the whole contract, &c. taken together being only to give the assured an option to continue the insurance or not, during 15 days after the expiration of the year, by paying the premium for the year ensuing, notwithstanding any intervening loss, provided the office had not, before the end of the year, determined the option by giving notice that they would not renew the contract. *Savin v. James.*

6 E. R. 571

INTEREST OF MONEY.

I. WHERE RECOVERABLE, AND HOW COMPUTED.

II. WHEN ALLOWED IN ERROR.

I. WHERE RECOVERABLE, AND HOW COMPUTED.

- 1 Debt will lie for interest of money. *Herries v. Jamieson.* 5 T. R. 553
- 2 A bond is given by A., B., and C., to D., reciting "that A. having received from D. a certain sum of money in the *East-Indies*, had drawn bills of exchange there payable to D. on a house in *England*; and that the obligors had agreed with D. that, if the bills should not be accepted and paid, they would pay the amount thereof, with interest, from the day of their respective dates, by way of penalty;" with a condition to be void if

the bills should be accepted and paid according to the tenor thereof. On non-payment of the bills, D. is entitled to recover no more than the amount of them with interest from the time of their becoming due. *Orr v. Churchill.*

1 H. B. 227

- 3 Proceedings on a single bond were stayed by the Court of C. P. on payment by the obligor of principal and costs without interest. *Hogan v. Page.*

1 B. & P. 357

See *McClure v. Dunkin.*

1 E. R. 436, ante, 169

Holdip v. Otway.

ibid.

- 4 *Secus*, in the case of a bond conditioned for the payment of a lesser sum; on which interest must be paid from the day of the date, though no interest be reserved in terms nor any

day certain for payment expressed.
Farquhar, Bart. v. Morris.

7 T. R. 124, ante, 164

5 In an action of debt, to recover a sum awarded to the plaintiffs by a jury under the 43 G. 3. c. 140., and 48 G. 3. c. 11., as a compensation to be made by the *Bristol Dock Company* for an injury done to the plaintiff's property by means of the works authorized by those Acts: Held, that the jury might give interest for the detention of the sum awarded. *Hillhouse v. Davis* 1 M. & S. 169

6 Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expenses beyond the amount of 5*l.* per cent. if such charges are reasonable, warranted by usage, and not made a colour for usury. *Auriol v. Thomas.* 2 T. R. 52

7 The charge of 10*s.* per pagoda on a bill returned protested from *India* is not excessive, though it was taken in payment here at the rate of 6*s.* 6*d.* per pagoda. 2 T. R. 52

8 Notice must be given to the defendant of the prothonotaries appointment to compute principal and interest on a bill of exchange. *Branning v. Patterson.* 4 Taunt. 487

9 The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour. *Walker v. Burnes.* 5 Taunt. 240 S. C. not S. P. 1 Marsh. 36

10 In *assumpsit* for work and labour and money paid, the jury may in their verdict calculate interest on the money really advanced, but not on the damages for the work and labour, *Trelawney v. Thomas.* 1 H. B. 303

11 Where the defendant by a note in writing undertook to be answerable for goods to be furnished to a third person; the note specifying the time of credit to be allowed, the vendor was held to be entitled to interest on the price from the expiration of that time. *Mountford v. Wiles.*

2 B. & P. 337

12 Where goods are sold, to be paid for by a bill of a certain date, the price shall bear interest from the day when the bill would have been due, and may be recovered as damages, on

a special count for the non-delivery or non-payment of the bill. *Slack v. Lowell.*

3 Taunt. 157

13 But if, in such a case, upon a general count for goods sold and delivered, the jury give the price and interest as damages, the Court of C. P. will not therefore set aside the verdict.

3 Taunt. 157

14 Though an agreement for the sale of goods which were afterwards delivered, give a certain day of payment for the price, interest does not run upon the sum due from that day. *Gordon v. Swan.*

12 E. R. 419

15 But where goods are sold and delivered upon an agreement by the vendee to pay for them by a bill at a certain date; as interest would have run upon such bill, if given, it may be recovered in an action for the price of the goods brought after the time when such bill would have become due; and it may be recovered as part of the estimated value of the goods upon the common count for goods sold and delivered. *Marshall v. Poole.*

13 E. R. 98

16 Interest is not allowable by law upon money lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time. *Calton v. Bragg.*

15 E. R. 223

17 In an action for money had and received, the plaintiff can recover only the net sum received, without interest. *Walker v. Constable.*

1 B. & P. 306

18 Execution cannot be taken out for interest upon a sum awarded to be paid on a particular day, and for which sum judgment was entered up. But it is in the province of the jury (or the arbitrator interposed in their place) to allow interest or not in the damages. *Lee v. Lingard.*

1 E. R. 401

II. WHEN ALLOWED IN ERROR.

1 In debt upon a recognizance, bail in error in the Exchequer Chamber are not liable to pay interest on the judgment, between the signing of the judgment in the Court of King's Bench, and the affirmation of it in *Cam. Scac.* *Frith v. Leroux.*

2 T. R. 57

2 But when the judgment is affirmed, it then becomes the debt of the bail:

- and if an action be brought against them on that judgment, the jury may give interest as damages for the detention of the debt. 2 T. R. 59
- 3 The Court will not direct the Master to include interest in the costs to be taxed on nonprossing a writ of error returnable in parliament for want of transcribing. *Cumming v. Hanforth*. 2 T. R. 58
- 4 And if an action of debt be brought on a judgment, which was affirmed in error, against the party himself, the jury by way of damages may give interest upon the sum recovered by the judgment from the time of signing it, where by the practice of the Court in which error is brought, such interest is not allowed in costs upon the affirmance. *Entwistle v. Shepherd*. 2 T. R. 78
- 5 The Court of Exchequer Chamber will allow interest to a defendant in error, under stat. 3 H. 7. c. 10. on a judgment of *non-pros.* as well as on a judgment of affirmance. *Note.* For the future the interest allowed will be 5l. per cent. instead of 4l. *Sykes v. Harrison (in error)*. 1 B. & P. 29
- 6 But it is entirely a matter in the discretion of that Court, whether interest shall be allowed or not, on such affirmance. *Shepherd v. Mackreth*. 2 H. B. 284
- 7 And upon the affirmance of a judgment for the plaintiff, in an action upon an attorney's bill, they will not allow interest. *Walker v. Bayley (in error)*. 2 B. & P. 219
- 8 An avowant in replevin for rent in arrear, for whom verdict and judgment are given below, which are affirmed on a writ of error, is not entitled to be allowed interest on the sum recovered, by force of the stat. 3 H. 7. c. 10. which is confined to judgments recovered by plaintiffs below, and affirmed on a writ of error. *Goldring v. Dias*. 10 E. R. 2
- 9 In trover for bills of exchange, the Court of Exchequer Chamber allowed interest from the date of the final judgment upon all such bills as had been received before the judgment, and upon all such as had been received afterwards from the time of the receipt. *Atkins v. Wheeler (in error)*. 2 N. R. 205
- 10 Upon affirmance of a judgment, for the plaintiff in an action for not performing a contract, the Exchequer Chamber refused to allow interest. *Bristow v. Waddington (in error)*. 2 N. R. 360
- 11 Upon a writ of error being nonprossed, if the cause of action in the Court below was not a debt which carried interest, the Court of error will not allow interest on the sum recovered by the judgment, unless it is distinctly proved, or admitted, that the writ of error was brought for delay. *Saxelby v. Moor*. 3 Taunt. 51
- 12 Although there are strong circumstances, from which it may be inferred that it was brought for delay only. *id. ibid.*
- 13 No interest given on affirmance of a judgment on a replevin bond. *Anonymous*. 4 Taunt. 30
- 14 Interest allowed on affirmance of a judgment on a contract to make good to the acceptor of a bill, so much money as the dividends of a bankrupt's estate should fall short of the amount of the bill. *Furlonge v. Rucker*. 4 Taunt. 250
- 15 Interest allowed on the affirmance of a judgment obtained for the balance of a merchant's account, and for interest on that balance. *Hammel v. Abel*. 4 Taunt. 208
- 16 Interest allowed upon the affirmance of a judgment for goods sold and delivered, which were to have been paid for by a bill, the bill not having been given. *Middleton v. Gill*. 4 Taunt. 298
- 17 Interest is not allowed upon the affirmance of a judgment merely for money lent. *Gwyn v. Godby*. 4 Taunt. 346
- 18 But interest is allowed upon the affirmance of a judgment for the balance of an account for money lent and for interest upon the advances, where the plaintiffs, as bankers, have been in the habit of charging it. 4 Taunt. 346
- 19 No interest on affirmance in error of a judgment on a bail recognizance in the King's Bench. *Anonymous*. 4 Taunt. 722
- 20 Interest given on affirmance of a judgment on a promise to give a mortgage. *Anonymous*. 4 Taunt. 876
- 21 If judgment be entered generally upon a declaration in *assumpsit*, some of the counts of which are for unliquidated damages, no interest can be

allowed on affirmance of judgment in error. *Powell v. Saunders* (in error), in *Cam. Scac.* 5 Taunt. 28
 22 *Semble*.—That a judgment on a count

for not accounting for goods delivered to sell on commission, will not bear interest on affirmance in error. 5 Taunt. 28

ISSUE.

- 1 The word "*issue*" includes descendants in the most remote degrees. *Haydon v. Wilshire*. 3 T. R. 373
- 2 A bond given by a father on the marriage of his daughter, was conditioned for payment of interest of a certain sum to the husband, or his executors, during the obligor's life, and also for payment of the principal to the husband or his executors, within a limited time after the obligor's death, if

any of the *issue* of the body of his daughter should be living at that time; there were children of the marriage, who all died before the obligor, leaving grand-children: the grand-children were deemed to be *issue* of the body, &c. within the meaning of the condition; and consequently the husband's executors were entitled to recover on the bond. 3 T. R. 372

JURISDICTION.

- I. SUPERIOR COURTS.
- II. INFERIOR COURTS.
- III. PLEAS TO.

I. SUPERIOR COURTS.

- 1 Where it appears that the Court have no jurisdiction, they will not go into the merits. *Owen v. Hurd*. 2 T. R. 644
- 2 The jurisdiction of the superior Courts at *Westminster* cannot be ousted but by express words or necessary implication: Therefore, the statute 25 G. 3. c. 51. having created penalties of 50*l.* and of 10*l.* and having enacted that the former should be sued for in any of the Courts at *Westminster*, and provided that it should and might be lawful for justices of the peace, &c. to hear and determine the latter, with a power to them to mitigate the penalties, &c. it was held, that such proviso ousted the jurisdiction of the superior Courts, as to the 10*l.* penalties. *Cates, q. t. v. Knight*. *The same v. Mellish*. 3 T. R. 442
- 3 Mutual covenants in a deed, that in case of dispute they shall be referred to arbitration, do not oust the Courts of law on equity of their jurisdiction. *Thompson v. Charnock*. 8 T. R. 140
- 4 Upon a case directed out of Chancery,

the Court of C. P. have not jurisdiction to solve any questions that are not expressly put in the case. *Morgan v. Horseman*. 3 Taunt. 245

- 5 Neither the Court of King's Bench nor Common Pleas have jurisdiction to discharge a defendant on common bail on the ground of the plaintiff's being an assignee under a commission of bankruptcy against the defendant, even though he has received dividends under the commission. *Hill v. Reeves*. 1 B. & P. 424
- 6 But the former Court suspended a rule on the sheriff to bring in the body, in order to give defendant time to apply to the Chancellor for relief. *Oliver v. Ames*. 8 T. R. 364
- 7 The Court of C. P. declared that they had no jurisdiction to discharge a defendant out of execution on the ground of a commission of bankruptcy being afterwards sued out against him by the plaintiff; leaving it to the Court of Chancery either to supersede the commission, or direct the bankrupt to be discharged. *McMaster v. Kell*. 1 B. & P. 302
- 8 Nor where the commission had been sued out previously to the arrest. *Percy v. Powell*. 3 B. & P. 6
- 9 The Court will not mitigate a fine imposed by an inferior Court (by the Court of Great Sessions in *Wales*) on the sheriff of the county for not at-

tending); the record whereof has been removed by *certiorari*. *Rex v. Loveden.* 8 T. R. 615

10 The Court will not go into any question not intended to be referred to them by a case stated at the Court of Quarter Sessions, on an appeal against an order of justices. *Rex v. Aire and Calder Navigation.* 2 T. R. 666

11 If there be any evidence tending to prove an offence, over which a magistrate has a summary jurisdiction by conviction, the Court cannot judge of the degree of it, or controul the determination of the magistrate upon that evidence. *Rex v. Davis.*

6 T. R. 177

12 If justices of the peace acquit a defendant against whom an information is laid before them for a penalty, the Court cannot reverse the judgment, though the justices state (on a return to a *certiorari* to remove the proceedings here) evidence, which *prima facie*, is sufficient to convict, and no contradictory or explanatory evidence. *Rex v. Reason.*

6 T. R. 375

II. INFERIOR COURTS.

N. B. See ADMIRALTY, *ante*, page 19.

1 The jurisdiction of a Court of Conscience cannot by any fiction be extended to contracts made on the high seas. *McCollam v. Carr.* 1 B. & P. 223

2 By charter the mayor and some of the aldermen of London have jurisdiction in *Southwark*, but as the charter contains no *non-intromittent* clause as to the justices of the county of Surrey, the latter have a concurrent jurisdiction with the former. *Rex v. Sainsbury.* 4 T. R. 451

3 The bishop of Ely has not a palatinate

jurisdiction within the isle, though exercising *jura regalia* there. *Grant v. Bagge.* 3 E. R. 128

III. PLEAS TO.

1 Every plea to the jurisdiction of the Court ought to give some other Court by which the matter may be tried: Therefore, it is not sufficient for a native of Ireland, charged with the publication of a libel in *Middlesex*, to plead to the jurisdiction of the King's Bench, that Ireland, before the union, was governed by its own laws, and not by the laws of Great Britain; and that, since the union, it is yet governed by its own laws, &c. and that there always have been, and now are, Courts and jurisdictions in Ireland, distinct from those in Great Britain, and competent for the trial of all offences committed by the natives resident there; and that the defendant is a native of and was resident in Ireland at the time of the offence alleged, and that the subject-matter of the supposed libel related to things in Ireland; for the objection, if any, going to the total want of jurisdiction in any of the Courts of this part of the kingdom to try the defendant for such an offence, it should either be taken advantage of by a plea in bar, or by evidence under the general issue. *Rex v. Johnson.* 6 E. R. 583

2 In trespass, if the defendant justify as plaintiff in a suit in an inferior Court, under mesne process of that Court, he must allege in his plea that the cause of action arose within the jurisdiction, otherwise the plaintiff may demur. *Evans v. Munkley.*

4 Taunt. 48

And see *Trevor v. Wall.* 1 T. R. 151, *nte*, page 376, and the cases there collected.

JURY.

1 No cause to be tried by a special jury in *Middlesex* or London, unless the rule for a special jury shall be served, and the cause marked in the marshal's book two days before the adjournment. *Reg. Gen. T. T.* 52 G. 3.

4 Taunt. 601

2 If the same special jurymen be struck

to try several causes on the same question, and the Court of C. P. being dissatisfied with the verdict in the first, direct it to abide the event of another cause, they will also, on motion, discharge the same special jurymen from trying the second cause. *Mayor, &c. of Doncaster v. Coe.* 3 Taunt. 404

- 3 Upon suggestion that a rule for a special jury has been obtained for the purpose of delay, the Court of C. P. would not discharge the rule, but directed the cause to be tried by a special jury within the Term. *Bloxam v. Brown*.
4 Taunt. 470
- 4 It is discretionary in the Court of C. P. to grant or to continue a rule for a special jury.
4 Taunt. 470
- 5 If after a special jury has been struck, the cause goes off for default of jurors, no new jury can be struck, but the cause must be tried by the jury first appointed. *Rex v. Perry*. 5 T. R. 453
- 6 Affidavit of a juror, that the jury having been divided, tossed up, and that the plaintiff had won, rejected; for such conduct is a very high misdemeanour in the juror himself; and the information must come from some other source, such as from some person who had seen the transaction through a window, or the like. *Vasie v. Delaval*.
1 T. R. 11
- 7 So the Court of C. P., after consultation with the other judges, rejected an application to set aside a verdict on the affidavit of a jurymen that it was decided by lot. *Owen v. Warburton*.
1 N. R. 326
- 8 The Court will not, at a distance of time after the trial, amend the *postea*, by increasing the damages given by the jury, although all the jurymen join in an affidavit, stating their intention to have been to give the plaintiff such increased damages, and that they conceived that the verdict they had given was calculated to give him such sum. *Jackson v. Williamson*.
2 T. R. 281
- 9 The proper time for explanations of that sort is at the trial. 2 T. R. 282
- 10 The son of a jurymen summoned and returned, having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mis-trial. *Hill v. Yates*.
12 E. R. 229
N. B. See *Curry's case*, cited 12 E. R. 231, from the book of *Crown Cases in the possession of the Chief Justice for the time being*.
- 11 A custom to swear the jurors at one Court-leet to inquire, and return their presentment at the next Court, is bad in law. *Davidson v. Moscrop*.
2 E. R. 56
- 12 If after indictment, arraignment, the jury charged, and evidence given, on a capital offence, one of the jurymen becomes incapable through illness, of proceeding to verdict, the Court of Oyer and Terminer may discharge the jury, and charge a fresh jury with the prisoner, and convict him. *Rex v. Edwards*.
4 Taunt. 309
- 13 But *semble* that the prisoner shall be again allowed his challenge to each of the eleven former jurymen.
4 Taunt. 309

JUSTICES OF THE PEACE.

- I. PRIVILEGES AND DUTIES.
- II. ORDERS OF.
- III. COMMITMENTS BY.
- IV. PROCEEDINGS AGAINST.

- (a) *By Information*,
- (b) — *Action*.

I. PRIVILEGES AND DUTIES.

N. B. For the notice of action required to be given to magistrates, see ante, page 10.

- 1 The jurisdiction of County Justices can only be taken away by express words. *Blankley v. Winstanley*.
3 T. R. 279

- 2 The stat. 4 G. 3. c. 90. having enacted,

that until a poor-house should be built for the hundred of L. and C., the poor should continue under the government and management of the overseers of the poor, and after that time under the government and management of the guardians of the poor appointed by that Act; it was held, that, after the poor-house was built, the overseers of the poor and county magistrates had no authority in this district as far as respected the poor, and consequently that the overseers could not obey an order of justices made for the relief of a poor person within it. *Rex v. Keer & Rich*.
5 T. R. 159

- 3 The stat. 43 G. 3. c. 141. does in no

instance extend to protect justices of peace in the execution of their office against actions for acts of trespass or imprisonment, unless done on account of some conviction made by them of the plaintiffs in such actions by virtue of any statute, &c. *Massey v. Johnson.* 12 E. R. 67

4 But the statute extends to protect magistrates against actions of trespass only in the case of a conviction quashed; giving to the party grieved a remedy by action on the case. *Gray v. Cookson.* 16 E. R. 13

5 Where magistrates are to execute a judicial fact, they must meet and execute it together: Therefore, an appointment of overseers by two justices separately, is bad. *Rex v. Forrest.* 3 T. R. 38, 380

And see *Rex v. The Inhabitants of Great Marlow.* 2 E. R. 244

6 So is an indenture of a parish apprentice. *Rex v. The Inhabitants of Ham-stall Ridgware.* 3 T. R. 380

7 So an order of removal, or of filiation. 3 T. R. 380

8 An order of removal signed by two justices separately, and in different counties, is only voidable, not void: and the parish wishing to avoid it must appeal to the next Sessions. *Rex v. The Inhabitants of Stotfold.* 4 T. R. 596

And see post, tit. POOR.

9 But where the justices act ministerially, as in allowing a poor-rate, they may act separately. 3 T. R. 381, 2
And see *Wootton v. Hervey*, next page.

II. ORDERS OF.

See BASTARD, ante, page 140.

For Orders of Removal, see post, tit. POOR.

I The Court will intend every thing in an order of justices to be right, unless the contrary appear. *Rex v. Aire and Calder Navigation.* 2 T. R. 666

2 It must appear on an order made by a justice that he had jurisdiction to make it, otherwise it is void. *Rex v. The Inhabitants of Hulcott.* 6 T. R. 587

3 An order of a justice for discharging a servant from her master's service under stat. 5 Eliz. c. 4. was held void, (and not merely voidable) because it did not appear on the order itself that she was a servant in husbandry. *Rex v. The Inhabitants of Hulcott.* 6 T. R. 583

Quare, Whether the insanity of such a servant be a good cause for discharging her? 6 T. R. 583

4 An order of two justices founded on the statute 5 G. 1. c. 8. (for providing for the families of men absconding out of their estates) should state how much of the goods or rents of the fugitive should be seized by the parish officers, and the subsequent order of confirmation by the Sessions should specify the quantum of relief to be appropriated out of the goods and rents so seized, and limit a period for such appropriation; supposing such prospective order to be good, and that the order is not to be confined to the discharge of expenses already incurred by the parish. *Stable v. Dixon.* 6 E. R. 163

5 And *quare*, if the original order be defective in the particular mentioned, whether the Sessions can make it good by an order of confirmation directing the parish officers "to receive 7l. 15s. rent of the rents and profits, &c." towards the discharge of the parish for providing for the party's wife," &c. *id.*

6 But, at any rate, a payment of one sum of 7l. 16s. is a sufficient compliance with such order, on the only ground of construction on which it can be supported. And the tenant in whose hands the rent was seized, cannot justify in covenant by his landlord for rent in arrear, the retaining a second sum of 7l. 16s. out of the second year's rent upon the supposition that such Order of Sessions extended to enable the parish officers to receive so much annually out of the rents; for in that view the order would be bad in law upon the face of it, as an indefinite order for the annual payment of such a sum, without any limitation of time, or until further order. 6 E. R. 163

7 An order made by justices of peace, under the stat. 13 G. 3. c. 78. s. 19. for stopping up an old foot-way, and setting out a new one, must follow the form prescribed in the schedule annexed to the Act, and set forth the length and breadth of the new foot-way, otherwise it is no answer to a justification of a right of way pleaded to an action of trespass, *quare clausura fregit*, brought by the owner of the soil over which the old way led. The statute requires that the form set forth in the schedule "shall be used on all

occasions, with such additions and variations *only* as may be necessary to adapt it to the particular exigency of the case." Under these words a material variance from the form prescribed is fatal, and may be taken advantage of in a collateral proceeding. *Davidson v. Gill.* 1 E. R. 64

- 8 An order for reimbursement under stat. 33 G. 3. c. 8. s. 3. made upon the parish for which a substitute in the militia serves, to indemnify the parish in which such substitute's family shall have become chargeable and been relieved under an order of maintenance, must be made by the same magistrate and at the same time as the first order of maintenance; and notice of such order of reimbursement ought to be served upon the parish to be affected by it before they can be proceeded against criminally for disobedience to it. *Rex v. The Inhabitants of Ledbury.* 7 T. R. 558
- 9 The statute 42 G. 3. c. 90. s. 61., enables a magistrate to make an order for payment of servants' wages in certain cases; and directs, that in case of *refusal or non-payment* of any sum so ordered for 21 days after such determination, he may issue his warrant of distress; but it gives an appeal to the Sessions: Held, that 21 days having elapsed between the making of such order before the appeal, and also 12 days after such appeal dismissed before the warrant of distress issued, the magistrate was warrantable in issuing such order of distress without proof of any demand subsequent to the appeal. *Wootton v. Hervey.* 6 E. R. 75

III. COMMITMENTS BY.

N. B. *When a commitment by parol, is good.* See *Still v. Walls.*

7 E. R. 533

- 1 A commitment in execution by a magistrate must state that the party has been *convicted*; setting forth that he was charged on oath with the offence is insufficient. *Rex v. Cooper.* 6 T. R. 509
- 2 A commitment for *treasonable practices* is legal. *Rex v. Despard.* 7 T. R. 736
- 3 Under stat. 10 G. 3. c. 44. s. 7. a justice of the peace, after convicting a hackney-coachman for refusing to

go with his coach, may immediately commit him to the House of Correction if he do not pay the penalty. *Duck v. Addington.* 4 T. R. 447

- 4 A commitment on stat. 17 G. 2. c. 5. (the Vagrant Act), must be a commitment in execution, and is therefore bad if it merely state the charge, and order the party to be committed for safe custody till the Sessions, without *convicting* the offender of the charge. *Rex v. Rodes.* 4 T. R. 220

And see BAIL, ante, page 107.

- 5 A commitment in execution of a rogue and vagabond under stat. 23 G. 3. c. 88. should state that the defendant was apprehended with the implements of housebreaking upon him *at the time of such apprehension.* *Rex v. Brown.* 8 T. R. 26

- 6 Under the stat. 20 G. 2. c. 19. s. 2. for regulating servants in husbandry, artificers, and other labourers there mentioned, if a justice of the peace, upon a complaint made to him of the misconduct of such persons in their employments, sentence the offender to be committed to the House of Correction for a time not exceeding one calendar month, he must, if he intend to proceed upon that statute, also sentence him *there to be corrected and held to hard labour*: but the statute gives the justice an option to punish the offender in that manner, or otherwise, by abating part of his wages or by discharging him from his employment. And the meaning of the terms, "*there to be corrected*," is to be understood of a correction by whipping. But this latter punishment cannot be inflicted upon the like offender under the stat. 6 G. 3. c. 25., which enables the justice to commit the offenders to the House of Correction for any time not exceeding three months, nor less than one month; nor can the punishments inflicted by the two acts be blended. The *employer* of the servant is the master for whose service he is retained, and not the bailiff of the farm, who in fact hires the servant. *Rex v. Hoscason.* 14 E. R. 605

- 7 *Quære*, Whether justices of the peace have not the power of committing a pauper for refusing to answer questions relative to his settlement? *Rex v. Jackson.* 1 T. R. 659

IV. PROCEEDINGS AGAINST.

(a) *By Information.*

N. B. *When magistrates may be indicted, see Rex v. Sainsbury.*

1 T. R. 451, *ante*, page 370

- 1 Wherever justices of the peace act uprightly, though they mistake the law, no information will be granted against them. *Rex v. Jackson.*

1 T. R. 653

- 2 An information will be granted against a justice of the peace as well for granting as for refusing an ale licence improperly. *Rex v. Holland.*

1 T. R. 692

- 3 The Court will grant a rule *nisi* for a criminal information at the end of a Term against a magistrate for malpractices *during the Term*, but not for any misconduct before the Term. *Rex v. Smith.*

7 T. R. 80

- 4 A criminal information may be moved for against magistrates, for misconduct in the execution of their offices, in the second Term after the offence committed, there being no intervening assizes. *Rex v. Harris.*

13 E. R. 270

- 5 But the Court will not grant a rule *nisi* for a criminal information against a magistrate so late in the second Term after the imputed offence, as to preclude him from the opportunity of shewing cause against it in the same Term. *Rex v. Marshall.*

13 E. R. 322

- 6 A commitment by a justice of peace for a time certain, as for 14 days, under the Vagrant Act, is a commitment in execution, and the party is not entitled to be bailed: and if another magistrate, on illegal and corrupt motives, discharge a person so committed, the Court will grant an information against him. *Rex v. Brooke.*

2 T. R. 190

- 7 The Court will not grant an information against a magistrate for having improperly convicted a person, unless the party complaining make an exculpatory affidavit denying the charge. *Rex v. Webster.*

3 T. R. 388

- 8 The Court refused a criminal information against a magistrate for returning to a writ of *certiorari* a conviction of a party in another and more for-

mal shape than that in which it was first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk; the conviction returned being warranted by the facts. *Rex v. Barker.*

1 E. R. 186

(b) *By Action.*

- 1 Where a justice of the peace maliciously grants a warrant against another without any information upon a supposed charge of felony, the remedy against the justice is trespass for the false imprisonment, and not case. *Morgan v. Hughes.*

2 T. R. 225

- 2 Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend. *Lowther v. Rudnor (Earl).*

8 E. R. 113

- 3 A magistrate is liable to answer in an action of trespass for such part of an imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. *Mussey v. Johnson.*

12 E. R. 67

- 4 It seems, that if a conviction be good upon the face of it, the production and proof of it at the trial will justify the convicting magistrates under the general issue in an action of trespass, as well in respect of such facts therein stated as are necessary to give them jurisdiction, as upon the merits of the conviction. *Gray v. Cookson.*

16 E. R. 13

- 5 In trespass against magistrates for an act done by them *ex officio*, the plaintiff must shew at *nisi prius* that he proceeded upon a writ sued out within six months after notice to them of the action, although there be a continuing cause of action; and therefore the plaintiff must shew a return and continuance of the first writ, if the second be out of the time fixed by the notice. *Weston v. Fournier.*

14 E. R. 491

- 6 In an action against a magistrate for a malicious conviction, it is not suffi-

ent for the plaintiff to shew that he was innocent of the offence of which he was convicted; but he must also prove, from what passed before the

magistrate, that there was a want of probable cause. *Burley v. Bethune.*

1 Marsh. 220

KING'S BENCH PRISON.

RULES OF.

See post, tit. PRISONER.

- 1 All former Rules for establishing the rules of the KING'S BENCH PRISON repealed—The Rules of the KING'S BENCH PRISON to be in future comprised within the bounds following, *viz.*—From *Great Cumber Court* in the parish of *St. George the Martyr*, in the county of *Surrey*, along the north side of *Great Suffolk Street*, as far as the *Star Brewhouse*, and from thence along the north-west side of *Gilbert's Lane* to the *Blackfriars Road*, and across the said road along the north-west side of *Webber Street* to the *Half-Way House*, and from thence along the western side of *Barrow's Buildings* and *St. George's Row* to the *Westminster Road*, and then across the said road and along the western side of *St. George's Mall*, and from the pastry-cook's at the west end thereof directly across to the lamp-post on the foot-path near the watch house facing the *Dog and Duck*, and along the said foot-path from the said lamp-post to another lamp-post on the eastern side of the said road facing *Key's Nursery*, and then along the whole of the said road leading by *Prospect Place* to the *Elephant and Castle*, and from thence along the eastern side of *Newington Causeway* to *Great Cumber Court* aforesaid; and the *House of Correction for the County of Surrey*, the *New Gaol, Southwark* and the *Gaol now building for the County of Surrey* and the highways, exclusive of the houses

on each side thereof, leading from the KING'S BENCH PRISON to the said gaols respectively are within the said Rules; AND all taverns, victualing-houses, ale-houses, wine-vaults, houses or places licensed to sell gin or other spirituous liquors, and all places licensed for public entertainments are excluded out of the said rules.

Reg. Gen. E. 35 G. 3. 6 T. R. 305

- 2 The parish of *St. George the Martyr* within the Borough of *Southwark* in the County of *Surrey*, and the church-yard adjoining thereto, declared to be within the said rules.

Reg. Gen. T. 36 G. 3. 6 T. R. 778

- 3 No prisoner in the KING'S BENCH PRISON, or within the rules thereof, shall have or be entitled to have day-rules above three days in each Term, and every such prisoner having a day-rule shall return within the walls or rules of the said prison, at or before nine o'clock in the evening of the day for which such rule shall be granted. *Reg. Gen. E. 30 G. 3.*

3 T. R. 584

- 4 But a prisoner may, on shewing special cause, obtain additional day-rules. *Reg. Gen. M. 37 G. 3.*

7 T. R. 82

- 5 The granting of day-rules to prisoners in the King's Bench prison during Term is in the discretion of the Court on application, the same as before *East. 30 G. 3.*; but prisoner out upon such day-rules must return at or before nine o'clock in the evening. *Reg. Gen. H. 45 G. 3.*

6 E. R. 2

LANDLORD AND TENANT.

I. CONTRACTS BETWEEN.

(a) *How construed.*

II. RENT.

(a) *When and by whom payable.*

III. NOTICE TO QUIT.

(a) *When necessary, and how given.*(b) *Form of.*(c) *How served.*(d) *At what time to expire.*(e) *Where waved.*

I. CONTRACTS BETWEEN.

(a) *How construed.*

1 The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husband-like manner. *Powley v. Walker.* 5 T. R. 373

2 A. agreed to underlet his house to B. The latter paying for the furniture at an appraisement: Held, that B. was excused from performance of the agreement, because A. at the time he quitted the house, was in arrear for rent to his landlord. *Partridge v. Sowerby.* 3 B. & P. 172

3 A. agrees by parol to sell an estate to B. on certain terms, provided B. will continue C. his tenant, *not for one year only, but from year to year*, (C. having just before been let into possession, under a contract for the purchase of the estate, which he had failed to pay for in time, and had therefore forfeited his deposit); and A. thereupon agreed to take C.'s forfeited deposit as part of the purchase-money: A. and B. afterwards reduce their agreement respecting the purchase into writing, in which no notice is taken of the stipulation concerning C.'s tenancy; yet held, that this stipulation, being collateral to the written agreement, was binding upon B.; and that the agreement operated as a tenancy for two years certain at least, though no rent was then mentioned, but was to be settled afterwards; and that the tenancy could not be put an end to at

the end of the first year by six months' previous notice to quit. *Denn d. Jacklin v. Cartwright.* 4 E. R. 29

4 The defendant agreed by parol to rent a house, as tenant from year to year, for the residue of a term, which was three years and three quarters: he held for three years and one quarter, and quitted. Ruled, that though perhaps he might have quitted without notice at the end of three years, yet the remaining longer implied a contract to pay rent for the residue of the term. *Sauvage v. Dupuis.*

3 Taunt. 410

5 Strong circumstances of inconvenience apparent on an instrument, if it should be construed as a lease, indicate the intention of the parties, that it should be an agreement only. Such as a stipulation that out of the rent mentioned, a proportionate abatement should be made in respect of certain excepted premises; for until that was apportioned, the lessor could not distrain. And a stipulation that the tenant should hold at and under all usual covenants as between landlord and tenant where the premises are situate; for it may be disputable what are usual covenants. *Morgan d. Dowding v. Bissell.* 3 Taunt. 65

6 An agreement to grant a lease contains no implied engagement for general warranty, nor for delivery of an abstract of the lessor's title. *Gwillim v. Stone.* 3 Taunt. 433

7 If an agreement be made, to let premises so long as both parties like, reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called. And though the tenant has expended money on the improvement of the premises, that does not give him a term until he is indemnified. *Richardson v. Langridge.*

4 Taunt. 123

II. RENT.

(a) *When and by whom payable.*

N. B. See DEBT, I. II., ante, 243.

EJECTMENT, IV., 292.

1 If A. tenant for life subject to forfeit-

ure, remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.'s claiming and receiving the rent from C.; his executor may, on shewing that he acquiesced under a false apprehension, recover from C., the amount of the rent erroneously paid to B. *Williams v. Bartholomew.*

1 B. & P. 326

2 The goods of a tenant are liable for a year's rent, notwithstanding an out-lawry in a civil suit. *St. John's College, Oxford, v. Murcot.* 7 T. R. 259

3 A sheriff's officer being in possession of the tenant's effects under an out-lawry, made a distress for rent, sold the goods distrained, and afterwards the out-lawry was reversed: Held, that the officer was liable to pay the produce of the goods to the landlord in an action for money had and received.

7 T. R. 259

III. NOTICE TO QUIT.

(a) *When necessary, and how given.*

See *Roe d. Brune v. Pridcaux*, 10 E. R. 158. *post*, tit. POWER.

1 Where the term of a lease is to end on a precise day, there is no occasion for a notice to quit; because the lease is of course at an end, unless the parties come to a fresh agreement. *Per Mansfield, J. Messenger v. Armstrong.*

1 T. R. 54

Right d. Flower v. Darby. 1 T. R. 162

2 Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice to quit as the original lessor must have given. *Maddon v. White.* 2 T. R. 15

3 If a tenant for life, under a limited power of leasing, grant a lease exceeding his power, the lease is void, and not capable of conformation by the remainder-man: But if the remainder-man accept rent, *as rent*, after the death of the tenant for life, it is an admission that the defendant is his tenant, and then he is entitled to notice to quit. *Doe d. Martin v. Wynn.*

7 T. R. 83

4 Ejectment may be brought by a mortgagee, without giving notice to quit, against one who was let into possession as tenant from year to year by the mortgagor, after the mortgage made to the original mortgagee, but

before the assignment of it to the lessor. *Thunder d. Weaver v. Belcher.*

3 E. R. 449

5 An agreement to lease at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, and did not sell any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being createable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe d. Warner v. Browne.*

8 E. R. 166

6 Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy; but a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord had done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over; but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. *Cobb v. Stokes.*

8 E. R. 358

7 Where a lease for 21 years contained a proviso, that in case either landlord or tenant, or their respective heirs or executors, wished to determine it at the end of the first 14 years, and should give six months' notice in writing under his or their respective hands, the same should cease: Held, that a notice to quit, signed by two only of three executors of the original lessor, to whom he had bequeathed the freehold as joint-tenants, expressing the notice to be given on behalf of themselves and the third executor, was not good under the proviso, which required it to be given under the hands of all three. Neither could such notice be sustained under the general rule of law, that one joint-tenant may bind his companions by an act done for his benefit; for non constat that the determination of the lease was for the benefit of the co-joint-tenant;

which it was incumbent on the party who wished to avail himself of it to prove. And the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor will make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. *Right d. Fisher v. Cuthell.*

5 E. R. 491

- 8 Tenant in tail having received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessor in possession, under a void lease granted by tenant for life, under a power, the rack-rent value of which was 30*l.* a year, cannot maintain an ejectment, laying his demise at least on a prior day, without giving the lessee some notice to quit, so as to make him a trespasser after such recognition of a lawful possession either in the relation of tenant, or at least continuing by sufferance till notice. *Denn d. Brune (Clerk) v. Rawlins.*

10 E. R. 261

- 9 It seems that a receiver appointed by the Court of Chancery with a general authority to let the land to tenants from year to year, has also authority to determine such tenancies by a regular notice to quit. *Doe d. Marrack v. Read.*

12 E. R. 57

- 10 If upon notice to quit given to a tenant, he gives notice to his undertenants to quit at the same time, and upon the expiration of the notice he quits so much as is occupied by himself, but his undertenants refuse to quit, an ejectment may still be maintained against him for so much as his undertenants have not given up. *Roe v. Wiggs.*

2 N. R. 330

- 11 If four joint-tenants jointly demise from year to year, such of them as give notice to quit may recover their several moieties in ejectment on their several demises. *Doe d. Wayman v. Chaplin.*

3 Taunt. 420

- 12 Where tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that any thing short of a regular notice to quit from the landlord to his immediate tenant

would, after such sub-letting, have determined the tenancy in the whole; yet the landlord cannot entitle him to recover against the sub-lessee, (there being no privity of contract between them,) upon giving half a year's notice to quit in his own name, and not in the name of the first lessee; for as to the part so underlet the original tenancy still continued undetermined. *Pleasant d. Hayton v. Benson.*

14 E. R. 234

(b) Form of.

* See *Right d. Fisher v. Cuthell, supra.*

- 1 Where a farm was leased for 21 years at a rent of 180*l.* per ann. consisting, as described in the lease, of the *Town Barton*, and its several parcels described by name, at the rent of 83*l.*, other closes named, at other rents of 5*l.* 5*s.*, and 1*l.*; and the *Shippen Barton*, and its several parcels described by name, at 86*l.*; with a power reserved to either party to determine the lease at the end of 14 years, on giving two years' previous notice: Held, that a notice by the landlord to his tenant to quit "*Town Barton, &c. agreeably to the terms of the covenant between us on the expiration of the 14th year of your term.*" given in due time was sufficient. *Doe d. Rodd v. Archer.*

14 E. R. 245

- 2 A notice to quit a part only of premises leased together is bad. *id. ibid.*
- 3 A notice desiring the defendant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year subsequent to the term, but is a mere demand of possession. *Doe d. Godsell v. Inglis.*

3 Taunt. 54

(c) How served.

- 1 If a tenant hold under an agreement for a lease at a yearly rent, whereby it is stipulated that the agreement shall continue for the life of the lessor, and that a clause shall be inserted in the lease, giving the lessor's son power to take the house for himself when he came of age, the son must make his election in a reasonable time after he comes of age. The delay of a year is unreasonable, and the tenant cannot be

- ejected upon a half-year's notice to quit, served after such a delay. *Doe d. Bromfield v. Smith*. 2 T. R. 436
- 2 If he had elected within a week or fortnight, that certainly would have been reasonable. 2 T. R. 436
- 3 An ejectment against the bailiffs *pro tempore* of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs: for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe d. Carlisle (Earl) v. Woodman*. 8 E. R. 227
- 4 Where the tenant of an estate holden by the year has a dwelling-house at another place, the delivery of a notice to quit to his servant at the dwelling-house, is strong presumptive evidence that the master received the notice, and ought to be left to the jury. *Jones d. Griffith v. Marsh*. 4 T. R. 464
- 5 A notice to quit at *Michaelmas* served personally on the tenant, who made no objection at the time, was held to be *prima facie* evidence from whence the jury may find that the tenancy commenced at that period. *Doe d. Clarges, Bart. v. Forster*. 13 E. R. 405
- 6 A notice to quit in writing, signed by the party giving it, and attested by a witness, must be proved by calling that witness, or his absence must be accounted for; proof that it was served on the tenant, that he read it and did not object to it, is not sufficient. *Doe d. Sykes v. Durnford*. 2 M. & S. 62
- (d) *At what time to expire.*
- 1 In the case of a tenancy from year to year, there must be half a year's notice to quit, ending at the expiration of the year. *Right d. Flower v. Darby*. 1 T. R. 159
- 2 Six months' notice to quit is not sufficient. 1 T. R. 163
- 3 There is no distinction between houses and lands, as to the time of giving notice to quit. 1 T. R. 162, 3
- 4 In an ejectment brought by Mr. *Duncombe*, he could not prove the time when the term commenced, and the tenant proving it to be different from the time to quit mentioned in the notice, the plaintiff was nonsuited. *Per Lord Mansfield*. 1 T. R. 161, n.
- 5 In ejectment; *Eyre*, Baron, held a notice to quit at *Lady-day* to be *prima facie* evidence of a holding from *Lady-day* to *Lady-day* till the contrary was shewn. *Doe d. Puddicombe v. Harris*. 1 T. R. 161, n.
- 6 Tenant from year to year before a mortgage, or grant of the reversion, is entitled to six months' notice to quit before the end of the year from the mortgagee or grantee. *Birch v. Wright*. 1 T. R. 380 & 382
- 7 It was said that three months' notice to quit lodgings was sufficient, *per* *Ld. Mansfield*, C. J. *Throgmorton d. Woodby v. Whelpdale*. 6 E. R. 121, n.
- 8 If a landlord lease for seven years by parol, and agree that the tenant shall enter at *Lady-day* and quit at *Candlemas*, though the lease be void by the statute of frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at *Candlemas*. *Doe d. Rigge v. Bell*. 5 T. R. 471
- 9 A notice delivered to a tenant at *Michaelmas* 1795, to quit at "*Lady-day* which will be in the year 1795," was holden to be a good notice to quit at *Lady-day* 1796. *Doe d. Duke of Bedford v. Knightley*. 7 T. R. 63
- 10 Where tenant for life grants a lease for years, which is void against the remainder-man, and the latter, before he elects to avoid it, receives rent from the tenant, whereby a tenancy from year to year is created; this is with reference to the old term, and half a year's notice to quit from the remainder-man ending with the old year is proper. *Roe d. Jordan v. Ward*. 1 H. B. 97
- And see *Doe d. Collins v. Waller*. 7 T. R. 47
- 11 Where a defendant in ejectment held as to the arable lands from *Candlemas* and as to the rest of the farm from

May-day, the rent being payable at *Michaelmas* and *Lady-day*, and notice to quit was given six months before *May-day*, but not six months before *Candlemas*; Lord *Kenyon* non-suited the plaintiff. *Quere.* Whether the notice to quit were given half a year before *Lady-day*? *Doe d. Lord Grey de Wilton v. ———, Doe v. Calvert.*

2 E. R. 384

12 Under an agreement by a tenant of a farm "to enter on the tillage land at *Candlemas*, and on the house and all other the premises at *Lady-day* following, and that when he left the farm he should quit the same *according to the times of entry as aforesaid*," and the rent was reserved half-yearly at *Michaelmas* and *Lady-day*: Held, that a notice to quit delivered half a year before *Lady-day*, but less than half a year before *Candlemas* was good; the taking being in substance from *Lady-day*, with a privilege for the incoming tenant to enter on the arable land at *Candlemas* for the sake of ploughing, &c. *Doe d. Strickland v. Spence.*

6 E. R. 120

13 Under an agreement of demise, dated in *January*, of a dwelling-house, mills, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture and bleaching grounds, water-courses, &c. for a term of 45 years, to commence as to the meadow ground from the 25th of December last: as to the pasture from the 25th of March next, and as to the housing, mills, and all the rest of the premises, from the first of May; reserving the first year's rent on the day of *Pentecost*, and the other half year's rent at *Martinmas*: Held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May; that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely ancillary to the other and principal subject of demise; and consequently that a notice to quit served on the 28th of Sept. (which would have been sufficient with reference even to the 25th of March, the day of entering on the pasture ground; the 29th of Septem-

ber being the corresponding half yearly day of holding to the 25th of March) to quit at the expiration of the current year of holding was sufficient. *Doe d.*

Lord Bradford v. Watkins. 7 E. R. 551

14 Lease of lands by deed, since the New Style, to hold from the feast of *St. Michael*, must be taken to mean from New *Michaelmas*, and cannot be shewn by extrinsic evidence to refer to a holding from Old *Michaelmas*; and a notice to quit at Old *Michaelmas*, though given half a year before New *Michaelmas*, is bad. *Doe d. Spicer v. Lea.*

11 E. R. 312

15 Where house and land are let together to be entered upon at different times; and it does not appear from the terms of the demise from what time the whole is to be taken as let together: it is a question of fact for the jury, which is the principal, and which the accessorial subject of demise, in order for the judge to decide whether the notice to quit the whole were given in time. *Doe d. Heapy v. Howard.*

11 E. R. 498

16 On a letting of a house from year to year to quit at a quarter's notice, the quarter must end with a year of the tenancy. *Doe d. Pitcher v. Donovan.*

1 Taunt. 555

(c) *Where waved.*

1 Where one in remainder, after the expiration of an estate for life gave notice to the tenant to quit on a certain day, and afterwards accepted half a year's rent which accrued before the expiration of the notice to quit; such acceptance, being only evidence of a holding from year to year, is rebutted by the previous notice to quit; and therefore the notice remains good. *Sykes d. Murgatroyd v. ———.*

1 T. R. 161, n.

2 But a distress taken for rent accrued after the expiration of a notice to quit, is a waiver of the notice to quit. *Zouch d. Ward v. Willingale.*

1 H. B. 311

3 So if a landlord receive rent accrued due after the expiration of a notice to quit, it is a waiver of that notice. *Goodright d. Charter v. Cordwent.*

6 T. R. 219

4 If notice to quit at *Midsummer* be given to a tenant holding from *Michaelmas*, he may insist on the insufficiency of the notice at the trial of an

ejectionment, though he did not make any objection at the time it was served, but merely said, "I pay rent enough already, and it is hard to use me thus." *Oakapple v. Copous*.

4 T. R. 361

- 5 A landlord gave a notice to quit different parts of a farm at different times, which the defendant neglected to do in part, in consequence of which the landlord commenced an ejectionment; and before the last period mentioned in the notice was expired, the landlord fearing that the witness, by whom he was to prove the notice, would die, gave another notice to quit at the respective times in the following year, but continued to proceed with his ejectionment: Held, the second notice was no waiver of the first. *Doe d. Williams v. Humphrey*. 2 E. R. 237
- 6 A landlord of premises about to sell them, gave his tenant notice to quit on the 11th of October, 1806, but promised not to turn him out unless they were sold: and not being sold till February, 1807, the tenant refused on demand to deliver up possession. And on ejectionment brought: Held,

that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and therefore that the tenant, not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit. *Whiteacre d. Boulton v. Symonds*. 10 E. R. 13

- 7 If a landlord give notice to his tenant to quit at the expiration of the lease and the tenant hold over, the landlord is entitled to double rent; and a second notice delivered to the tenant after the expiration of such notice, to quit on a subsequent day, or pay double rent, is no waiver of such first notice, or of the double rent which has accrued under it. *Messenger v. Armstrong*. 1 T. R. 53

- 8 A second notice to a defendant to quit at Michaelmas 1811, is a waiver as to him of a former notice given to the original lessee, from whom he claimed by assignment, to quit at Michaelmas 1810. *Doe d. Brierly v. Palmer*. 16 E. R. 53

LEASE.

I. WHAT INSTRUMENT SHALL AMOUNT TO.

II. FOR WHAT TERM GRANTED.

III. VOID OR FRAUDULENT.

IV. TERMINATION OF.

- (a) *By surrender.*
 (b) — *Condition or Proviso.*
 (c) — *Forfeiture.*

I. WHAT INSTRUMENT SHALL AMOUNT TO.

N. B. *For the Construction of Provisoes and Covenants in Leases*, see COVENANT II. III. ante 229, 233, &c.

N. B. *For Leases granted by virtue of Powers.* See post, tit. POWER.

- 1 A paper, containing words of present contract, with an agreement that the lessee should take possession immediately, and that a lease should be executed in future, operates only as an agreement for a lease, and not as a

lease itself; and therefore it need not be stamped, if executed before stat. 23 G. 3. c. 58. imposing a stamp on agreements. *Goodtitle d. Estwick v. Way*. 1 T. R. 735

- 2 An instrument on an agreement stamp, reciting that A. in case he should be entitled to certain copyhold premises on the death of B. would immediately demise the same to C. declaring that he did thereby agree to demise and let the same with a subsequent covenant to procure a licence to let from the lord, operates as an agreement for a lease, and not as an absolute demise. *Doe v. Clare*. 2 T. R. 739

- 3 An instrument executed on the 24th November, 1807, on an agreement stamp, setting forth the condition of a future lease of lands and rent, to be entered upon, the one in February, and the other in May succeeding, "and that a lease was to be made on

those conditions, with the usual covenants," signed by the defendant, is not a present demise, there being not only a stipulation for a future lease, but time given to perform it, and no present occupation: yet, when the party was let into possession, and paid rent under the agreement, the Court held him liable to an action for the mismanagement of the farm, under a count stating that the premises were demised to him. *Tempest v. Rawling*.
13 E. R. 18

4 Words in an agreement that *A.* shall hold and enjoy, &c. if not accompanied with restraining words, operate as words of present demise: *Secus*, if they be followed by others which shew that the parties intended that there should be a lease in future. The whole must depend on the intention of the parties. *Roe d. Jackson v. Ashburner*.
5 T. R. 163

5 These words in an instrument, "be it remembered that *J. B.* hath let, and by these presents doth demise," &c. held to operate as a present demise, although the instrument contained a further covenant for a future lease. *Burry v. Nugent*.
5 T. R. 165, n.

6 *A.* agreed to let her house to *B.* "during her life, supposing it to be occupied by *B.*, or a tenant agreeable to *A.*," and "a clause was to be added in the lease" to give *A.*'s son an option to possess the house when of age: Held, that this was only an agreement for a lease, and not a perfect lease, the latter clause shewing it to be executory; and that a lease granted in pursuance of such agreement would only enure for the joint lives of *A.* and *B.* *Doe d. Bromfield v. Smith*.
6 E. R. 530

7 An instrument containing words of present demise will operate as a lease, if such appears to be the intention of the parties, though it contain a clause for a future lease or leases: as where one thereby agrees to let and the other agrees to take land for 61 years, at a certain rent for building, and the tenant agreed to lay out 2000*l.* within four years in building five or more houses, and when five houses were covered in, the landlord agreed to grant a lease or leases (which might be for

the more convenient underletting or assignment of the leases) but this agreement was to be considered binding till one fully prepared could be produced. *Poole v. Bentley*.
12 E. R. 168

8 Whether an instrument shall be a lease, or only an agreement for a lease, depends on the intention of the parties, as it is to be collected from the instrument. *Morgan d. Dowding v. Bissell*.
3 Taunt. 65

9 An instrument dated in *March*, 1798, whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and, upon demand, to execute a counterpart of a lease of the said farm from the 5th of *April*, 1798, for 15 years, under a certain yearly rent; which said lease was to contain the usual covenants, and an agreement for re-entry in case of non-payment of rent, and also the further covenants, &c.; and this agreement was to bind until the said lease was made and executed, &c.; under which agreement the tenant entered on the 5th of *April*, 1798; was held to be a present demise, and therefore requiring a lease stamp; the agreement for a future lease with further covenants being for the better security of the parties. *Doe d. Walker v. Groves*.
15 E. R. 244

II. FOR WHAT TERM GRANTED.

1 Demise of freehold and copyhold lands, at an entire rent, *habendum* so much as freehold for 21 years, and so much as copyhold for 3 years, warranted by the custom and covenant for renewal of the lease of the copyhold every 3 years, *toties quoties*, during the 21 years under the like covenants; and that in the mean time, and until such new leases should be executed, the lessee should hold the said land as well copyhold as freehold, &c.: Held, that this was only a lease of the copyhold for three years, and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not having been any fresh lease granted. *Penny d. Eastham v. Child*.
2 M. & S. 255

III. VOID OR FRAUDULENT.

See FRAUDS, STATUTE OF, I. *ante*, 339.

- 1 A lease executed by the tenant for life (in which the reversioner, who was then under age, is named, but not executed by him) is void on the death of the tenant for life; and an execution by the reversioner only afterwards, is no conformation of it, so as to bind the lessee in an action of covenant. *Ludford v. Barber*. 1 T. R. 86

And see *Doe d. Martin v. Watts*, 7 T. R. 83, *ante* 449

- 2 A lessee of land in the *Bedford Level* cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by the stat. 15 Car. 2. c. 17. for want of being registered; such Act enacting, that "no lease, &c. should be of force but from the time it should be registered," not avoiding it as between the parties themselves, but only postponing its priority with respect to subsequent incumbrancers, registering their titles before. *Hodson v. Sharpe*. 10 E. R. 350

- 3 Lease dated two days before release, good to support release which refers to a lease as of the day next before the date of release. *Ramsbottom v. Timbridge*. 2 M. & S. 434

- 4 Lease of lands of which lessor was seised in fee, and of other lands of which he was seised for life, with power of leasing at one entire rent, and the lease not well executed according to the power: Held, that the lease was good after the death of lessor for the lands in fee, though not for the other lands; for the rent may be apportioned. *Doe d. Vaughan v. Meyler*. 2 M. & S. 276

- 5 Where a person pretending to be a purchaser of goods under an execution, leased the goods at a rent to the former owner, who still continued in possession, no money having been proved to be given for the purchase, nor rent paid under the lease, it was a question for the jury, Whether the lease was not fraudulent? But, under circumstances, the possession of the lessee might have been the possession of the lessor. *Reid v. Blades*. 5 Taunt. 212

IV. TERMINATION OF

(a) By Surrender.

- 1 Where a lease came into the hands of the original lessor by an agreement entered into between him and the assignee of the original lessee, "that the lessor should have the premises as mentioned in the lease, and should pay a particular sum over and above the rent annually, towards the goodwill already paid by such assignee;" such agreement operates as a surrender of the whole term. *Smith v. Mapleback*. 1 T. R. 441

- 2 The mere cancelling in fact of a lease, is not a surrender of the term thereby granted within the statute of frauds, which requires such surrender to be *by deed or note in writing, or by act or operation of law*. Nor is a recital in a second lease, that it was granted in part consideration of the surrender of a prior lease of the same premises, a surrender *by deed or note in writing* of such prior lease; it not purporting in the terms of it to be of itself a surrender or yielding up of the interest; though in some instances the acceptance of a second lease for part of the same term before demised, may be a surrender of such prior term by operation of law; and this even though the second lease be voidable, if it be not merely void. But where tenant for life with a special power of leasing, reserving the best rent, *in consideration* (as recited) of the surrender of a prior term of 99 years, (of which above 50 were unexpired) and certain charges to be incurred by the tenant for repairs and improvements, &c. granted to him a new lease of the premises for 99 years *by virtue of the power reserved to her, or any other power vested in, or in anywise belonging to her*, which new lease was void *by the power* for want of reserving the best rent: Held, that the second lease, which was intended and expressly declared to be granted by virtue of and under the power, and being apparently not intended by the parties to be carved out of the estate for life of the lessor, being void under the power, should not operate in law as a surrender of the prior term, as passing an interest out of the life estate of the grantor, contrary to the manifest intent of the parties; and con-

sequently that the prior term, though the indenture of lease were in fact cancelled and delivered up when the new lease was granted, might be set up by the tenant of the premises in bar to an ejectment by the remainder-man after the death of tenant for life; however such second lease might have operated by way of estoppel as against the lessor during her life. *Roe d. Earl of Berkeley v. Archbishop of York.*

6 E. R. 86

- 3 One being in possession of premises as tenant from year to year, under an agreement for a lease for 14 years, and the rent being in arrear, enters into an indenture with his landlords, whereby, reciting such tenancy and arrears of rent accrued, and that he had agreed to quit and to deliver up the premises to them, and that a valuation should be made of his effects on the premises by two indifferent persons to be chosen, &c., and that the same should in the mean time be assigned and delivered up to a trustee for the landlords; the deed assigned his effects on the premises to such trustee, on trust to have the valuation made, and out of the amount to retain the arrears of rent, and pay the residue to the tenant: Held, that the tenant not having in fact quitted the possession, nor any valuation having been made of his effects; such agreement to quit, &c. being conditional, and the condition not performed, nor the agreement in any manner acted upon, did not operate as a surrender of the tenant's legal term from year to year; and consequently that the right of the landlord, to distrain for the arrears of rent, continued after six months from the making of the indenture. *Coup-land v. Maynard.*

12 E. R. 134

(b) By Condition or Proviso.

- 1 A lease in 1785, for 3, 6, or 9 years, determinable in 1788, 1791, 1794, is a lease for 9 years, determinable at the end of 3 or 6 years, by either of the parties, on giving reasonable notice to quit. *Goodright v. Richardson.*

3 T. R. 463

- 2 If a lease be granted for 7, 14, or 21 years, the lessee only has the option at which of the above periods the lease shall determine. *Denn v. Spurrier.*

3 B. & P. 442

- 3 And so also under a lease for 14 or 7 years. *Doe d. Webb v. Dixon,*

9 E. R. 16

- 4 Tenant for life leases premises for 21 years, and before the expiration of that term dies; the trustees of the remainder-man, then an infant, continue to receive the rent reserved, and he, on coming of age, sells the premises by auction; in the conditions of sale the premises are declared to be subject to the lease, and in the conveyance to the purchaser the lease is referred to as in the possession of the lessee; and in the covenant against incumbrances, that lease is excepted; the purchaser mortgages, and in the mortgage deeds the like notice is taken of the lease, and the mortgagees for some time receive the rent reserved: Held, that the lease expired with the interest of the tenant for life, and that the notice since taken of it did not operate as a new lease. *Doe d. Potter v. Archer.*

1 B. & P. 531

And see *Roe d. Jordan v. Ward.*

1 H. B. 97, *ante*, page 451

(c) By Forfeiture.

- 1 A forfeiture by tenant for years in levying a fine, not having been taken advantage of by the entry of the then reversioner to avoid the lease, cannot be taken advantage of after the reversion has been conveyed away, to recover the estate, in ejectment, from the tenant upon the several demises of the grantor and grantee of such reversion. *Fenn d. Matthews v. Smart.*

12 E. R. 444

- 2 If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by, and witnessing the act for six years, waive the forfeiture. *Doe d. Sheppard v. Allen.*

3 Taunt. 78

- 3 Some positive act of waiver, as receipt of rent, is necessary. *id.*

- 4 But if he permits the tenant to expend money in improvements, *semble* that that is evidence to be left to a jury, of his consent to the alteration of the premises. *Per Mansfield C. J.*

3 Taunt. 78

- 5 A. grants a lease to B., which contains a covenant that B., his executors or administrators, without mentioning "assigns," should not underlet without the consent of the lessor. B. be-

comes bankrupt, and his assignees assign the premises to C., B. obtains his certificate, and C. re-assigns the premises to him, after which he underlets them to another person: Held, that B. having been discharged at the time

of his bankruptcy from all covenants in the lease by stat. 49 G. 3. c. 121. s. 19. the under-letting by him, which was in the character of assignee, was no forfeiture of the lease. *Doe d. Cheere v. Smith.* 1 Marsh. 359

LEGACY.

1 No action at law lies to enforce payment of a legacy; the Court of Chancery being the proper jurisdiction for that purpose. *Deeks v. Strutt.*

5 T. R. 690

2 But an action at law will lie against an executor to recover a specific chattel bequeathed, after his assent to the bequest. *Doe d. Lord Saye and Sele v. Guy.*

3 E. R. 120

3 Where two legacies of the same sum are bequeathed to the same person by different instruments, viz. one by will, and the other by a codicil, the legatee is entitled to both; unless it appear from the context of the two instruments, or there be some other circumstance, to shew the intention of the testator, that he should take but one. *James v. Semmens.*

2 H. B. 213

4 Where there is a devise to A. for life of the rents and profits of a real estate, and the interest and dividends of personal property, and after his death, the whole estates both real and personal to be divided between B. and C.; the executors and trustees are bound to pay to A. the annual produce of the personal as well as real property, especially if the personal property be money in the funds, without requiring a receipt stamped as for a legacy, under stats. 20 G. 3. c. 28: 23 G. 3. c. 58., and 29 G. 3. c. 51. [But see stat. 36 G. 3. c. 52.] *Green v. Croft.*

2 H. B. 30

Quare, Whether, in any case, an executor can refuse to pay a legacy until a receipt or discharge be given?

2 H. B. 30

LIBEL.

I. ACTION.

(a) *In what Cases maintainable.*

(b) *Pleadings and Justification.*

II. INFORMATION OR INDICTMENT.

(a) *When supportable.*

(b) *Pleadings and Evidence.*

I. ACTION.

(a) *In what Cases maintainable.*

1 An action may be maintained for words written, for which an action could not be maintained if they were merely spoken. *Thorley v. Lord Kerry.*

4 Taunt. 355

2 To print of any person that he is a swindler, is a libel, and actionable. *J. Anson v. Stuart.*

1 T. R. 748

3 A letter written to a third person calling plaintiff "a villain," held actionable, without proof of special damage. *Bell v. Stone.* 1 B. & P. 331

4 It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in Court, which contained an insinuation that the plaintiff had committed perjury. *Stiles v. Nokes.*

7 E. R. 493

5 It is not the subject of an action to publish a true account of the proceedings in Parliament or of the Courts of Justice. *Rex v. Wright.* 8 T. R. 298

6 And this decision was recognized by the Court of C. P., who held it could not be maintained, however injurious such publication might be to the cha-

racter of an individual. *Curry v. Walter.* 1 B. & P. 525

- 7 If a Court Martial, after stating in their sentence the acquittal of an officer against whom a charge has been preferred, subjoin thereto a declaration of their opinion that the charge is malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused is highly injurious to the service, the President of the Court Martial is not liable to an action for a libel for having delivered such sentence and declaration to the Judge Advocate. *Jekyll v. Sir J. Moore.* 2 N. R. 341

(b) *Pleadings and Justification.*

- 1 In an action for a libel written in a foreign language, the plaintiff must set forth the libel in the original; and if he only set out a translation of it, the Court will arrest the judgment. *Zenobio v. Artell.* 6 T. R. 162
- 2 An action upon a libel charging in one count, that the defendant published it as purporting to be a letter from A. to B.; and in another, charging generally, that the defendant published the libellous matter; is not sustained by proof of a publication wherein the defendant stated, that in a debate in the *Irish House of Commons*, several years before, the Attorney-General of *Ireland* had read such a letter, and then stating the libellous matter as said by him in commenting upon that letter; for the characters of the several libels are essentially different, though the slander imputed may be the same. *Bell v. Byrne.* 13 E. R. 554
- 3 It seems, also, that a libellous assertion, that the plaintiff "has been for some time past confined on a charge of high treason," taken as a fact asserted generally by the publisher on his own knowledge, would refer to the period of the publication, and therefore would not be proved by shewing that it was asserted to have been said by another some years before, and consequently referring to the period when it was said. 13 E. R. 554
- 4 There may be an implied justification of a libel, or of slander, from the occasion (as if read in a judicial pro-

ceeding), as well as on account of the subject-matter. *Weatherherson v. Hawkins.* 1 T. R. 111

- 5 A justification to an action for a libel for charging the plaintiff with being a swindler, must state the particular instances of fraud by which the defendant means to support it. *J'Anson v. Stuart.* 1 T. R. 748
- 6 A justification generally in the words of the libel, where the libel is general, is not sufficient. 1 T. R. 748
- 7 It is no justification to an insinuation of perjury against the plaintiff (who had sworn to an assault by A. B. on him), that it *did appear* (which was the suggestion in the libel) *from the testimony of every person in the room, &c. except the plaintiff*, that no violence had been used by A. B. &c.; for *non constat* thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial, &c.* and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles v. Nokes.* 7 E. R. 493
- 8 The justification of a libel must state issuable facts, not general charges of misconduct. A libel charged an attorney with general misconduct, *viz* gross negligence, falsehood, prevarication, and excessive bills of costs, in the business he had conducted for the defendant; a plea in justification, repeating the same general charges without specifying the particular acts of misconduct upon demurrer was held insufficient. *Holmes v. Catesby.* 1 Taunt. 543
- 9 Plea justifying a libel which stated the grounds on which the plaintiff was dismissed the *East-India Company's* service, on the ground that the Company ordered the defendant, as Governor in Council, to dismiss the plaintiff for the reasons assigned: the plea does not shew a sufficient justification for publishing the causes of dismissal. *Oliver v. Lord W. C. Bentinck.* 3 Taunt. 456
- 10 *Quare*, Whether the matter of justification ought not to be pleaded? *Curry v. Walter.* 1 B. P. 525

II. INFORMATION OR INDICTMENT.

(a) *When supportable.*

N. B. See the case of *Rex v. Watson*.
9 T. R. 199. *ante*, INFORMATION I.
pages 376, 7.

- 1 The Court refused to grant a criminal information against a bookseller as for a libel in printing a true, but unauthorized copy of a report of the House of Commons; though the report reflected on the character of an individual. *Rex v. Wright*. 8 T. R. 293
- 2 An indictment for publishing libellous matter, reflecting on the memory of a dead person, not alleging that it was done with a design to bring contempt on the family of the deceased, to stir up the hatred of the King's subjects against them, or to excite his relations to a breach of the peace, cannot be supported. *Rex v. Topham*.
4 T. R. 126
- 3 A member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that House, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers. *Rex v. Creevey*, Esq. M. P. 1 Taunt. 273

(b) *Pleadings and Evidence.*

- 1 An indictment or information for a libel need not charge the offence to have been committed *vi et armis*, or allege that the libellous matter is false. *Rex v. Burke*. 7 T. R. 4
- 2 On the trial of an indictment for a libel, the only questions for the consideration of the jury are the fact of publishing, and the truth of the *inuenidos*. Whether the subject-matter be or be not a libel is a question of law for the consideration of the Court. *Rex v. The Dean of St. Asaph*.
3 T. R. 428, *n*.
And *Rex v. Withers*. 3 T. R. 428
N. B. But see stat. 32 G. 3. c. 60.; and the opinion of *Kenyon* Ch. J. in *Rex v. Holt*. 5 T. R. 443
- 3 It is not competent to a defendant, charged with having published a libel,

to prove that a paper, similar to that for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. *Rex v. Holt*. 5 T. R. 436

- 4 The publisher of a public register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register; after which he receives two letters in the same hand-writing, directed as mentioned, and having the *Irish* post-mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed: This is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register in *Middlesex*, for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in *Middlesex*. *Rex v. Hon. R. Johnson*.
7 E. R. 65
- 5 Proof that the defendant gave a bond to the stamp-office for the duties on the advertisements in a newspaper under the stat. 29 G. 3. c. 50. s. 10. and had occasionally applied at the stamp-office respecting the duties, is evidence that he is the publisher. *Rex v. Topham*. 4 T. R. 126
- 6 An affidavit made and signed by the printer and publisher and proprietor of a newspaper as required by stat. 38 G. 3. c. 78., which affidavit contained the names of the parties, the place where the paper was printed, and the title of it; together with the production of a newspaper, tallying in every respect with the description of it in the affidavit: is not only evidence, by that Act, of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be: and this upon the trial of an information for a libel contained in such newspaper. *Rex v. Hart and White*. 10 E. R. 94

LIEN.

- I. IN WHAT CASES ACQUIRED.
 II. WHERE NOT.

I. IN WHAT CASES ACQUIRED.

N. B. When an attorney has a Lien for his costs, see ante, page 84.

1 A customer lodges bills of exchange in the hands of his banker generally, and when the banker advances money to him, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, but without any special agreement to that effect: this does not invalidate the banker's general lien upon all the other bills in his hands, but he may retain them, in order to secure the payment of his general balance. *Davis v. Bowsher.* 5 T. R. 488

2 A banker has a lien for the amount of his balance upon money securities paid in by a customer on his running account; and the banker's assignees, after his bankruptcy, may sue the drawer of one of those securities, made payable to bearer, who defended the action on behalf of the customer, and may recover against such drawer the amount of the balance: and this, notwithstanding an offer made to the assignees on the part of the customer before the action brought, that he was not aware of the exact balance, but that if any were due, he was ready to pay it, on receiving back the security; for this was no tender of the balance to defeat this action. *Scott v. Franklin.* 15 E. R. 428

3 The lien of a common carrier for his general balance, however it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; yet is not to be favoured, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. *Rushforth v. Hadfield.* 6 E. R. 519

4 And therefore where a jury negated such general usage, though frequent

instances of such usage were produced at the trial, and in one instance so far back as 30 years, the Court refused to grant a new trial; and stated their opinion that the jury had done right. *Rushforth v. Hadfield.* 7 E. R. 224

And see *Whitehead v. Vaughan.*

6 E. R. 523, n.

5 A principal gives notice to his factor of an intended consignment of a ship to him for the purpose of sale, and in consequence draws bills on him, which the factor accepts: and then the principal dies, and his executors direct the captain of the ship to follow his former orders; who thereupon delivers the ship into the possession of the factor, who sells the same: Held, that the factor has a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances by him actually paid, as for the amount of his out-standing acceptances not then due. *Hammonds v. Barclay.* 2 E. R. 227

6 The assignee of a policy of insurance on goods, who became such by the indorsement to him of the bill of lading of the goods by the consignor after he had directed his correspondent to make the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and can only claim, subject to that lien, the money received on such policy by the broker, in whose hands it was deposited for that purpose by the correspondent. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew at the time that the policy was effected for another person. *Mann v. Shiffner.* 2 E. R. 523

7 Where a captain of a ship contracts for goods, though they are furnished for the use of the ship, he is answerable in respect of this contract. So that in such case, the tradesman has a claim both on the captain and owners, as well as a specific lien on the ship itself. *Farmer v. Davis.* 1 T. R. 108

8 One having purchased of the consignee all the tar on board a ship under two bills of lading, and having obtained delivery from the captain of the greater

part of the goods under one of the bills of lading, the captain has a lien on the rest of the tar under the other bill of lading for the freight of the whole: and this, though some of it had been removed into a lighter alongside of the ship sent by the vendee, which the captain afterwards fastened to the ship's side. *Sodergreen v. Flight*. 6 E. R. 622, n.

- 9 The Ship Register Acts do not prevent a person having a lien on the papers deposited with him, of a ship which he is commissioned to sell. *Mestaer v. Atkins*. 5 Taunt. 381

S. C. not S. P. 1 Marsh. 76

- 10 A vendor has a general lien for the price of the goods sold while in his possession. *Hanson v. Meyers*.

6 E. R. 614

II. WHERE NOT.

- 1 Goods delivered to a person claiming them wrongfully, who pays freight and other charges, cannot be detained for those expenses against the rightful owner. *Lempriere v. Pasley*. 2 T. R. 485

- 2 A quantity of timber placed in a dock, on the bank of a navigable river, being accidentally loosened, is carried by the tide to a considerable distance, and left at low water upon a towing path: *A.* finding it in that situation, conveys it to a place of safety, beyond the reach of the tide at high-water: *A.* has no lien on the timber for the trouble or expense to which he may have put himself in the carriage of it; but is liable to an action of trover, unless he deliver it up to the owner on demand, though nothing be tendered by the owner by way of compensation. *Nicholson v. Chapman*.

2 H. B. 254

- 3 But probably in such case, *A.* might maintain an action against the owner for a compensation. 2 H. B. 254

- 4 A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has no right to retain them, against the consignee, for a general balance due to him for the carriage of other goods of the same sort sent by the consignor. *Butler v. Woolcot*. 2 N. R. 64

- 5 The dyers of *Hulifax* were found by verdict to have no lien for their general balance; and therefore the Court held that they could not retain for the price of dyeing any other than the

particular goods dyed, or at most only for the dyeing of such goods as were delivered to them at one and the same time, under one entire contract; but certainly not for different parcels delivered at several times, which they happened to collect in their hands at one time, and some of which they had afterwards parted with without obtaining payment. *Close v. Waterhouse*. 6 E. R. 523, n.

- 6 A factor has no lien on goods unless they come into his actual possession. *Kinloch v. Craig*. 3 T. R. 119, 783

- 7 If *A.* deposit goods with *B.* for sale, and *B.* promise to pay the proceeds to *A.* when sold; *B.* has no lien on the goods (if not sold) for the balance of his general account arising upon other articles. *Walker v. Birch*.

6 T. R. 258

- 8 *A.* a factor, having sold goods of *B.* in his own name to *C.*, the latter, without paying for these goods, sent another parcel of goods to *A.* to sell for him, never having employed *A.* as a factor before. *C.* then became bankrupt, and his assignees claimed the goods sent by him to *A.*, and which still remained unsold, tendering the charges upon those goods. *A.* refused to deliver them up, claiming a lien upon them for the price of the former goods sold by him to *C.*, there being a balance then due from *B.* to himself: Held, that the assignees were entitled to recover. *Houghton v. Matthews*.

3 B. & P. 485

- 9 A pawnbroker has no lien on plate, after the death of a tenant for life who pawned it with him, as against the remainder-man, although the pawnee had no notice of the settlement. *Hoare v. Parker*. 2 T. R. 376

- 10 In a respondentia bond, the condition, after reciting that the money was lent upon the goods laden and to be laden on board a certain ship on her voyage out and home, was that if the ship should proceed on her voyage, and return within 36 months (the dangers of the seas excepted), and if the borrower within 30 days after her arrival should pay to the lender the sum agreed on, or if in the voyage and within the said 36 months the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average

on all the goods carried out and acquired during the voyage which should be saved, then the obligation to be void: Held, that this was no more than a *personal* obligation from the borrower to the lender, and did not give the latter any *specific pledge or lien* on the home cargo, or the proceeds thereof. *Busk v. Fearon*. 4 E. R. 319

- 11 The master of a ship has no lien on it for money expended, or debts incurred by him for repairs done to it on the voyage. *Hussey v. Christie*.
9 E. R. 426

- 12 *Qu.*—Whether the captain of a ship parts with his lien on goods for his freight by depositing them in the King's warehouse pursuant to the requisitions of an Act of Parliament? *Ward v. Felton*. 1 E. R. 512

- 13 Where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have

carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods: Held, that the ship-owner had no lien upon the goods actually on board for the amount of the *dead freight*, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board; which damages were unliquidated; and there being no lien in such a case either by the usages of trade or the express contract of the parties. *Phillips v. Rodie*.
15 E. R. 547

- 14 Nor had the ship-owner any lien for demurrage. 15 E. R. 547

- 15 The indorsing of a bill of lading by a consignor to the consignee, for the purpose of performing a contract, does not constitute a lien in favour of the latter for his advances to the consignor. *Snaith v. Burridge*.
4 Taunt. 684

LIMITATION OF ACTIONS.

I. IN WRITS OF FORMEDON.

II. RIGHT OF ENTRY.

III. ASSUMPSIT.

- (a) *Action, from what time to be computed.*

- (b) *What acknowledgment will take a Case out of the Statute.*

- (c) *Statute, how pleaded.*

IV. IN TRESPASS OR CASE.

I. IN WRITS OF FORMEDON.

- 1 Tenant in tail dies leaving issue in tail a grand-daughter, a *feme covert*; the grand-daughter dies *covert*, leaving issue in tail two sons infants; the elder attains the age of 21 years and dies, the younger attains his age of 21, and 14 years after sues out a writ of formedon in the *descender*: Held, that he is barred by the statute 21 Jac. 1. c. 16. *Cotterell v. Dutton*.
4 Taunt. 826

II. RIGHT OF ENTRY.

N. B. See the opinion of Lord Kenyon in *Doe d. Duroure v. Jones*:

4 T. R. 311. *as to the construction of all the Statutes of Limitation on this head.*

- 1 *Qu.*—Whether the lord's right of entry for a forfeiture be not barred after 20 years by the Statute of Limitations? *Roe d. Tarrant v. Hellier*.
3 T. R. 162, 3

- 2 *I. S.* demised lands to the rector of *D.* for 40 years at a certain rent in the lease; the rector, after covenanting for payment of the rent, further granted to *I. S.* the tithe of oats for the parish of *D.*; the lease also contained a proviso for re-entry, in case the rent should be in arrear, or *I. S.*, his heirs, &c. should be disturbed by the rector or his assigns in the receipt of the tithe, and concluded with a covenant on the part of *I. S.*, that the rector should quietly enjoy the lands under the covenants, grants, and agreements contained in the lease. After the expiration of the lease, the rector continued to hold the land, but withheld the rent for more than 20 years; the heirs of *I. S.* at the same time continuing to take the tithe of oats, and some confusion existing as to the

respective rights of the rector and the heirs of I. S., the latter being portionists of the tithes of the parish: Held, in ejectment by the representatives of I. S. against the rector, that the possession of the land by the latter were not adverse so as to let in the operation of the Statute of Limitations. *Roe d. Pellatt v. Ferrars.*

2 B. & P. 542

3 Where the ancestor died seized, leaving a son and daughter infants; and on the death of the ancestor a stranger entered, and the son soon after went to sea, and was supposed to have died abroad *within age*: Held, that the daughter was not entitled to 20 years to make her entry after the death of her brother, but only to 10 years; more than 20 years having, in the whole, elapsed since the death of the person last seized. *Doe d. George v. Jesson.*

6 E. R. 80

4 If an estate, which, by a fine levied, is turned to a right of entry, can be devised, the devisee must enter within the same time within which the deviser must have entered if living. *Goodright d. Burton v. Forrester.*

1 Taunt. 578

5 If an estate descend to parceners, one of whom is under a disability, which continues more than 20 years, and the other does not enter within 20 years, the disability of the one does not preserve the title of the other after the 20 years elapsed. *Roe d. Langdon v. Rowleston.*

2 Taunt. 441

6 Twenty years' adverse possession of a waste inclosed, is a bar to the entry of a commoner. *Hawke v. Bacon.*

2 Taunt. 156

III. ASSUMPSIT.

(a) *Action, from what time to be computed.*

1 Though one plaintiff be abroad, if the other be in *England*, the action must be brought within six years after the cause of action arises. *Perry v. Jackson.*

4 T. R. 516

2 Where a bill of exchange is drawn payable at a certain future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover the money in an action for money lent, although six years have elapsed since the time when the loan was advanced; the Statute of Limitations

beginning to operate only from the time when the money is to be repaid, *i. e.* when the bill becomes due. *Wittershiem v. The Countess of Carlisle.*

1 H. B. 631

3 No debt accrues on a note payable after sight until it is presented for payment; therefore the Statute of Limitations is no bar to such a note unless it is presented for payment within six years before the action brought. *Holmes v. Kerrison.*

2 Taunt. 323

4 One of two makers of a joint and several promissory note having become a bankrupt, the payee receives a dividend under the commission, on account of the note: this will prevent the other maker from availing himself of the statute, in an action brought against him for the remainder of the money due on the note: the dividend having been received within six years before the action brought. *Jackson v. Fairbank.*

2 H. B. 340

5 If goods are consigned to a factor for sale on commission, it shall be presumed that he contracts to account for such as are sold, to pay over the proceeds, and to re-deliver the residue unsold, on demand. And an action does not lie against him for not accounting, till after a demand made of an account: Therefore, the Statute of Limitations runs only from the time of a demand made. After a reasonable time elapsed, a jury might presume that the consignor had made a demand and that the factor had accounted. And 14 years would be a sufficient time for such a presumption; if it were not rebutted by circumstances. *Topham v. Braddick.*

1 Taunt. 572

6 No action on an implied *assumpsit* lies by the reversioner and owner of the inheritance to recover the value of timber, cut by the deceased, (tenant for life,) after a fine levied by her, whereby she acquired a base fee, and before the avoidance of such fine and base fee by the entry of the reversioner for that purpose: such entry not revesting the reversioner's old estate *by relation during the continuance of the base fee* thus created, so as to entitle him at law to the timber and other mesne profits taken during that interval. Even supposing that after the Statute of Limitations had run against the appropriate action, by the reversioner against the tenant for life, for mesne

profits, or for waste, upon the original wrongful act of cutting down and converting the trees, an action of *assumpsit* for money had and received for the purchase-money of the trees sold, which was in fact paid to the former tenant for life within six years, was maintainable against her representatives after her death. *Hughes v. Thomas.* 13 E. R. 474

- 7 Though the cause of action accrued within the jurisdiction of the Supreme Court at *Calcutta*, while both the parties were resident there, and by the King's charter, granted in pursuance of the stat. 13 G. 3. c. 63. that Court is authorized to exercise the same jurisdiction in civil cases as is exercised by the Court of King's Bench within *England* by the common law thereof, and assuming that by such authority the provisions of the Statute of Limitations 21 Jac. 1. c. 16. s. 7., and 4 Ann. c. 16. s. 19. are transferred to *India*, as part of the law of *England*, auxiliary to the common law; yet, by the express tenor of the savings in those statutes, as applicable to the Courts here, the plaintiff's right of action upon an *assumpsit* is saved, if he (having returned home before the defendant) commence such action within six years after the defendant's return home, though more than six years had elapsed in *India* after the cause of action accrued there, and during the defendant's stay within the jurisdiction of the Court in that country. *Williams v. Jones.*

13 E. R. 439

(b) *What acknowledgment will take a Case out of the Statute.*

- 1 A letter, written by a defendant (who pleaded the Statute of Limitations to an action of *assumpsit*) to the plaintiff's attorney on being served with a writ, couched in ambiguous terms, neither expressly admitting or denying the debt, should be left to the jury to consider whether it amounts to an acknowledgment of the debt, so as to take it out of the statute. *Lloyd v. Mound.* 2 T. R. 760
- 2 If there be a mutual account of any sort between the plaintiff and defendant, for any item of which credit has been given within six years, that is evidence of an acknowledgment of there being such an open account between the parties, and of a promise to

pay the balance, so as to take the case out of the Statute. *Callins v. Skoulding.* 6 T. R. 189

- 3 Evidence of an acknowledgment by the defendant within six years of an old existing debt of above six years standing due to the plaintiff's intestate, but which acknowledgment was made after the intestate's death, will not support a count by the administrator, laying the promise to be made to his intestate, to which the Statute of Limitations was pleaded. *Surrell (Administrator) v. Winc.* 3 E. R. 409

- 4 An acknowledgment of a debt, though accompanied with a declaration by the defendant that he did not consider himself as owing the plaintiff a farthing, it being more than six years since he contracted, is sufficient to take the case out of the Statute. *Bryan v. Horseman.* 4 E. R. 599

- 5 So where the defendant, in an affidavit for leave to plead the Statute stated that *since the bill of exchange* (on which the action was brought) *no demand for payment had been made on him*, it was deemed sufficient to be left to the jury, as an acknowledgment. *Rucker v. Sir S. Hannay.* 4 E. R. 604, n.

- 6 Under a plea of the Statute of Limitations, the plaintiff gave in evidence a letter of the defendant in answer to an application for payment of his debt, in which the latter referred the plaintiff to his solicitors by whose opinion he should be governed, adding, "*they are in possession of my determination and ability*," and also a conversation with the defendant's solicitors, in which they stated that if the plaintiff had any letter which would bind the defendant, the debt would be paid, if it amounted to 100*l.*: this being left to the jury, a verdict was found for the plaintiff; but the Court of C. P. inclining to think it did not take the case out of the Statute, granted a new trial. *Bicknell v. Keppel.* 1 N. R. 30

- 7 *Assumpsit* against the defendant as acceptor of a bill of exchange, and upon an account stated; evidence that the defendant acknowledged his acceptance, and that he had been liable, but said that he was not liable then, because it was out of date, and that he could not pay it, it was not in his power to pay it, was held sufficient to take the case out of the statute, upon a plea of *actio non accrevit infra sex annos*. *Leaper v. Tatton.* 16 E. R. 420

8 "I owe you not a farthing, for it is more than six years since," is not to be left to the jury as evidence of an admission, to take a debt out of the Statute of Limitations. *Coltman v. Marsh.* 3 Taunt. 380

(c) Statute, how pleaded.

1 The plaintiff may declare on the original promise, although he relies on the subsequent promise to take the case out of the Statute of Limitations. *Leaper v. Tatton.* 16 E. R. 420

2 To an action brought by the assignees of an insolvent debtor, to recover money owing to him before his insolvency, in which the plaintiffs declare, that in consideration of the money being due to the insolvent, the defendant promised to pay them as assignees, it is a *bad plea* to say 'that the cause of action first accrued to the insolvent before the plaintiffs became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent, and before the suing out of the writ of the plaintiffs.' *Kinder v. Paris.* 2 H. B. 561

3 *2u.* Whether in such case, the defendant might plead that the money was first due to the insolvent, more than six years before the action was brought, and that he had made no express promise to the plaintiffs within six years? 2 H. B. 561

4 *Assumpsit* on a note payable by instalments, plea in bar as to the said several causes of action, except the last instalment, that "the said several causes of action did not, nor did any of them accrue within six years:" Held, on special demurrer, that though some of the instalments might be barred, and the others not, yet that the introduction to the plea and the body of it were inconsistent. *Gray v. Pindar.* 2 B. & P. 427

5 A replication to a plea of the Statute of Limitations shewed a bill of *Middlesex* sued out by the plaintiff on the 8th of August, 1805, (being in the vacation) within six years after the cause of action accrued; to which the sheriff returned *non est inventus*; and then stated the *alias* and a succession of *pluries* bills down to *Easter Term*, 1811, to each of which but the last it was averred that the sheriff made no return, and that the defendant did not

appear, but that he did appear to the last on the return-day, when the plaintiff offered himself against the defendant in the plea aforesaid, as by the record and proceedings thereof, remaining in the said Court, &c. at large appears: Held, 1st, that this latter allegation had reference to all and every the prior process stated, and was therefore tantamount to an allegation of the sheriff's return of *non est inventus* to the first bill of *Middlesex* stated, with a *prout patet*, &c. against which there could be no averment in pleading. 2dly, that the Court will take notice in pleading of the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have been then issued as of the preceding Term. *Harrington v. Taylor.* 15 E. R. 378

6 An attachment of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the Statute. *Smith v. Bower.* 3 T. R. 662

IV. IN TRESPASS OR CASE.

1 Where the plaintiff complained of a plea of *trespass*, for that the defendant with force and arms assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society, &c. against the peace, &c. to his damage, &c.: *Quare*, whether this be *trespass* or *case*? (and former authorities have considered it to be *case*) at any rate, a plea of not guilty *infra sex annos* is good on general demurrer. *Macfudzen v. Olivant.* 6 E. R. 337

2 An action cannot be maintained against an officer of the customs, for seizing goods as forfeited by the revenue laws, unless it be brought *within three months after the actual seizure*: notwithstanding a suit is instituted in the Exchequer for the condemnation of the goods, which is depending at the expiration of the three months. *Godin v. Ferris.* 2 H. B. 14

3 Where the commander of one of the King's armed vessels seized a vessel and cargo at sea, and brought them into the next port on suspicion of smuggling, and after process in the Exchequer, the owner obtained an order for re-delivery, under which he obtained only part of the goods from the defendant; the owner cannot maintain trover for the remainder, if

the action were brought *after three months from the original seizure, though within three months from the order of the re-delivery.* *Saunders v. Saunders.* 2 E. R. 254

4 A magistrate is liable to answer in an

action for such part of an imprisonment suffered under his warrant, as was within six calendar months before the action commenced against him. *Massey v. Johnson.* 12 E. R. 67

LIMITATION OF ESTATE.

N. B. See *post. tit.* POWER.

REMAINDER.

1 The words *limit and appoint* may operate as words of grant, so as to pass a reversion. *Shove v. Pincke.*

5 T. R. 124, 310

2 There may be a limitation to one unborn for life only, but not to the issue of such an one for life. *Brudenell v. Elwes.*

1 E. R. 452

(And see 1 E. R. 442)

3 If an estate be limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. *Denn v. Gillot.*

2 T. R. 431

4 But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife solely. 2 T. R. 431

5 Where there is an estate limited to a person for life, with remainder to the heirs of the body of the same person, it is an estate tail; but the limitation of the remainder must be to the heirs of the body of that person alone: therefore, if an estate be limited to A. for life, remainder to the heirs of the bodies of A. and B., it is not an estate tail. *Denn v. Gillot.*

2 T. R. 435

6 A limitation by a deed, to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue, to the second, third, and other sons of A. and of the several heirs male of the body and bodies of all and every such son and sons respectively issuing gives an estate in tail male to the first son of A. *Owen v. Smith.*

2 H. B. 594

7 By deed, and fine an estate was limited to the use of the husband for life, remainder to trustees and their heirs during his life, to preserve contingent remainders, remainder to the wife for life, remainder to the trustees and their heirs (not saying during her life), in trust to support the contingent uses

and estates thereafter limited, remainder to the first and other sons in tail, remainder to the wife in tail, remainder in default of issue to such persons and for such estates as she should appoint, &c.: Held, that the trustees took a legal estate in fee after the determination of the wife's life estate, and that all the subsequent limitations were trust estates: Held also, that an appointment by the wife to the use of the right heirs of the husband could not unite with the antecedent life estate of the husband, but could only give an equitable estate to the person who at his death should answer the description of his right heir. *Venables v. Morris.*

7 T. R. 438 & 342

8 A. being possessed of lands for a term of 999 years, previous to his marriage with B., granted the term to "B. and her heirs, immediately after the death of A. to hold the same to the said B. and her heirs to and for her and their own proper use for ever;" the marriage took effect, A. survived B. and died without issue, intestate, and without having taken out administration to B. his wife; the term upon the death of A. went to his administrator, and not to the administrator of B.: the Court being of opinion that the deed must be construed as a present gift to the wife in case she survived her husband, to take effect in possession on that event. *Doe d. Roberts v. Polgrean.*

1 H. B. 535

9 A., a grandfather after the marriage of his son B., who had two children then living, by deed conveyed lands to trustees to the use of himself for life; remainder to B. for life; remainder to trustees, &c.; remainder to the use of such child or children of B. and in such shares, &c. as B. should appoint; and in default of such appointment, "to the use of all and every the children of B. and the heirs of their several and respec-

- ...tive bodies as tenants in common, but if only one such child, to the use of such only child, and the heirs of his or her body; remainder to the right heirs of *A.* in fee:" then *A.* conveyed the reversion in fee to *C.*; afterwards *B.* had other children, and died without appointing: Held, that *B.*'s children took vested interests as tenants in tail, and that on the death of each child without issue, his share fell into the reversion conveyed to *C. Doe d. Tanner v. Dorville.* 5 T. R. 518
- 10 By a marriage settlement, lands were limited to *A.* for life, remainder to *B.* his intended wife for life, with inter-

mediate remainders, remainder to the heirs of the body of *B.* *A.* became a bankrupt, and by an Act of Parliament passed to vest his estates in trustees for the payment of his debts, &c. the lands were given after payment, &c. to *B.* for life, with such remainders over (in general terms of reference) as were limited by the settlement. Under these circumstances *B.* had a vested estate-tail of which a recovery might be suffered. *Goodright d. Burton v. Rigby.* 2 H. B. 46

Affirmed in the Court of King's Bench 5 T. R. 177

LITERARY PROPERTY.

- 1 The Stat. 8 Ann. c. 19. s. 5. makes, it necessary for the printer of a book, composed after the passing of the Act, and published for the first time after the composition, which book is printed and published with the consent of the proprietor of the copyright, to deliver a copy upon the best paper to the warehouse-keeper of the Company of Stationers for the use of the library of the University of Cambridge, notwithstanding the title to the copy of such book, and the consent of the proprietor to the publication, be not entered in the register-book of the said Company. *Cambridge University v. Bryer.* 16 E. R. 317
- 2 An action is maintainable on the stat. 8 Ann. c. 19. for pirating a single sheet of music. *Clementi v. Goulding.* 11 E. R. 244
- And see *Hime v. Dale.*
Storace v. Longman.
id. 244, 5, *notis.*
- 3 An author, whose work is pirated before the expiration of twenty-eight years from the first publication of it, may maintain an action on the case for damages against the offending party, although the work was not entered at Stationers' Hall, pursuant to the directions of stat. 8 Ann. c. 19. and although it was first published without the name of the author affixed. *Beckford v. Hood.* 7 T. R. 620
- 4 Acting a piece on the stage, of which the plaintiff had bought the copyright, is not evidence of a publication by the

defendant within the meaning of stat. 8 Ann. c. 19. *Goleman v. Wathen.* 5 T. R. 245

- 5 An action lies to recover damages "for pirating the new corrections and additions to an old work." *Cary v. Longmun.* 1 E. R. 358
- 6 No such action lies for publishing sea-charts on an improved and more useful principle, with material corrections, though many of the lines were copied from old charts. *Sayre v. Moore.* 1 E. R. 361, n.
- 7 But the action lies for a servile imitation of parts of a book of chronology, though other parts of the book were different. *Truster v. Murray.* 1 E. R. 363, n.
- 8 Two penalties may be incurred on the same day on stat. 12 G. 2. c. 36. for selling books, the originals of which have been written and published here, and afterwards re-printed in another country, and imported into this, if the acts of sale be distinct. *Brooke v. Milliken.* 3 T. R. 509
- 9 The assignee of a print may maintain an action on statute 17 G. 3. c. 57. against any person who pirates it. *Thompson v. Symmonds.* 5 T. R. 41
- 10 In such an action it is not necessary to produce the plate itself in evidence: one of the prints taken from the original plate is good evidence. 5 T. R. 41
- 11 The date must always appear on the print. 5 T. R. 41
- 12 2u.—Whether, on an assignment, the name of the inventor or the assignee should appear? *Thompson v. Symmonds.* 5 T. R. 41

LOTTERY.

See *tit.* AFFIDAVIT I. *ante*, 22, &c.

CONVICTION 192, &c.

- 1 An unstamped agreement to sell a share of a ticket in the lottery, before the tickets are deposited with the commissioners, is within the penalty inflicted by s. 21. of 22 G. 3. c. 47. *Rex v. Hawkesworth.* 1 T. R. 450
- 2 The sale of lottery tickets, by which the purchaser is to be entitled to all the benefit of them, *except the 10l. prizes*, is prohibited and made void by statute 22 G. 3. c. 47. *Deey v. Shee.* 2 T. R. 617
- 3 Since that Act no interest in any ticket can be conveyed, less than the whole of the specific ticket or share; and those shares not less than sixteenths. Per *Buller, J.* *id.* 622
- 4 The printer of a newspaper publishing an illegal proposal for gambling in the lottery, incurs a penalty under statute 22 G. 3. c. 47. s. 13., which enacts that no person shall sell the chances of tickets, &c. nor publish any proposal for it, under a penalty of 50l. *King q. t. v. Smith.* 4 T. R. 414, n. [N. B. *The printers of the newspapers afterwards obtained an act of indemnity against penalties incurred before this determination.* See stat. 32 G. 3. c. 61.]
- 5 A plaintiff who sues for penalties under the 27 Geo. 3. c. 1. s. 2. must make an affidavit previous to the suing out of the writ, specifying the amount of the penalties sued for. *King q. t. v. Horne.* 4 T. R. 349
- 6 In an action for the penalty of the Lottery Acts, it is sufficient if the process state the sum to which they amount as the debt, without describing it as arising from penalties, or specifying the offence, provided there be an affidavit for that purpose, and it is also a sufficient compliance with the stat. 33 G. 3. c. 62. sect. 38. to state in the process that the plaintiff is "appointed by the Commissioners of his Majesty's Stamp Duties to prosecute." *King q. t. v. Pacy.* 2 H. B. 601
- 7 The ticket last drawn out of the lottery was considered as the last drawn ticket, so as to entitle the holder to a prize, though another number was never drawn, and no account could be given of it. *Schinotti v. Bumstead.* 6 T. R. 646
- 8 It is not illegal for one of the persons mentioned in the second schedule of the Act 49 Geo. 3. c. 70. (local and personal,) as being authorized to sell the city lands by lottery, to sell shares in the tickets and to receive for a share more than the proportionate part of five pounds for a whole ticket. *Leese v. Rolfe.* 5 Taunt. 120

MANDAMUS.

- I. IN WHAT CASES, AND HOW GRANTED.
- II. ON WHAT GROUNDS REFUSED.
- III. WRIT—FORM OF.
- IV. RETURNS—HOW MADE.

I. IN WHAT CASES, AND HOW GRANTED.

- 1 Upon application for a *mandamus* to be restored, the party must shew a *prima facie* title, because he may, if properly admitted, have another remedy: *Secus* on a *mandamus* to admit. *Rex v. Jotham.* 3 T. R. 577
- 2 The Court granted a *mandamus* directed to the commissioners of the land-tax in *A.* to elect a clerk to them in the department for the rates and duties on windows, houses, and lights. *Rex v. The Commissioners of the land-tax for St. Martin's Westminster.* 1 T. R. 146
- 3 A *mandamus* will lie to the commissioners of excise to grant a permit, if a proper case be laid before the Court. *Rex v. Commissioners of Excise.* 2 T. R. 381
- 4 The shipper of beer, on which the duty has been paid, which is shipped for exportation to the *West-Indies*, is entitled to take the oath appointed by

38 G. 3. c. 54. s. 4. in order to obtain a drawback upon such beer, without being subject to any deduction out of such drawback, in respect of the quantity of beer to be charged in the victualling bill of the master, for the consumption of the voyage, on which no drawback is allowed: and therefore the Court granted a *mandamus* to the collector of the excise to administer such oath. *Rex v. Cookson.*

16 E. R. 376

5 The office of clerk of the Bridge-house estates in *London* being an ancient office for life, the duty of which is to superintend certain estates which are appropriated by the corporation to the support of *London Bridge*, some of those estates having been granted to them for that express purpose, a *mandamus* lies to restore to it. *Rex v. The Mayor, Aldermen, and Common Council of London.* 2 T. R. 177

6 A *mandamus* granted to restore to the office of clerk or surveyor of the city work; which was also an office for life, on receiving which an oath was administered. 2 T. R. 177, n.

7 Upon affidavits that one of two candidates for an office had a majority, only by means of illegal votes, the Court granted a *mandamus*, to the corporation to admit and swear in the other who appeared upon the affidavits to have the greater number of legal votes; and this although the first, was admitted and sworn into the office; there being no other specific, or at least no other so convenient mode of trying the right. *Rex v. The Corporation of the Bedford Level.*

6 E. R. 356

8 A *mandamus* may be granted under stat. 11 G. 1. c. 4. to proceed to the election of an annual officer in a corporation, as well as to the head officer. *The case of the Corporation of Scarborough.* 2 T. R. 732, n.

9 If it appear with sufficient certainty to the Court, that a person has been elected mayor of a borough on the day appointed by the usage, who is not qualified to accept the office, by reason of his not having previously taken the sacrament within the time limited by law, they will grant a *mandamus* to the electors to proceed to a new election under the stat. 11 G. 1.

c. 4. s. 2, as if no election had in fact been made. *Rex v. Corporation of Bedford.* 1 E. R. 79

10 A charter having granted that upon the death or amotion of a principal burgess (who is appointed to hold for life) it should be lawful for the mayor and the remaining principal burgesses, within eight days next following, to elect another; the eight days after a vacancy having slipped without an election, a *mandamus* was granted upon the stat. 11 G. 1. c. 4. s. 2. to make an election. *Rex v. The Mayor, &c. of Thetford.* 8 E. R. 270

11 A *mandamus* to a corporation to put the corporate seal to the certificate of the election of a corporator, in order that it may be laid before the King for his approbation, is granted of course. *Rex v. The Mayor, &c. of York.*

4 T. R. 699

12 Therefore such a writ was granted, directed to the corporation of *York*, on an affidavit that the recorder, applying, had the majority of legal votes; though it was stated that the other candidate had the majority at the election, and that the corporation had already certified his election.

4 T. R. 699

13 *Mandamus* granted to compel a mayor and the capital burgesses of a corporation to fill up two vacancies occasioned by the death of two capital burgesses, though there was an information in nature of a *quo warranto* depending against the mayor, questioning his title. *Rex v. Grampound (Corp.)*

6 T. R. 301

14 Where there is no regular presiding sworn officer at an election, (e.g. of churchwardens, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided), the controul of the election devolves at common law upon the electors themselves: but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; and therefore a resolution by them, that it shall conclude at a given time, must at least limit a time reasonable in itself with respect to numbers and dis-

- tance, and be of sufficient notoriety. But whether a resolution by a majority of the vestry, on the first day of the election, to close the poll at four o'clock on the next day, in a parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years, not to keep the poll open for more than two days, and no instance within living memory of extending it beyond four o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, and others had no notice of the resolution, was a fit question to be tried upon a *mandamus*. *Rex v. Winchester Bp.'s Commissary*. 7 E. R. 573
- 15 Where a charter of incorporation, after ordaining who should be entitled to be burgesses, directed that they should make application for that purpose to the mayor and commonalty on a day certain in each year, and at no other time, and then make due and legal proof of their qualifications, and A. and B. claiming to be admitted burgesses, made application to the mayor and commonalty on the charter day, and offered to make due and legal proof of their qualifications, but their applications were not heard, nor their proofs received on account of the time having been spent in other business; the Court granted a *mandamus* to the mayor and commonalty to enter an adjournment to a subsequent day, and then to hold a meeting, and receive and examine such proofs, &c. and a return to such *mandamus* that it was impossible for A. and B., before the expiration of the charter day, to make due and legal proof, &c., according to the intent of the charter, by reason of the day being consumed in the necessary business of the borough, and that the mayor and commonalty were not authorized to hear such proof on any other than the charter day, &c., was held ill and quashed. *Rex v. The Mayor, Burgesses, and Commonalty of Carmarthen*. 1 M. & S. 697
- 16 A *mandamus* will lie to compel a dean and chapter to fill up a vacancy among canons residentiary; and on such a *mandamus* the Court will compel an election at the peril of those who resist. *Chichester (Bishop) v. Harward*. 1 T. R. 652
- 17 If a visitor of a college in one of the Universities refuse to exercise his visitatorial power by receiving and hearing an appeal, the Court will grant a *mandamus* to compel him. *Rex v. Ely (Bishop)*. 5 T. R. 475
- 18 That a *mandamus* lies to a visitor to hear an appeal, and give some judgment: see also *Rex v. The Bishop of Lincoln*. 2 T. R. 338, n. *And post, tit. VISITOR.*
- 19 Where a parish consists of several townships, some of which maintain their own poor, and have overseers separately appointed, the Court will grant a *mandamus* for the separate appointment of overseers for the remaining townships. *Rex v. Sir W. Horton*. 1 T. R. 374 (And see *Rex v. Newell*. 4 T. R. 266)
- 20 If, on an appeal against overseers' accounts, the Sessions disallow some of the items, and do not order the overseers to pay the balance to the successors, two justices out of sessions may enforce payment of the balance; and if they refuse to interfere, the Court will grant a *mandamus* to compel them to hear the complaint. *Rex v. Carter*. 4 T. R. 246
- 21 If the overseers after allowance of their accounts by two justices at special sessions, and an order by the justices to pay over the balance to their successors, which order is confirmed on appeal, refuse to pay such balance, the two justices may issue their warrant to levy the same under 50 G. 3. c. 49. upon the application of one of the succeeding overseers, although the rest of the churchwardens and overseers refuse to concur in such application; therefore, where the justices refused to issue such warrant upon such application, the Court granted a *mandamus*. *Rex v. Pascoc*. 2 M. & S. 343
- 22 Where the father and son were removed from A. to B. by two several orders of removal; and the parish officers of A. and B. agreed that the removal of the son should follow that of the father, without the expense of a separate appeal; in consequence of which an appeal was only entered against the order removing the father; and after the sessions had determined that

the father was settled in *A.*, and had quashed that order, *A.* refused to take back the son: The Court granted a *mandamus* to the sessions to receive and determine the appeal against the order removing the son, though at a subsequent sessions to that holden next after the order of removal made; the appeal being directed to be entered *nunc pro tunc* with proper continuances. *Rex v. The Justices of Wiltshire.* 1 E. R. 683

23 A *mandamus* was granted to the sessions to receive an appeal which was presented during the next sessions after an order of removal made, though not presented till after the day on which, by the practice of that sessions, appeals were required to be entered. *Rex v. The Justices of Leicester.* 1 E. R. 686

24 Where an order of removal was made and executed on the day before the holding of the *Epiphany* sessions, and the parish to which the pauper was removed, gave due notice and entered their appeal at the *Easter* sessions at which sessions the justices refused to hear the appeal, on the ground that it should have been entered at the *Epiphany* sessions; the Court granted a *mandamus* to the justices to receive such appeal, notwithstanding it appeared that the *Epiphany* sessions continued for fourteen days, and were afterwards twice adjourned to distant days, and that it was the practice of the sessions to allow appeals to be entered at any time during their continuance, or at the adjournments, and to respite the hearing to the next sessions. *Rex v. The Justices of Surrey.* 1 M. & S. 479

25 The stat. 16 Car. 1. c. 4. s. 2. having continued the stat. 1. Jac. 1. c. 6., the 2d and 3d sections of which last-mentioned statute, in extension of the stat. 5 Eliz. c. 4. authorize the justices in sessions (with the sheriff, if he conveniently may,) to rate the wages of any labourers, &c.; or workmen whatsoever, &c.; the Court granted a *mandamus* to the justices, &c. of *Kent*, to hear an application of the journeymen millers of that county, praying them to make such rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry. *Rex v. The Justices of Kent.* 14 E. R. 395

26 If the lord of a manor refuse to admit a person to whom a copyhold is surrendered on account of a disagreement respecting the fine to be paid, the Court will grant a *mandamus* to compel the lord to admit without examining the right to the fine: for no right to the fine can arise till admittance. *Rex v. The Lord and Steward of the Manor of Hendon.* 3 T. R. 484

27 A *mandamus* lies to the lord and steward of a manor to admit one to a copyhold tenement who has a *prima facie* legal title in order to enable him to try his right; though equity had before refused to compel the lord to admit him for want of his shewing an equitable right to the property. But if there be a claim of a previous fine due to the lord in respect of the ancestor from whom the party claims, the rule will only be granted on payment of such fine or *finis* as shall be due. *Rex v. Coggan.* 6 E. R. 431

28 A similar *mandamus* was just before granted to the Duke of *Leeds* to admit Mr. *Conolly* to certain customary tenements in the manor of *Wakefield*, in *Yorkshire*, to enable him to try his title thereto. *id.* 432, n.

II. ON WHAT GROUNDS REFUSED.

1 Wherever a party has a specific legal remedy, the Court will refuse to grant a *mandamus*. *Rex v. Bishop of Chester.* 1 T. R. 396

2 The Court will not grant a *mandamus* to a ministerial officer, such as the treasurer of a county, to obey an order of the Court of Quarter Sessions; but the proper remedy in case of his refusal to obey such order is by indictment. *Rex v. Bristow.* 6 T. R. 168

3 The Court refused a *mandamus* to the officers of the customs to register a ship transferred by the survivors of two part-owners, merchants, on the ground that the executors of the deceased part-owner, ought to have joined in the transfer. *Rex v. Collector of Customs, at Liverpool.* 2 M. & S. 223

4 A *mandamus* to the mayor of *Colchester* to admit a recorder of that borough refused, because there was a recorder *de facto*, and the parties had another remedy by *quo warranto*:

though both of them claimed under the same election. *Rex v. The Mayor of Colchester.* 2 T. R. 259

5 *Mandamus* to the mayor, &c. of London, to admit a person to the office of auditor of the Chamberlain's and Bridge-master's accounts, who had served it three years successively, and been elected again the fourth year by the livery, refused; because the custom of the city appeared to be, that no person should be elected to, or serve, the said office for more than two years successively. *Rex v. The Mayor of London.* 1 T. R. 423

6 A *mandamus* refused to restore to the office of clerk of the Bridge-house estates in London, though the party was irregularly suspended; it appearing on his own shewing that there was good ground for the suspension, if the proceedings had been regular. *Rex v. Mayor of London.*

2 T. R. 177

7 Where a corporator, who was entitled to a dividend of certain profits, arising from a fishery which was enjoyed in partnership by the corporators, was suspended from such profits until he paid a fine imposed by a bye-law, the Court refused a *mandamus* to restore him to office; he having a remedy by action and in equity for the share of the profits, if unjustly withholden from him, and the suspension not being equivalent to a removal. *Rex v. Whitstable Fishery Corporation.*

7 E. R. 353

8 Where a charter of incorporation of Hen. 7., granted to the citizens and commonalty in these words: "*Quod ipsi, et successores sui, in perpetuum, singulis annis successivis, viginti quatuor concives civitatis in aldermannos, necnon quadraginta alios ejusdem civitatis pro communi consilio civitatis illius eligere, facere, et creare possint*;" and it appeared that in the year 1693, and the two following years, successive elections of the forty common-council-men had been made, since which time the usage had been not to elect the aldermen or common-council-men annually: the Court refused a *mandamus*, which was applied for in order to raise the question against the usage whether the election of those officers ought to be annual, there being another remedy

open to the parties making this application. *Rex v. The Mayor and Citizens of Chester.* 1 M. & S. 101

9 Where, by the constitution of a corporation, a person having served a seven years' apprenticeship to a freeman residing in the town, is entitled to his freedom, and where by a bye-law the indentures must be inrolled by the town-clerk within a limited time, an apprentice who is bound to a freeman, resident only occasionally, and whose service is to be performed at another place, is not entitled to have his indentures inrolled, nor will the Court grant a *mandamus* to the town-clerk for that purpose. *Rex v. Marshal.* 2 T. R. 2

10 The Court will not grant a *mandamus* to compel a Canal Company, pursuant to the provisions of an Act of Parliament, to proceed to an assessment of the value of land, taken by them for the purposes of their canal; and also of the recompense to be made for the damages thereby sustained; if the parties interested in the land do not make their application to the Court within a reasonable time after the land was taken by the Company; especially, if the parties have another remedy by ejectment. *Rex v. Stainforth and Keadby Canal Company.*

1 M. & S. 32

11 If trustees under a Road Act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, the Court will not compel them by *mandamus* to continue such repairs, unless there be a special provision in the Act to that effect. *Rex v. The Commissioners of the Llandillo District.*

2 T. R. 232

12 It seems that an indictment against Commissioners of an Inclosure Act, for not obeying an Order of Sessions, directing them to set out a road as a public road, would not be such a remedy to the party, supposing him entitled to have the road so set out, as would make the Court refuse to interfere by *mandamus*. *Rex v. The Commissioners of Dean Inclosure.*

2 M. & S. 80

13 No *mandamus* lies to the Archbishop of Canterbury to issue his *fiat* to the proper officer, &c. for the admission of a doctor of civil law, graduated at

Cambridge, as an advocate of the Court of Arches. *Rex v. Canterbury (Abp.)*

8 E. R. 212

14 The Court will not grant a *mandamus* to a bishop to license a lecturer without the consent of the rector, where such lecturer is supported by voluntary contributions, unless an immemorial custom to elect without such consent is shewn. *Rex v. The Bishop of London.*

1 T. R. 313

15 A *mandamus* to a bishop to license a curate of an augmented curacy, where there was a cross-examination, refused, because the party had another specific legal remedy by *quare impedit*. *Rex v. The Bishop of Chester.*

1 T. R. 396

16 Where no immemorial custom appeared to appoint a lecturer in a parish church, and on the contrary it appeared that the lectureship was founded in 1658, when the episcopal constitution was suspended, and consequently there could not be the joint assent of the bishop, the rector, and the vicar, to the endowment; a *mandamus* to the bishop to license a lecturer, without the assent of the vicar, was denied; though it appeared that the lectureship was originally endowed by the rector, with an annual stipend payable out of the impropriate rectory, and that several lecturers had from time to time been accepted by the bishops and vicars for the time being. *Rex v. The Bishop of Exeter.*

2 E. R. 462

17 The Act of Uniformity, 13 and 14 Car. 2. c. 4. s. 19. having enacted that no person shall be allowed to preach as a lecturer, in any church, &c. "unless he be first approved and thereunto licensed by the Archbishop of the Province, or Bishop of the Diocese," &c. the Court will not entertain a motion for a *mandamus* to the bishop to license a lecturer appointed by the parish upon the previous refusal of the bishop to do so, upon the alleged ground of unfitness in the party elected, unless it be shewn that the like application had also been made to the archbishop and rejected by him. *Rex v. Bishop of London.*

13 E. R. 419

18 The Court discharged a rule for a *mandamus* to the bishop of London to license a clerk chosen by the inhabitants of St. Bartholomew, Exchange,

London, to, an endowed lectureship in the parish church there, upon affidavit made by the bishop that the party elected had been admitted before him with a view to his being "approved and licensed;" (which are the words of the stat. 13 & 14 Car. 2. c. 4. s. 19. imposing that function upon the Archbishop or Bishop before any lecturer may lawfully preach); that he had made diligent inquiry concerning his conduct and ministry, and being convinced from such inquiry that he was not a fit person to be allowed to lecture, he had conscientiously determined, after having heard him, that he could not approve or license him thereunto. And the rule which included the Archbishop of Canterbury, as well as the Bishop, in the alternative, was also discharged as against the former (against whom it was not pressed); though it was considered to be equally open to the party to make a substantive application against the Archbishop, if he declined to inquire as to his fitness, with a view to approve or disapprove of him as a fit person to be licensed. *Rex v. Archbishop of Canterbury and Bishop of London.*

15 E. R. 117

19 An immemorial custom for the inhabitants of a parish to elect a lecturer is binding on the rector; but where there is no such custom, and the lecturer has been paid out of the poor-rates, the Court will not grant a *mandamus* to the rector to certify to the Bishop the election of a lecturer chosen by the inhabitants. *Rex v. Field.*

4 T. R. 125

20 Where the minister of an endowed dissenting meeting-house had been expelled by a majority of the congregation, the Court refused a *mandamus* to restore him, which was applied for in order to enable him to justify his conduct, because it did not appear that he had complied with all the requisites necessary to give him a *prima facie* title. *Rex v. Jotham.*

3 T. R. 575

21 On a commission of charitable uses, it was agreed between the lord of the manor of A. and the inhabitants of W. within the manor, that certain copyhold lands should be let for the maintenance of a stipendiary curate of the chapel of W. to be nominated

by a majority of the inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach; the usage of nominating, &c. had been pursuant to the agreement; and now the lord having refused to allow and present the nominee of the majority of the inhabitants, the latter prayed a *mandamus*, which the Court refused; for their right is either a mere trust, and then their remedy is in equity; or it is a legal right, and then a *quare impedit* will lie. *Rex v. Marquis of Stafford.* 3 T. R. 646

22 The publication of a pamphlet against the established religion in the University of *Cambridge*, is an offence within one of the Statutes of the University, and punishable by banishment by the Vice-Chancellor, assisted by the heads of colleges in the Vice-Chancellor's Court: and though the statute inflicting that punishment adds, that the party shall be banished from his college, the Court will not grant a *mandamus* to restore a person to the franchises of the University, against whom, only banishment from the University is pronounced in the above Court. *Rex v. Cambridge University.* 6 T. R. 89

23 In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation, in default of his heirs, devolves upon the King, to be exercised by his great seal; and on that ground the Court refused to interfere by *mandamus* to compel the master and fellows of *St. Catherine's Hall, Cambridge*, to declare one of their fellowships vacant, and to proceed to a new election. *Rex v. St. Catherine's Hall, Cambridge.* 4 T. R. 233

24 A *mandamus* to admit a vestry clerk refused. *Rex v. Croydon Churchwardens.* 5 T. R. 713

25 *Mandamus* to the churchwardens to make a church-rate refused, it being a subject of ecclesiastical jurisdiction. *Rex v. The Churchwardens of St. Peter, Thetford.* 5 T. R. 364

26 A rate to reimburse churchwardens such sums as they had expended, or might thereafter expend, on the parish church, would be bad on the face of it, as in part retrospective; and

therefore the Court would not grant a *mandamus* to the chapel-wardens of a township within the parish to make such a rate for raising their accustomed proportion of the whole: and their refusal to make such a rate, when demanded, applying as well to the form as to the substance of the demand, the Court would not grant the *mandamus* to raise the money in the common form of such a rate prospectively, out of which the churchwardens might repay themselves. *Rex v. Haworth Chapel-wardens.* 12 E. R. 556

27 A *mandamus* to country justices, to rate a parish within their jurisdiction in aid of another parish, lying within a borough, which has an exclusive jurisdiction, refused; because they have no means of inquiring into the complaint. *Rex v. Holbeck.* 4 T. R. 778

28 By an Act of Parliament for maintaining the poor at *Southampton*, and for other purposes, and incorporating the guardians, power is given to the guardians to raise money for certain purposes, and to appoint a treasurer who is to account to them and pay over, &c. according to their order; and an appeal is given to the Quarter-Sessions against any thing done under the Act, who have power to make such order therein, "either by directing the money to be returned, or otherwise, as to them shall seem meet:" the guardians ordered the treasurer to pay a sum of money for a purpose different from those mentioned in the Act, against which an appeal was entered at the sessions, where that sum was disallowed in the account, and the treasurer who had paid it was ordered to repay it to the succeeding treasurer: the Court refused to grant a *mandamus* to compel the late treasurer to pay over the money according to the Order of Sessions, because he was a ministerial officer, and bound to obey the order of the guardians. *Rex v. Shaw.* 5 T. R. 549

29 The Court will not grant a *mandamus* to magistrates to order them to issue warrants of distress to levy a poor-rate on certain persons who have refused to pay, unless those persons have been previously summoned by the justices: but they will grant a *man-*

damus to them to receive complaints, &c. against the persons who refuse to pay, &c. and to proceed thereupon to levy, &c. *Rex v. Bent*.

6 T. R. 198

30 Where the weavers presented a petition to the justices at sessions, praying them to limit a rate of wages, according to the provisions of stat. 5 *Eliz.* c. 4. s. 15., and 1 *Jac.* 1. c. 6. s. 3., and the justices heard the petition and counsel in support of it, and after making inquiry and examining witnesses upon the subject, determined that they could not make any rate more beneficial to the weavers: the Court refused a *mandamus* to the justices to hear and determine, although they did not examine the witnesses tendered by the petitioners, nor any witnesses upon oath, or in open Court. *Rex v. The Justices of Cumberland*.

1 M. & S. 190

31 The Court will not grant a *mandamus* to the justices at sessions to re-hear an appeal against an order of removal, after judgment given by them, and entered by the clerk of the peace for quashing the order; upon the ground that the justices at sessions were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment of the appeal. *Rex v. The Justices of Leicestershire*.

1 M. & S. 442

32 A *mandamus* to the justices in sessions, to allow an item of charge in the coroner's account, refused; because the justices were of opinion, under the circumstances, that there was no ground to suppose that the deceased had died any other than a natural, though a sudden death; and therefore that the inquisition had not been duly taken; and the Court seeing no reason for interfering with that judgment. *Rex v. The Justices of Kent*.

11 E. R. 229

33 The 13 *G.* 1. c. 23. s. 5., for settling "disputes between clothiers or makers of woollen goods, and weavers, or persons employed in such manufactures," does not relate to demands against clothiers by the owner of a scribbling and carding mill for work done by him for the clothiers in teasing, scribbling, carding, and stubbing the wool at his mill: therefore the Court re-

fused a *mandamus* to two justices to hear and determine such demands.

Rex v. Heywood. 1 M. & S. 624

34 The defendants appealed to the sessions against a conviction on a penal statute, where the conviction was affirmed: afterwards the record was removed by *certiorari*, where the conviction was quashed for a defect in the information; then the prosecutor moved that a *mandamus* might issue to compel the magistrates to proceed on the original information: but the Court refused to make such a rule. *Rex v. Jukes*.

8 T. R. 625

35 The 16 *G.* 3. c. 30., which gives an appeal to the sessions against a conviction for deer-stealing, requires the person appealing to give six days' notice; and if an appeal be entered without notice, the sessions have no authority to adjourn it to the next sessions: where the sessions did so adjourn the appeal, and at the next sessions it was dismissed for want of notice, the Court refused to grant a *mandamus* to the justices to re-hear it. *Rex v. The Justices of Oxfordshire*.

1 M. & S. 446

36 A *mandamus* to the steward of a manor to admit a copyholder claiming by descent refused, because he had a complete title against all the world but the lord without admittance. *Rex v. Rennett*.

2 T. R. 198

III. FORM OF WRIT.

1 A *mandamus* directed not to a corporation by its corporate name, but to more persons than are by the charter required to do the thing enjoined by the *mandamus*, seems ill. *Rex v. Smith*.

2 M. & S. 583

2 In a *mandamus* to a company in a corporation to compel them to enrol indentures of apprenticeship, it is sufficient to state generally that those who have served a free burgess, &c. under indentures of apprenticeship, and whose indentures have been inrolled, are entitled to be admitted to their freedom; that *A. B.* had served, &c. that his indentures ought to have been inrolled on being tendered, &c. and that they were tendered for that purpose, but that the defendants refused to enrol them. *Rex v. Coopers' Company of Newcastle-on-Tyne*.

7 T. R. 543

- 3 Where a *mandamus* to the ordinary, to license a curate, only stated that he had been duly nominated and appointed by the inhabitants to be curate, without stating either the consent of the rector, or any custom for the inhabitants to make such nomination and appointment, the Court quashed the writ, upon the ground that the writ should have stated those facts which constituted the duty of the ordinary, and induced an obligation upon him in point of law to do the act required. *Rex v. The Bishop of Oxford.* 7 E. R. 345
- 4 After a return has been made to a *mandamus*, the defendant cannot make any objection to the writ itself. *Rex v. Mayor, &c. of York.* 5 T. R. 66
- 6 If the writ set forth all the proceedings of the election, concluding, "by reason whereof A. was elected," it is a bad return to say that he was not elected: the defendant should traverse one of the facts alleged. *Rex v. Mayor of York.* 5 T. R. 66
- 7 In a return to a *mandamus* to a corporation to restore a member who had been removed, it should appear that the body removing had proved the charge for which the member was removed: it is not sufficient to state merely that he was present when the charge was made and did not deny it. *Rex v. Faversham Fishermen's Company.* 8 T. R. 352
- Affirmed by Lord Kenyon, C. J. and Lawrence J., in *Harman v. Tappenden.* 1 E. R. 562-3

IV. RETURNS—HOW MADE.

- 1 If a return to a *mandamus* consist of several independent matters, not inconsistent with each other, but part of them good in law and part bad, the Court may quash the return as to such part only as is bad, and put the prosecutor to plead or traverse the rest. *Rex v. The Mayor, &c. of Cambridge.* 2 T. R. 456
- 2 That A. was not a burgess; that he was not eligible to the office of common-councilman; and that he was not elected, are not inconsistent returns. 2 T. R. 456
- 3 If two or more inconsistent causes be returned to a *mandamus*, the Court will quash the whole return. 2 T. R. 456: and *Rex v. The Mayor of York.* 5 T. R. 66
- 4 It is inconsistent to state in a return to a *mandamus* (to certify the election of a recorder, supposed in the writ to be on the 15th of January) that the corporation were not then duly assembled; and afterwards to state the election of another corporate officer, to wit, on the 15th of January. The day in such a case is material: and then its being laid under a *viz.* does not make any difference. 5 T. R. 66
- 5 A return to such a *mandamus*, that the corporation were not duly assembled to proceed to the election of a recorder, is bad; because it contains a negative pregnant. *Rex v. Mayor of York.* 5 T. R. 66
- 6 And see *Rex v. Burgesses of Carmarthen*, 1 M. & S. 697, *ante*, page 470.
- 8 Masters of grammar-schools must be licensed by the ordinary, who may examine the party applying for a licence as to his learning, morality, and religion: Therefore, it is a good return to a *mandamus* (to the ordinary to grant a licence to a schoolmaster), to state that he had suspended granting his licence until the party would submit himself to be examined touching his sufficiency in learning. *Rex v. The Archbishop of York.* 6 T. R. 490
- 9 A return (by a rector to a *mandamus* to restore a parish clerk) held insufficient, because it did not state that the party had been summoned to answer to a charge, before he was removed. *Rex v. Gaskin.* 8 T. R. 209
- 10 The Court will not quash a return to a *mandamus* (which directed an inferior Court to give judgment on an indictment) merely because it states an erroneous judgment given below; but a writ of error must be brought to reverse the judgment. *Rex v. The Justices of the W. R. of Yorkshire.* 7 T. R. 467
- 11 Though by the statute 9 Ann. c. 20. s. 2. the prosecutor of a *mandamus* to which there is a return, and issue taken on the facts therein, had an option to try the question in the same county in which he might have brought an action for a false return; yet if all the material facts are alleged in one

county, and issue taken thereon there, he cannot issue the *venire facias* into another county, though he might originally have alleged the facts there,

and have there brought his action for a false return. *Rex v. The Mayor, &c. of Newcastle.* 1 E. R. 114

MANOR.

I. LORD OF.

(a) What acts he may do.

II. COURTS AND CUSTOMS.

III. PLEADINGS AND EVIDENCE.

I. LORD OF.

(a) What acts he may do.

1 If a lord of a manor convey a customary estate to the tenant, he cannot reserve to himself the ancient services; for the tenant by reason of the statute of *quia emptores* must then hold of the superior lord. *Bradshaw v. Lawson.* 4 T. R. 443

2 Where the lord of a customary manor, by his deed, made since the statute of *quia emptores*, granted to his customary tenant, who then held by the payment of certain customary rents and other services, that in consideration of a 6l penny fine (or 6l years' rent), he, the lord, *ratified and confirmed* to the tenant and his heirs *all his customary and tenant-right estates*, with the appurtenances, &c. and granted that the tenant and his heirs should be thereof *freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c. dues, customs, services, and demands*, at any time thereafter happening to *become due* in respect of the tenancy; *except* one penny yearly rent, and also *excepting and reserving* suit of Court, with the service incident thereto; and *saving and reserving* all royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the signory, so as not to prejudice the *immunities* thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c. without licence: Held, that such confirmation to the tenant of his customary and tenant-right estate, freed, &c. from all rents and services, except, &c. was tantamount to a release

of those rents and services not specifically excepted; and that by virtue thereof, the customary tenement became frank-fee, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became thereupon devisable by the Statute of Wills. Such customary estates, which are peculiar to the north of *England*, are not freehold, but seem to fall under the same general consideration as copyholds; alienable by bargain and sale, and admittance thereon, and not holden at the will of the lord. *Doc d. Reay v. Huntington.* 4 E. R. 270

3 The lord of a manor, to whom the grant of a market is made *infra villam de W.* may hold it any where *infra villam de W.*: and whether *villa* extend to the town of *W.*, or the township or parish of *W.*, the lord has a right to remove the market-place from one situation to another within the precinct of his grant. And though he should have holden it for above 20 years within the township of *W.*, where the grant only gave it him within the town properly so called at the time, yet if he afterwards give notice of the removal to another place in the township, the public have no right to go upon his soil and freehold in the old market-place; and any person going there is liable to an action of trespass by the lord. *Curwen v. Salkeld.* 3 E. R. 538

4 The lord of a manor, as such, has no right, without a custom, to enter upon the copyholds within the manor, under which there are mines and veins of coal, in order to bore for and work the same: and the copyholder may maintain trespass against him for so doing. *Bourne v. Taylor.* 10 E. R. 189

5 Though the lord of a manor in *Cornwall* may by conveyance and acts of

ownership establish his right to all tin mines within the manor, as well under the freehold tenements as under customary tenements and the wastes; yet consistently therewith, the tenants of certain tenements in a vill within the manor, some of them freehold and some customary, may, by acts of ownership for more than twenty years past, establish their right to copper mines, as well under the waste and customary lands, as under the freehold lands within the vill. *Curtis v. Daniel.*

10 E. R. 273

II. COURTS AND CUSTOMS.

- 1 To constitute a Court-baron, it must be held before two free suitors at least. *Rumsey v. Walton.* 4 T. R. 446, n.
- 2 An amercement at a Court-leet for a private injury to the lord is illegal, though there be a custom to warrant it. *Wood v. Lovatt.* 6 T. R. 511
- 3 A custom to swear the jurors at one Court-leet to inquire, and to return their presentments at the next Court, is bad in law. *Davidson v. Moscrop.*
- 4 A custom within a manor, that lands shall descend to the *eldest sister*, where there is neither a son nor a daughter, does not extend to an *eldest niece*; but the lands must descend according to the rules or the common law, in default of such son, daughter, and sister. *Denn d. Goodwin v. Spray.*
- 5 It seems that a custom for the homage to assess a compensation in lieu of heriot, to be paid by an in-coming copyholder on surrender or alienation is not good. *Parkin v. Radcliffe.*
- 6 If the lord of a manor set up a custom to have the best live or dead chattel as an heriot?—2u.—If the tenant can modify that custom by pleading another that the homage shall assess a compensation in lieu of the heriot?

1 B. & P. 282

And see *Kingsmill v. Bull*, next page.

- 7 A custom that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and

repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often, and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements. *Wilson v. Willes, Knt.*

7 E. R. 121

III. PLEADINGS AND EVIDENCE.

- 1 An allegation in a declaration that one was seised of a manor of F., and that he and all those whose estates he has in the said manor have immemorially appointed a sexton of the parish of F., is sustained by proof of his seisin of a quondam manor which had ceased to be a legal manor for defect of freehold tenants, and existed now only by reputation. *Soane v. Ireland.*
- 2 Where the defendant justified under the lord, as being seised in fee of the veins of coal lying under the copyhold tenements, together with the liberty of boring for and getting the coal, &c. it is not enough for the plaintiff to reply, that as well all the veins of coal under the said closes in which, &c. as the rest of the soil within and under the same, had immemorially been parcel of the manor and demised and demiseable by copy, &c. without any exception or reservation of the coal, &c.; unless he also traverse the liberty of working the mines, because the plea claims such liberty not merely as annexed to the seisin in fee, to be exercised when in actual possession, but as a present liberty, to be exercised during the continuance of the copyholder's estate: and therefore, the replication is only an argumentative denial of the liberty, and does not confess and avoid it. *Bourne v. Taylor.*
- 3 Where a plea of justification in trespass for taking two horses, as heriots, stated a custom in the manor that the lord from time immemorial, until the division of a certain tenement into

10 E. R. 259

10 E. R. 189

moieties, had taken and been accustomed to take a heriot upon the death of every tenant dying seised; and since the division the lord had taken and been accustomed to take on the death of every tenant dying seised of either of the moieties a heriot for each moiety: this must be taken to

be one entire custom, and not two distinct customs, the one applicable to the tenement before, and the other after the division of it: and being said to be an immemorial custom, it is disproved by evidence that the division was made within memory. *Kingmill, Bart. v. Bull.* 9 E. R. 185

MARRIAGE.

N. B. See *Ilderton v. Ilderton*.

2 H. B. 145, ante, 288

1 Bastards are within the meaning of the Marriage Act, stat. 26 G. 2. c. 33. which requires the consent of the father, guardian, or mother to the marriage of persons under age, who are not married by banns. *Rex v. Hodnot.*

1 T. R. 96

2 All marriages, whether of legitimate or illegitimate children, are within the general provisions of the Marriage Act 26 G. 2. c. 33. which requires all marriages to be by banns or licence: and, by three judges, a marriage of an illegitimate minor had by licence with the consent of her mother is void by the 11th section; the words father and mother in that section meaning legitimate parents: by one Judge, it is *casus omissus* in the Act, and the marriage good. *Priestley v. Hughes.*

11 E. R. 1

3 Evidence that *British* subjects in a foreign country, being desirous of intermarrying, went to a chapel for that purpose, where a service in the language of the country was read by a person habited like a priest, and in-

terpreted into *English* by the officiating clerk; which service the parties understood to be the marriage service of the Church of *England*; and they received a certificate of the marriage which was afterwards lost; is sufficient whereon to found a presumption (nothing appearing to the contrary) that the marriage was duly celebrated according to the law of that country, particularly after 11 years' cohabitation as man and wife till the period of the husband's death; and such *British* subjects being attached at the time to the *British* army on service in such foreign country, and having military possession of the place, it seems that such marriage solemnized by a priest in holy orders (of which this would be reasonable evidence), would be a good marriage by the law of *England*, as a marriage contract *per verba de presenti* before the Marriage Act; marriages beyond sea being excepted out of that Act; and it would make no difference if solemnized by a Roman Catholic Priest. *Rex v. Brampton (Inhab.)*

10 E. R. 282

MESNE PROFITS.

Pleadings and Evidence.

1 The defects of a declaration in an action for mesne profits, in not stating any time when the defendant broke and entered the messuage, &c. and ejected the plaintiff from the occupation of it; and in stating only that the defendant kept and continued the plaintiff so ejected for a long space of time, without stating for how long;

are cured by the operation of the stat. 4 Ann. c. 16. after judgment by default and writ of inquiry of damages executed; so that no objection can be taken in arrest of final judgment for such defect in form. *Higgins v. Highfield.*

13 E. R. 407

2 In trespass for mesne profits, upon a plea of the general issue, evidence is not admissible that the plaintiff had accepted the rent of the premises for

the time in dispute, and had agreed to ~~wave~~ the costs of the ejectment.
Doe d. Hill v. Lee. 4 Taunt. 459
 § *Semble*, that a tenant, whose under-

tenant retains the possession after the Term, is not liable for mesne profits.
Per Mansfield, C. J. Burne v. Richardson. 4 Taunt. 720

MILITARY LAW.

I. OFFICERS.

(a) *Authorities and Incapacities.*

II. COURTS MARTIAL.

(a) *How constituted, and Jurisdiction of.*

III. SOLDIERS (Regular).

IV. MILITIA.

V. VOLUNTEERS.

I. OFFICERS.

(a) *Authorities and Incapacities.*

N. B. For the Liability of Military Officers, see *Myrtle v. Beaver*.

Rice v. Shute, ante, page 62

- 1 It is not incident to the office of commander in chief of a squadron to have authority to hold a Court-martial. *Johnstone v. Sutton* (in error), in *Cam. Scac.* 1 T. R. 548
 Affirmed in *Dom. Proc.* 1 T. R. 784
- 2 An action of trespass lies for an inferior military officer against his superior officer (both being under martial law), who imprisons him for disobedience to an order made under colour, but not within the scope of military authority. Although the imprisonment be followed by a trial by a Court-martial. *Warden v. Bailey.* 4 Taunt. 67
- 3 The colonel of a regiment has no authority to order his serjeant to pay money towards lighting and warming a regimental school and school-master's salary. *id.*
- 4 Nor, as it seems, to order them to attend school to learn to read and write. 4 Taunt. 67
- 5 Neither the full or future half-pay of a military officer is assignable. *Lidderdale v. Duke of Montrose.* 4 T. R. 248
Burwick v. Reade. 1 H. B. 627

II. COURTS-MARTIAL.

(a) *How constituted, and Jurisdiction of.*

- 1 Courts-martial being established in this country by positive law, their proceedings and the relation in which they stand to the Courts of Westminster

Hall, must depend upon the same rules with all other Courts, which are instituted and have particular powers given them, and whose acts therefore may become the subject of application to the Courts at Westminster for a prohibition. *Grant v. Sir C. Gould.*

2 H. B. 100

- 2 It is totally inaccurate to state martial law as having any place whatever within the realm of *Great Britain*, merely because the decision of certain matters relating to the army is by a Court-martial. 2 H. B. 98, 99

- 3 The receiving pay as a soldier, subjects the receiver to military jurisdiction under the Mutiny Act. *Grant v. Sir C. Gould.* 2 H. B. 69

And see PROHIBITION, *post*.

- 4 By the Mutiny Act, the King may make articles of war, and constitute Courts-martial, with power to try and punish, as well in *Great Britain*, &c. as in *Gibraltar*, &c. By a subsequent clause no soldier shall, by such articles of war, be subjected to the punishment of death, or loss of limb, within *Great Britain*, &c. (omitting *Gibraltar*) for any crime not expressed to be so punishable by the Act. Then by the articles of war, persons found guilty by a Court-martial at *Gibraltar*, of theft, robbery, &c. or of having used violence, or committed any offence against the persons or property of others, "shall suffer death, or other punishment, according to the nature and degree of the offence, as by the sentence of such Court-martial shall be awarded:" Held, that the Court-martial have a discretionary power by such words, and are not restricted to pass such sentence on a delinquent as would be warranted by the law of *England*. But supposing they were, yet that a return to a *habeas corpus*, stating that upon a certain charge exhibited against the defendant before such a Court, for certain offences alleged to have been committed by

him at *Gibraltar*, such proceedings were had, that the Court-martial, after hearing the charge and the defence, found the defendant guilty of receiving certain goods named, from the warehouse of *W.* (at *G.*) knowing them to be stolen, in breach of the articles of war, whereupon they sentenced him to transportation for fourteen years, is good: For such a sentence would be warranted here by the stat. 4 G. 1. c. 11. if the principal were convicted of the felony, and the receiver were indicted as accessory to the fact. *Rex v. Suddis.*

1 E. R. 306

- 5 Courts martial are bound by the same rules of evidence as the Courts of common law; and their general proceedings, where not otherwise regulated by Act of Parliament, must follow the same course. *The case of the mutincers of the ship Bounty.*

1 E. R. 313, n.

Stratford's case.

ibid.

III. SOLDIERS.

- 1 The foot-guards may be billeted all over the kingdom, as well as the other troops. *Rex v. Calvert.* 7 T. R. 724
- 2 By 1 G. 1. c. 47. upon an information filed in this Court for persuading soldiers to desert, and tried at the assizes, this Court is the proper Court to award punishment, and if they award imprisonment, besides the penalty of 40*l.* they are bound also to award the pillory. *Rex v. Read.*

16 E. R. 404

Se Rex v. Fuller.

1 B. & P. 180, ante, 365

- 3 *Qu.*—Whether ale-house keepers, who have no stables, are bound to receive horses as well as soldiers? *Rex v. Dimpsey.*

2 T. R. 96

IV. MILITIA.

See POOR RELIEF, post.

- 1 A captain in the Militia receiving his pay and contingent allowances, before his qualification was properly authenticated, is not *executing any power* directed by the Militia Act of the 42 G. 3. c. 90. to be executed by captains, so as to bring him within the penalty of the 14th clause; the receipt of such pay and allowances not being provided for by that Statute, even if any other than acts of military discipline were intended to be so prohibited. *Robinson v. Garthwaite.*

9 E. R. 296

- 2 Under the Militia Acts 42 G. 3. c. 90: and 47 G. 3. c. 71., if a person ballotted is found at the time of enrolment to be unqualified for the service, and another is ballotted in his place out of the same list; this is a continuance of the same ballot, and is a legal ballot. *Astley v. Ray.*

2 Taunt. 214

V. VOLUNTEERS.

- 1 Members of volunteer corps enrolled under stat. 42 G. 3. c. 66. are entitled to resign on due notification of their intention; not being restrained by the rules of the corps, or its conditions of service; and this liberty is not taken away by stat. 43 G. 3. c. 96. which distinguishes between volunteer corps, and volunteers under that Act, serving in lieu of the compulsory levy. And the stat. 43 G. 3. c. 121. attaches only on corps of volunteers at the time of an actual invasion, and has no retrospective operation on persons having previously resigned. *Rex v. Dowley.*

4 E. R. 518

MISNOMER.

See ABATEMENT, II. (b) ante, page 2.

PRACTICE, *Setting aside Proceedings, post.*

- 1 If a defendant be arrested by a wrong Christian name, the Court of C. P. will discharge him on motion. And the sheriff is liable to an action. *Wilks v. Lörck.*

2 Taunt. 399

- 2 But where there is only an inaccuracy in the spelling, so that the name is still *idem sonans*, the Court of C. P. will not interfere. *Ahtobol v. Benidito.*

2 Taunt. 401

- 3 In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the misnomer of his com-

panions, upon the general issue, on the ground of a variance between the contract declared upon, and that proved. *Gordon v. Austin.*

4 T. R. 611

- 4 The defendant being sued by the name of "*Jonathan otherwise John Soans*," is no cause of demurrer to the declaration; for, *non constat*, that it is not all one *Christian* name. *Scott v. Soans.*

3 E. R. 111

- 5 If a person enter into a bond by a wrong *Christian* name, and be sued on such bond, he should be sued by such name. A declaration against him by his right name, stating that he, by the wrong name, executed the bond, is bad. *Gould v. Barnes.*

3 Taunt. 504

- 6 Misnomer in the bail-piece amended in C. P. *Anderson v. Noup.*

1 B. & P. 31

- 7 If the bail acknowledge in a cause in which the plaintiff is correctly named, and the officer by a misprision incorrectly names the plaintiff in the recognizance of bail, the recognizance may be amended at the instance of the bail, by substituting the plaintiff's right name. *Halliday v. Fitzpatrick.*

4 Taunt. 875

- 8 If bail by mistake misname in the recognizance the plaintiff to whom they mean to be bound, the Court of C. P. will not rectify the recognizance and proceedings in an action thereon after issue joined on *nul tiel record*. *Venn v. Warner.*

3 Taunt. 263

MORTGAGE.

N. B. See EJECTMENT, *ante*.

N. B. For the relative situations and powers of Mortgagor and Mortgagee, see *Birch v. Wright*. 1 T. R. 383

- 2 If a subsequent purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. *Willoughby v. Willoughby* (*in Chancery*).

1 T. R. 763

- 3 But if he had no notice of such prior incumbrance or purchase, and has the first and best right to call for the legal estate; then, if he gets an assignment of it, a Court of Equity will not deprive him of his advantage.

1 T. R. 763

- 4 If a second mortgagee lend his money upon an estate, upon which there is an old outstanding term, and has notice at the same time of a certain incumbrance prior to his own, the prior incumbrancer having the best right to call for the legal estate, may satisfy himself of any other incumbrances upon the estate, although they were

not known to the second mortgagee at the time he advanced his money. *Willoughby v. Willoughby*. 1 T. R. 763

- 5 Where an old mortgage term of 1000 years, created in 1727, was recognized in a marriage settlement by the owner of the inheritance in 1751, by which a sum was appropriated to its discharge; and no further notice was taken of it till 1802, when a deed, to which the then owner of the inheritance and the representatives of the termors were parties, reciting that the term was still subsisting, conveyed it to others to secure a mortgage: Held, that it could not be presumed to have been surrendered against the owner of the inheritance, who was interested in upholding it. *Doe d. Graham v. Scott.*

11 E. R. 478

- 6 No less time than 20 years will raise a presumption that a mortgage-term has been assigned or surrendered, although the defendant in ejectment, setting up the mortgage term as a bar, neither proves that interest continues to be paid, nor accounts for his possession of the mortgage deed. *Doe d. Brandon v. Calvert*. 5 Taunt. 170

NEW TRIAL.

I. MOTIONS AND RULES FOR.

(a) *When and how made.*

II. IN WHAT CASES GRANTED.

III. ON WHAT GROUNDS REFUSED.

IV. IN CRIMINAL CASES.

(a) *When and how obtained.*

I. MOTIONS AND RULES FOR.

(a) *When and how made.*

- 1 Where a new trial is moved for on the ground of a misdirection in point of law, if the Court see that justice has been done between the parties, they will not set aside the verdict, nor enter into a discussion of the question of law. *Edmonson v. Machell.* 2 T. R. 4
- 2 Notice must be given in C. P. to the Judge who tried the cause, two days before moving for a new trial. *Reg. Gen.* 5 Taunt. 86
S. P. 4 Taunt. 721
- 3 On a motion for a new trial by a defendant, in an action against him for goods delivered to the use of a third person, on his undertaking to see the plaintiff paid, the Court of C. P. will take into consideration, not only the expressions used, but the particular situation of the defendant at the time of his undertaking, and the amount for which he will thereby be made liable. *Keute v. Temple.* 1 B. & P. 158
- 4 Defendant brought a writ of error on the first day of Term; obtained a rule *nisi* for a new trial on the second; and justified bail in error before cause shewn; this was held to be no objection to his supporting the rule for a new trial, as a point of importance was depending, which would have been shut out in the Court of error. *Hemmett v. Yea, (Bart.)* 1 B. & P. 149, n.
- 5 A motion for a new trial is not a matter of right, and may be restrained to one point. *Hutchinson v. Piper.* 4 Taunt. 555
- 6 The Court of C. P. will not hear a rule for a new trial discussed, without having the report of the Judge who tried the cause, though there be no dispute about the facts. *Major v. Oxenham.* 5 Taunt. 340

II. IN WHAT CASES GRANTED.

- 1 A new trial granted in a civil case in the time of *Edw. 3.* 6 T. R. 623, n.
- 2 Where a new trial was granted upon a new ground, not opened at the first trial, it was ordered to be upon payment of costs. *Sutton v. Mitchell.* 1 T. R. 20
- 3 The Court may in any case grant a new trial upon the ground of excessive damages. *Ducker v. Wood.* 1 T. R. 277
- 4 In an action on the case for diverting the plaintiff's watercourse, where the jury under circumstances of aggravation, gave 3000*l.* damages, the Court granted a new trial on the ground that the damages given greatly exceeded the amount of the injury proved; but they directed that the former verdict should stand as a security in the mean time for the damages which might be given on the second trial. *Pleydell v. Lord Dorchester.* 7 T. R. 529
- 5 A new trial will be granted on account of excessive damages in an action for an assault and battery. *Jones v. Sparrow.* 5 T. R. 257
- 6 When there has been but a short time for investigating a question of real property, of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the Court of C. P. does not think their verdict wrong, yet if the inheritance is to be bound for ever by the verdict, they will grant a new trial on payment of costs. *Swinerton v. Marquis of Stafford.* 3 Taunt. 91
- 7 There is no species of action in which the Court of C. P. will not grant a new trial for excess of damages, if the circumstances require it. But, *Quære*, whether that Court will grant a new trial on the ground of surprise, occasioned by a witness giving different evidence from what was expected by the party calling him. *Hewlett v. Crutchley.* 5 Taunt. 277
- 8 If the testimony of witnesses on which a verdict has proceeded, be founded on and derive its credit from particular circumstances, and those circum-

stances be afterwards clearly falsified by affidavit, the Court of C. P. will grant a new trial. *Lister v. Mundell.*

1 B. & P. 427

- 9 The Court will grant a new trial in a penal action after verdict for defendant on account of a mistake or misdirection of the Judge.

Wilson v. Rastall.

4 T. R. 753

Calcraft v. Gibbs.

5 T. R. 19

dence, they would not grant a new trial, if the plaintiff be entitled to recover in conscience and equity. *Wilkinson v. Payne.*

4 T. R. 468

- 9 So in the Court of C. P. where no point had been saved at the trial, a new trial was refused to be granted on a question of law, the justice and conscience of the case being with the verdict. *Cox v. Küchen.*

1 B. & P. 338

- 10 The Court of C. P. will not grant a new trial on account of a verdict being against evidence, where the damage to be recovered would not exceed 5l. *Roberts v. Carr.*

1 Taunt. 495

III. ON WHAT GROUNDS REFUSED.

- 1 Value and importance are not of themselves sufficient grounds for granting a new trial, unless there be also some doubt in the question; though they frequently weigh in obtaining a rule to shew cause why there should not be a new trial. *Vernon v. Hankey.*

2 T. R. 113

- 2 The Court will not grant a new trial to let the party into a defence of which he was apprised at the first trial.

2 T. R. 113

- 3 A new trial refused which would have given the defendant an opportunity of proving the illegality of a policy, which was not illegal on the face of it; for he should have shewn it on the trial. *Gist v. Mason.*

1 T. R. 84

- 4 If a vessel is damaged by another running foul of it, and the jury find a verdict for the plaintiff, the Court of C. P. will not send the case to a new trial, because there may be some ground to believe that the plaintiff was negligent in navigating his vessel, as well as the defendant. *Collinson v. Larkins.*

3 Taunt. 1

- 5 The Court will not grant a new trial in an action for criminal conversation merely because the damages appear to them to be excessive. *Duberley v. Gunning.*

4 T. R. 651

- 6 But if in such action, they are satisfied that the jury acted under the influence of undue motives, or of gross error or misconception, they will. *Chambers v. Caulfield.*

6 T. R. 244

- 7 In actions of trespass for debauching plaintiff's daughter, the Court will not readily grant a new trial on account of excessive damages. *Bennett v. Allcott.*

2 T. R. 166

- 8 The Court said, that where the jury had found a verdict for the plaintiff upon a presumption contrary to evi-

- 11 A verdict having passed for the defendants in an action to recover the amount of the re-exchange upon the dishonour of a bill drawn from *Lisbon* on *Lisbon*, upon evidence that the enemy were in possession of *Portugal* when the bill became due, and *Lisbon* was then blockaded by a *British* squadron, and there was in fact no direct exchange between *Lisbon* and *London*, though bills had in some few instances been negotiated between them through *Hamburg* and *America* about that period; the Court refused to grant a new trial, on the presumption that the jury had found their verdict upon the fact, that no re-exchange was proved to their satisfaction to have existed between *Lisbon* and *London* at the time; the question having been properly left to them to allow damages in the name of re-exchange, if the plaintiff, who had indorsed the dishonoured bill to the holder, had either paid or were liable to pay re-exchange; and saving the question of law, whether any exchange or re-exchange could be allowed between this and an enemy's country. *De Tastet v. Baring.*

11 E. R. 265

- 12 If the leading counsel at *nisi prius* takes one line of case, contrary to the opinion of his junior counsel, the Court of C. P. will not permit the junior counsel to obtain a new trial upon the ground that he was prepared with evidence to support another line of case, which his leader repudiated. *Pickering v. Dowson.*

4 Taunt. 779

- 13 If, upon the Judge directing the jury to give nominal damages, the plaintiff elects to be nonsuited, he will not be permitted to have a new trial upon the

ground of a misdirection of the Judge in that point. *Bulter v. Dorant.*

3 Taunt. 229

14 Where the circumstances of a case had been fully put into the possession of a jury, who had twice found a verdict the same way, although there was conflicting evidence, and although the Judge who last tried the cause thought the evidence against the verdict preponderated, the Court of C. P. refused to grant a second new trial. *Swinerton v. The Marquis of Stafford.*

3 Taunt. 232

15 An objection to the competency of witnesses, discovered after a trial, is not a sufficient ground of itself for granting a new trial: but it may have some weight with the Court, where the party applying appears to have merits. *Turner v. Pearte.*

1 T. R. 717

16 It is no ground for the Court to grant a new trial that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness who was called established the same fact, which was not disputed by the other side; and the defence proceeded upon a collateral point, upon which the verdict turned. *Edwards v. Evans.*

3 E. R. 451

17 New trial not to be granted on the mere affidavit of the one party contradicting the witnesses on the other side. *Feise v. Purkinson.*

4 Taunt. 640

18 The Court will not grant a new trial in a penal action, where a verdict has passed for the defendant on the ground of its being against the evidence. *Brook, q. t. v. Middleton.*

10 E. R. 268

IV. IN CRIMINAL CASES.

(a) When and how obtained.

1 A defendant, convicted on a criminal prosecution, cannot move for a new trial after the first four days of the next Term: though, if it appear to the Court at any time before judgment, that injustice has been done by the verdict, they will interpose and grant a new trial. *Rex v. Holt.*

5 T. R. 436

2 All the defendants convicted upon an indictment for a conspiracy must be present in Court when a motion for a new trial is made on behalf of any of them. *Rex v. Teal.*

11 E. R. 307

3 The Court refused to grant a rule nisi for a new trial after a verdict for the defendant upon an indictment for non-repair of a church-yard fence, which was moved on the ground of the verdict being against evidence. *Rex v. Reynell, Clerk.*

6 E. R. 315

4 A new trial may be granted in an information in nature of a *quo warranto*. *Rex v. Francis.*

2 T. R. 484

5 Where several defendants are tried at the same time for a misdemeanour, some of whom are acquitted and some convicted, the Court may grant a new trial as to those convicted, if they think the conviction improper. *Rex v. Mawbey (Bart.)*

6 T. R. 619

6 In cases of felony, no new trial can be granted. But in the case of a misdemeanour, the Court are not fettered with any rules in granting a new trial, but will either grant or refuse a new trial as it will tend to the advancement of justice. *Per Curiam.*

6 T. R. 638, 9

NOLLE PROSEQUI.

1 Where the cause of demurrer to a declaration was, that the counts were improperly joined, the Court of C. P. held, that the plaintiff could not enter a *nolle prosequi* as to some, and leave the others remaining. *Rose et Ux. v. Bowler.*

1 H. B. 108

2 So after demurrer to a declaration of two counts against two defendants, because one of them was not named in the last count, the Court held, that

the plaintiff could not enter a *nolle prosequi* on that count, and proceed on the other. *Drummond v. Dorant.*

4 T. R. 360

3 The Court of C. P. will not allow a defendant to strike out the entry of a judgment of *nolle prosequi* entered by the plaintiff, as to one of the counts of his declaration after it had been demurred to. Nor will it, in that stage of the proceedings, determine a ques-

- tion of costs respecting such a count. *Milliken v. Fox.* 1 B. & P. 157
- 4 In *assumpsit* against two, where one pleads *non-assump. it.*, and a plea of bankruptcy, and the plaintiff enters a *nolle prosequi* as to him, *as to the several matters* pleaded by him, and the other defendant pleads *non-assumpsit*, the latter is not discharged by the *nolle prosequi.* *Moravia v. Hunter.* 2 M. & S. 444
- 5 If a plaintiff enter a *nolle prosequi*, the defendant is entitled to costs. *Cooper v. Tiffin.* 3 T. R. 511

NON-RESIDENCE.

- 1 A curate of an augmented curacy by Queen Anne's bounty, is not liable to the penalties of stat. 21 H. 8. c. 13. for non-residence. *Jenkinson, q. t. v. Thomas.* 4 T. R. 665
- 2 That Act only extends to parsonages and vicarages. 4 T. R. 665
- 3 If a clerk, having a benefice with cure of souls, takes another benefice with cure of souls of the value of 8*l.*, he thereby vacates the former. *Brazen Nose College v. The Bishop of Salisbury.* 4 Taunt. 831
- 4 Where an Act of Parliament creates a new parish church and rectory, and directs that the bishop shall confer a certain prebend on the rector, and that the prebend shall remain united and annexed to the rectory for ever, this is not such an appropriation of the rectory to the prebend, as makes it an appropriate benefice within the stat. 21 H. 8. c. 13. s. 31., and tenable with another benefice having cure of souls. So, though another Act speaks of the rectory as inseparably annexed to the prebend. *ibid.*
- 5 A lease of a rectory by a rector becomes void by stat. 13 Eliz. c. 20. by his non-residence for 80 days, of which a stranger may take advantage. *Doe v. Barber.* 2 T. R. 749
- 6 So the rector himself may recover in ejectment against his lessee under such circumstances. *Throgmorton d. Fleming v. Scott.* 2 E. R. 467
- 7 The statute 43 Geo. 3. c. 84. s. 12. requires a prebendary to reside on his prebend, although the statutes of his cathedral do not require it. *Hardy v. Cathcart, Clerk.* 5 Taunt. 2
- 8 The stat. 43 Geo. 3. c. 84., which prohibits under a penalty a spiritual person from absenting himself from his benefice for more than a certain time in any one year, means year from the time when the action is brought for the penalty; in such action it is not necessary to allege in the declaration that the benefice has the cure of souls; and its being alleged that he absented himself for a period exceeding eight months together, (to wit) on the 10th Oct. 1810, for the space of nine months then next following, is sufficiently certain of the time of absence, for it shall be intended to be for more than eight months immediately consecutive to the 10th Oct., the jury having found a verdict for a penalty corresponding with that period of absence. The annual value means average annual value. A prebend is a benefice within the statute. *Cathcart, (Clerk) v. Hardy.* 2 M. & S. 534
- 9 The incumbent of two livings, *A.* and *B.*, obtains a licence from his bishop to reside out of the parish of *A.*, there being no parsonage-house therein, on condition of his residing at a short distance, and actually performing the duties: Held, that this is not such a residence at *A.* as to excuse him from residing at *B.* without another licence for that purpose. *Wright v. Flamank, (Clerk).* 1 Marsh. 368
- 10 Where a licence for non-residence has been obtained previously to the 14th July, 1814, pursuant to 54 Geo. 3. c. 54. but the allowance by the Archbishop, required by 43 Geo. 3. c. 84. s. 20. is not obtained till after that period: the licence when ratified is valid from the time when it was originally granted. *Wright v. Lamb, (Clerk).* 1 Marsh. 372
- 11 Though a licence for non-residence do not cover the whole of the period for which penalties are sought to be recovered; yet, if there be not sufficient time left uncovered, to subject the incumbent to a penalty, the Court will interfere to stay the proceedings. The stat. 54 Geo. 3. c. 54. which requires licences to be granted on or before the 1st July, 1814, does not limit the time within which certificates are

- to be granted. *Semble*, that a certificate granted after the 1st July, 1814, cannot be pleaded in bar to the action; but is only available by application to the Court to stay the proceedings. *Wynn v. Kay*. 1 Marsh. 387
- 12 In an action for non-residence, evidence that the defendant did several acts *as parson*, such as receiving tithes, &c. is sufficient without proving his admission, institution, and induction. *Bevan, q. t. v. Williams*. 6 T. R. 535, n.
- 13 In an action for a continued non-residence, it is not necessary to aver the non-residence to have been in any one year. Nor is it necessary to prove the non-residence to have commenced on the precise day, and continued to the precise day, which is alleged in the declaration. *Hardy v. Cathcart*. 5 Taunt. 2
- 14 The Court of C. P. will not stay proceedings on a writ suggested to be the commencement of an action for non-residence, unless the declaration be delivered, or there be other evidence that such is the scope of the action. *Wright, q. t. v. Lloyd*, (Clerk). 5 Taunt. 304
- 15 *Secus*, Where the declaration had been delivered. *Wright, q. t. v. Whalley*, (Clerk). 5 Taunt. 305
- 16 The Court of C. P. refused to extend the relief of the statute 54 Geo. 3. c. 6. to a case where the defendant had obtained a rule to compound before the statute had passed. *Wright, q. t. v. ———*, (Clerk). 5 Taunt. 306

OFFICERS.

I. OF THE COURTS OF JUSTICE.

(a) *Privileges, Fees, and Duties.*

II. ——— REVENUE.

(a) *Power and Authority of.*

III. COUNTY AND PAROCHIAL OFFICERS.

(a) *Fees, Exemptions, and Authority.*

I. OFFICERS OF COURTS.

(a) *Privileges, Fees, and Duties.*

- 1 When an immemorial privilege is claimed for *all* the officers of a Court of Justice, and new officers are made within the time of legal memory, they must also fall within the privilege. *Wilkes v. Williams*. 8 T. R. 634 (And see 8 T. R. 375.)
- 2 The privilege of officers of the Court of Chancery, to be impleaded in the Petty Bag Office. 8 T. R. 631
- 3 Although the names of the clerk of assize and clerk of arraigns are inserted in the commissions of *oyer and terminer*, yet there never was an instance of their acting as Judges, nor have they any authority to decide on any question. See *Milward v. Thatcher*. 2 T. R. 81
- 4 The Court of C. P. refused to refer a matter concerning the Warden of the Fleet to the Prothonotary for examination. *Johnson v. Smith*. 1 H. B. 105
- 5 The 29th of May is not a holiday in any of the law offices, and consequently no officer can take an extraordinary fee for business done on that day. *Pater v. Croome*. 7 T. R. 336
- 6 The only allowed holidays are *Candlemas*, the *Ascension*, and *St. John the Baptist*. 7 T. R. 336
- 7 Lord Mayor's Day is not such a holiday as entitles the sealer of writs to an extraordinary fee for sealing a writ on that day. *Worthy v. Palter*. 5 Taunt. 180
- 8 By statute 19 G. 3. c. 74., the clerk of assize on each circuit, is entitled to receive a certain fee for every person convicted of a transportable offence (except petty larceny), and sentenced to transportation, hard labour, or confinement in the house of correction, and for persons capitally convicted, who afterwards have received the King's pardon on condition of being transported or imprisoned. *Fleetwood v. Finch*. 2 H. B. 220
- 9 On the *Norfolk* circuit, that fee is one guinea. 2 H. B. 220
- 10 Clerk of the papers and clerk of the day-rules in the King's Bench prison removed by this Court for non-residence and misbehaviour, under statute 27 G. 2. c. 17. *Bryant's Case*. 5 T. R. 509
- 11 The clerk of the papers in the King's Bench prison cannot act by deputy, but must himself reside within the prison. *In re Bryant*. 4 T. R. 716; 5 T. R. 511
- 12 It is a high misprision in the officers of the inrolment office to alter the inrolment of a memorial of an annuity deed by making it to correspond with the memorial, at the instance of the grantee, without the sanction of the

Court of Chancery for the amendment.

- Garrick v. Williams.* 3 Taunt. 540
 13 It was ordered that, from and after the Last Day of Trinity Term, 54 Geo. 3. the seal office should be open from eleven in the morning till two in the afternoon: and from five to seven in the evening, during Term: and for ten days after every issuable Term, and one week after every other Term: and from eleven in the morning till three in the afternoon at all other times. Reg. Gen. T. T. 54 G. 3. 1 Marsh. 245

II. REVENUE OFFICERS.

(a) *Power and Authority of.*

N. B. See ACTION, Notice of (b) *ante*, 10.

- 1 The Court will not prevent officers of the revenue from seizing goods in dispute. *Rex v. The Commissioners of Excise.* 2 T. R. 381
 2 The stat. 9 G. 2. c. 35. s. 26. which enacts that prosecutions for assaults on revenue officers may be tried in any county, only extends to assaults on them *qua* officers; and a defendant having been found guilty on an indictment of a common assault on the prosecutor, who was in fact an excise officer, this Court arrested the judgment, though the prosecutor was described to be an excise officer; the offence being laid in *Surry*, and the venue in *Middlesex*. *Rex v. Cartwright.* 4 T. R. 490
 3 An officer of the Customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time. *Rex v. Warner.* 8 T. R. 375
And see POOR OVERSEERS, post.

- 4 A custom-house officer has authority to seize uncustomed goods, with the carriage and horses carrying off the same, though out of the limit of the particular port of which he is denominated an officer in his deputation from the commissioners of customs. *Rex v. Barfoot.* 13 E. R. 506
 5 An excise-officer seizing soap in the execution of his office at any distance from the sea, is within the protection of 24 G. 3. stat. 2. c. 47. s. 15. *Rex v. Brady (in Cam. Seac.)* 1 B. & P. 187
 6 The several King's waiters in the port of London hold separate offices by different patents; and though the fees are in the first instance paid by the merchant in one entire sum to a common receiver for all; yet the aliquot shares of each are separate, and each

is entitled to call for his share when in fact the sum so received is capable of being divided. These shares are now fixed by the stat. 38 G. 3. c. 86. at nineteen, and as the patentees die, the emoluments of each officer are to be carried to a superannuation fund, for the benefit of aged and disabled officers of the customs, and are not to be applied to the benefit of the surviving patent King's waiters, which before that Act had been practised. *Hudson v. Mucklow.* 12 E. R. 273

III. COUNTY AND PAROCHIAL OFFICERS.

(a) *Fees, Exemptions, and Authority.*

- 1 Where an Act confers certain privileges on officers who may be sued for things done in pursuance of that Act, and a subsequent Act imposes new obligations on the old officers, the privileges of the former Statute do not attach on them in respect of things done under the latter. *Bazing v. Skelton.* 5 T. R. 16
 2 The coroners of franchises that do not contribute to the county rates, are not entitled to the fees given by stat. 25 G. 2. c. 29, or to any fees to be paid by the county. *Rex v. The Justices of W. R. Yorkshire.* 7 T. R. 52
And see Rex v. Justices of Kent. 11 E. R. 229, *ante*, page 475.
 3 Churchwardens *de facto* may maintain an action against a former churchwarden, for money received by him for the use of the parish; though the validity of the election of the plaintiffs to their office be doubtful, and though they be not the immediate successors of the defendant. *Turner v. Baynes.* 2 H. B. 559
 4 The Crown may exempt persons from serving the office of constable, or any other office under the Crown, provided there be a sufficient number of persons left to serve the office. *Rex v. Clarke.* 1 T. R. 686
 5 A younger brother of the *Trinity-House* is not exempt from serving the office of headborough or constable, by any of the charters granted to the corporation. 1 T. R. 685
 6 A certificate granted upon 10 & 11 W. 3. c. 22. exempting the person prosecuting to conviction any one guilty of burglary from serving *Parish* and *Ward* offices, exempts the party from the office of petty constable for a township within, but not co-extensive with,

the parish where the burglary was committed. *Mosely (Bart.) v. Stonehouse.* 7 E. R. 174

- 7 The 23 G. 3. c. 90. s. 4., for paving and lighting the parish of *St. Martin*, which prohibits under a penalty any person during the time he shall be collector of any tax, or hold any office of profit, or be interested in any contract or work to be done in the execution of that Act, from acting as a

committee-man under the Act, does not extend to a collector of the assessed taxes. *Lee v. Birrell.* 1 M. & S. 482

- 8 Watchmen and beadles have authority at common law to arrest and detain in prison for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of a felony having been committed. *Lawrence v. Hedger.* 3 Taunt. 14

OFFICES.

N. B. For those who are exempted from serving the office of Constable, see OFFICER, III. last page.

- 1 The stat. 5 & 6 E. 6. prohibits the sale of certain offices. *Blackford v. Preston.* 8 T. R. 92
2 It is also illegal to sell many other public offices not within the stat. 5 & 6 Edw. 6. 8 T. R. 94
3 But offices not within the statute may be sold, provided the sale takes place

with the consent of those who have the power of appointment. *Blackford v. Preston.* 8 T. R. 94

(See stat. 49 G. 3. c. 126.)

- 4 Suspension makes no vacancy in an office, it is only an impediment to the enjoyment of any benefit from it; but all acts which are required to be done by such officer must still be done by him to give them validity. *Per Holt, C. J. Phillips v. Bury.* 2 T. R. 351

OUTLAWRY.

I. PROCEEDINGS TO, WHERE REGULAR.

II. REVERSAL OF.

(a) By Writ of Error or Motion.

III. PLEADINGS.

IV. EFFECT OF.

I. PROCEEDINGS TO, WHERE REGULAR.

- 1 In a record of outlawry, it appeared by the writ of proclamation and the return to it, that the prisoners were required to render themselves to the sheriff so that he might have their bodies before the justices, &c. at the return of the writ; and held good. *Rex v. Yandell.* 4 T. R. 521
2 If one exigent be awarded against the principal and accessory together, it is error only as to the latter. 4 T. R. 521
3 If it appear on the record that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not so expressly alleged. 4 T. R. 521
4 The writ of proclamation required the sheriff to proclaim the parties in open Court in the sheriff's county (not

saying County Court), and held good. *Rex v. Yandell.* 4 T. R. 521

- 5 The sheriff need not allege in his return to the writ of proclamation, that "the persons proclaiming did not appear and render themselves," though he must in his return to the exigent. 4 T. R. 521

- 6 The names of the coroners need not be subscribed to the judgment of outlawry; if it appear on the record that the judgment of outlawry was given by them, it is sufficient. 4 T. R. 521

- 7 It need not appear on a record of outlawry, that the *capias* and *exigent* were sealed by the justices of oyer and terminer, &c. *Rex v. Yandell.* 4 T. R. 521

- 8 The writ of *capias ullagatum*, and the sheriff's return to it, ought to be filed with the clerk of the *exigents*. *Reynolds v. Adams.* 3 T. R. 578

- 9 The sheriff must state, in his return to the writ of *exigent*, the day and year of each exaction; stating that on such a day in the 30th year of the reign, he exacted the defendant a third time; that afterwards on such a day (omitting

the year) he exacted him a fourth time; and that afterwards, on such a day in the 30th year aforesaid, he exacted him a fifth time is insufficient, and a good ground for reversing the outlawry. *Rex v. Almon (in error).*

5 T. R. 202

10 It need not be stated in express terms on a record of a judgment of outlawry that a writ of *capias* issued against the defendant; it is sufficient if it appear "that the sheriff was commanded to take the defendant," &c. *Rex v. Perry.*

6 T. R. 573

11 Neither is it necessary in stating every writ to repeat the day and year when each was issued: it will suffice if it appear by referring to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed thus, "Whereupon the exigent was awarded;" "whereupon" referring to the day when the *capias* was returned.

6 T. R. 573

12 There is no other mode of proceeding against two, of whom one is abroad, and the other will not appear for him, but appears for himself only, than by proceeding to outlawry against him who is abroad. *Goldsmith v. Levy.*

4 Taunt. 299

II. REVERSAL OF.

(a) By Writ of Error or Motion.

1 Outlawry in felony reversed, because it appeared on the writ of proclamation and the return to it, that the person indicted was outlawed after a day had been given him in Court, and before such day arrived. *Barrington v. Rex (in error).*

3 T. R. 499

2 Error assigned, that the party was beyond sea, at the time of the exigent proclaimed, is sufficient. *Serocold v. Hampsey.*

12 E. R. 624, n.

3 Error in fact, assigned to reverse an outlawry, that the defendant was beyond seas, is not answered by shewing that he went beyond seas to avoid the plaintiff's process. *Hesse v. Wood.*

4 Taunt. 691

4 The Court of C. P. will reverse an outlawry, for a common law error, on motion, upon the same terms to which the defendant would have been entitled, if he had sued out his writ of error. *ibid.*

5 The bail to be put in by the defendant upon reversing an outlawry, are bail in the original suit. And their recognizance is in the alternative, to pay the condemnation money, or render the defendant. *Hesse v. Wood.*

4 Taunt. 691

6 Error assigned in outlawry, that the outlaw was beyond the seas when the writ of exigent issued, and thence continually until the outlawry pronounced. Upon traverse of the whole allegation, and issue joined thereon: Held, that it was sufficient to prove that the outlaw was in parts beyond the seas at the time the writ of exigent issued. *Richardson v. Robinson.*

5 Taunt. 309

S. C. 1 Marsh. 58

7 Upon a writ of error, prosecuted by the party in person, to reverse an outlawry in a civil action, for a common law error, the recognizance of bail is to be taken in the common alternative form, to pay the condemnation money or render the principal; and not absolutely to pay the condemnation, as in case of reversal of outlawry upon the stat. 31 Eliz. c. 3. for want of proclamations, or upon the stat. 4 & 5 W. & M. c. 18. s. 3. on appearance by attorney and by motion. *Havelock v. Geddes.*

12 E. R. 622

8 On reversal of the outlawry on writ of error for such cause of error assigned in a case where special bail was required in the origination, the Court will direct the recognizance of bail in answer to the new action, to be taken in the alternative to pay the condemnation money, or, render the principal, and not absolutely to pay the condemnation money. 12 E. R. 625, n.

9 Upon the defendant's coming in to reverse an outlawry in a civil case, upon the stat. 4 & 5 W. & M. c. 18. the usual form for taking the recognizance of bail is to pay the condemnation money, and not in the alternative to pay it, or render the defendant. *Mathews v. Gibson.*

8 E. R. 527

10 The Court upon motion reversed the outlawry of the defendant in a civil suit upon his putting in bail in the alternative, to satisfy the condemnation money, or render the principal, and paying all costs, including costs, if any, in the Court of Exchequer, without requiring the recognizance of

bail to be for the payment of the condemnation money absolutely. *Graham v. Grill*. 1 M. & S. 409

- 11 The Court of C. P. will reverse an outlawry upon motion, on error in fact sworn to. *Beauchamp v. Tomkins*. 3 Taunt. 141

III. PLEADINGS.

- 1 In declaring against *A.*, upon a joint contract by *A.* and *B.*, it is not enough to allege that *B.* was in due manner outlawed; without adding that he was outlawed in that suit. *Saunderson v. Hudson*. 3 E. R. 144
- 2 An averment in a declaration that a co-defendant was by due course of law outlawed, at the suit of the plaintiff in this plea and suit, is sufficient without a prout patet per recordum, for the very record before the Court verified that averment; and outlawries in the same suit need never be pleaded with a prout patet. *Mumichael v. Johnson*. 7 E. R. 50

IV. EFFECT OF.

- 1 A person outlawed on an indictment

for sheep-stealing is ousted of clergy by 14 G. 2. c. 6. s. 1.: "outlawry", being a "conviction" within the meaning of that statute. *Rex v. Yandell*.

4 T. R. 521

- 2 A bankrupt who has been waived, (or outlawed,) and her person arrested and goods taken by the sheriff under a writ of *capias utlagatum*, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance. *Summervil v. Watkins*. 14 E. R. 536

- 3 *Semble* that bankruptcy and certificate is no ground of discharge of a prisoner in custody on an *utlagatum capias*. *Beauchamp v. Tomkins*. 3 Taunt. 141

- 4 The goods of a tenant are liable to a year's rent, notwithstanding an outlawry in a civil suit. *St. John's College v. Murcott*. 7 T. R. 259

OYER.

- 1 *Oyer* of a record is never granted. *Rex v. Amery*. 1 T. R. 149

- 2 The party who is to give *oyer* of a deed, is allowed two days for that purpose, exclusive of the day on which it is demanded. *Page v. Divine*. 2 T. R. 40

- 3 The defendant has as many pleading days to plead, after *oyer* is granted, as he had when it was demanded. *Webber v. Austin*. 8 T. R. 356

- 4 *Oyer* may be prayed any time before the expiration of twenty-four hours after the demand of a plea though the rule to plead be out. *Sparkes v. Simpson*. 2 B. & P. 379

- 5 As the practice of the Court of King's Bench is not to grant *oyer* of an original writ; and yet a plea in abatement for want of an addition to a defendant, in such writ is bad without *oyer*: the effect is to prevent such plea from

being pleaded, and therefore if pleaded the Court will quash it. *Deshons v. Head*. 7 E. R. 383

- 6 The defendant having pleaded letters patent to a *quo warranto* information, and made a profert of them, *oyer* was refused in another Term from that in which the profert was made. *Rex v. Amery*. 1 T. R. 149

- 7 If defendant, after craving *oyer* of a deed, do not set forth the whole deed, the plaintiff may sign judgment as for want of a plea; or the Court will quash the plea. *Wallace v. The Duchess of Cumberland*. 4 T. R. 370

- 8 Where the defendant, in an action of debt on bond, after craving *oyer*, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served defendant's attorney with a rule to abide, &c. and gave notice of trial; and afterwards defendant returned the paper-book, setting out a false *oyer* of

the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the Court ordered all the pleadings to be struck

out, and that plaintiff should have judgment; and that the defendant's attorney should pay all the costs. *Ferguson v. Mackreth*. 4 T. R. 371, n.

PARENT AND CHILD.

- 1 The father of a child is entitled to the custody of it, though an infant at the breast of its mother, if the Court see no ground to impute any motive to the father injurious to the health or liberty of such a child, as by sending it out of the kingdom; the father being at the time an alien enemy domiciled in this kingdom, and the mother being an *Englishwoman*, and apprehensive only that he meant to send the child abroad, but assigning no sufficient reason for such her apprehension. *Rex v. De Manneville*. 5 E. R. 221
- 2 A husband is not bound to maintain

his wife's child by a former husband. *Tubb v. Harrison*. 4 T. R. 118

- 3 One who marries a widow, having children by her former husband, is not bound to maintain such children, though they were maintained by the widow before her second marriage, when her second husband acquired her former means. *Cooper v. Martin*. 4 E. R. 76

- 4 If the putative father of a bastard child obtain possession of it by force or fraud, the Court will order it to be restored on the application of the mother. *Rex v. Mosely*. 5 E. R. 224, n.

PARTICULARS OF DEMAND.

- 1 A defendant cannot demand a bill of particulars till after appearance. *Küchen v. Blanchard*. 1 B. & P. 378
- 2 If a bill of particulars state the plaintiff's demand to be for goods sold and delivered to the defendant, no evidence can be received of goods sold by the defendant as agent for the plaintiff. *Holland v. Hopkins*. 2 B. & P. 243
- 3 If a plaintiff by his bill of particulars confine his demand to one count of his declaration, and defendant pay money into Court generally, the plaintiff is not at liberty to apply the money so paid in, to any of those counts on which he is precluded from giving evidence by his bill of particulars. 2 B. & P. 243
- 4 An order for a bill of particulars does not suspend the time for pleading, and therefore plaintiff may sign judgment immediately after delivering the particular, if the time for pleading be then out. *Hifferman v. Langelle*. 2 B. & P. 363
- 5 In an action of *assumpsit* for non-performance of a contract for the sale of a house, with counts to recover back the deposit, the plaintiff having in his

first count alleged that the defendant, who was to make a good title, had delivered an abstract which was "insufficient, defective, and objectionable," the Court of C. P. obliged the plaintiff to give a particular of all objections to the abstracts arising upon matters of fact. *Collett v. Thompson*. 3 B. & P. 246

- 6 In *ejectment*, brought on the forfeiture of a lease, the Court will compel the plaintiff to deliver a particular of the breaches of covenant, on which he intends to rely. *Doc d. Birch v. Phillips*. 6 T. R. 597
- 7 Where the plaintiff recovers a greater sum than he claimed by his particular, and upon discussion the Court of C. P. sanctioned the principle on which he recovered, and judgment was entered up accordingly, no objection having been made on the excess above the particular, either at the trial or on the argument, they would not reduce the judgment to the sum claimed by the particular. *Bell v. Puller*. 2 Taunt. 285
- 8 If a first particular be delivered under a Judge's order, and the plaintiff deliver a second particular without an

- order, he cannot give evidence upon any claim contained in the second particular, which was not included in the first. *Brown v. Watts*. 1 Taunt. 353
- 9 It is a great contempt to deliver under an order, a particular as general as the declaration. 1 Taunt. 353
- 10 An erroneous date to a bill of particulars of plaintiff's demand, is not material, where the date cannot mislead. *Mihonod v. Walter*. 2 Taunt. 224
- 11 If a bill of particulars specifies the transaction upon which the plaintiff's claim arises, it need not specify the technical description of the right which results to the plaintiff out of that transaction. *Brown v. Hodgson*. 4 Taunt. 189

PARTITION.

- 1 The stat. 8 & 9 W. 3. c. 31. s. 1., which directs the form to be pursued in a writ of partition, applies only to cases where the tenant does not appear. *Dyer*, Demandant, v. *Bullock*, Tenant. 1 B. & P. 344
- 2 The customary tenements in the north of *England*, which are parcels of the respective manors in which they are situate, and descendible from ancestor to heir by the hereditary right called tenant-right, and held by the lord according to the custom, are not within the statute of partition. *Barrell v. Dodd*. 3 B. & P. 376

PARTNERS.

- I. PARTNERSHIP—HOW CONSTITUTED.
- II. LIABILITY OF PARTNERS TO THIRD PERSONS FROM ACTS OF CO-PARTNERS.
- III. BANKRUPTCY—EFFECT OF.
- IV. PROCEEDINGS IN ACTIONS BY AND AGAINST.
- V. PLEADINGS AND EVIDENCE.
- I. PARTNERSHIP—HOW CONSTITUTED.
- 1 In order to constitute a partnership, a communion of profit and loss between the parties is essential; and this is the true criterion to judge by, where the question is, whether persons are partners or not? *Coope v. Eyre*. 1 H. B. 43, 48
- 2 Where one takes a moiety of the profits indefinitely, he shall, by operation of law, be made liable to losses. *Waugh v. Carver*. 2 H. B. 247
- 3 In some respects an individual partner, or a particular partnership, consisting of two or more such persons as are partners in some large partnership, may be considered as third persons in transactions in which the general partnership may happen to be engaged with a correspondent. Per *Eyre*, C. J. *Bolton v. Puller*. 1 B. & P. 546, 7
- 4 *A.* having neither money nor credit, offers to *B.* that if he will order with him certain goods to be shipped upon an adventure: if any profit should arise from them, *B.* should have half for his trouble; *B.* having lent his credit on this contract, and ordered the goods on their joint account, which were furnished accordingly, and afterwards paid for by *B.* alone: Held, that he was entitled to recover back such payment in *assumpsit* against *A.* who had not accounted to him for the profits; such contract not constituting a partnership as between themselves, but only an agreement for a compensation for trouble and credit; though *B.* were liable as a partner to third persons, creditors. *Hesketh v. Blanchard*. 4 E. R. 143
- 5 *A.* and *B.* general partners in trade being indebted to *C.* for advances paid by him on the joint account of the three in the purchase of tobacco, which had been sent out on a special joint adventure to *Spain*: with a view to liquidate that balance, *C.* agreed with *A.* and *B.* to join with them in another adventure to *Lisbon*, of which he was to have one moiety; and it was agreed that *A.* and *B.* should pur-

chase goods for the adventure, to be shipped on board a certain vessel, and pay for them, and the returns of such adventure were to be made to C., to go in liquidation of his demand on them; but C. was to bear his proportion of the loss, if any, and also to receive his share of the profit, if any, after reimbursing himself out of the returns the amount of his advances previously made to A. and B.: Held, that this agreement constituted a partnership between the three in the adventure at and from the time of the purchase of the goods for the adventure by A. and B. although C. did not go with them to make the purchase, nor authorize them to purchase on the joint account; but A. and B. alone in fact made the purchase; and although C. also purchased in his own name, and paid for goods to be sent out at the same time, in which B. was to share the profit or loss, and these goods were consigned for sales and returns to the same person who went out as supercargo on the joint account of the three. *Gouthwaite v. Duckworth.* 12 E. R. 421

6 If several persons horse, with horses their several property, the several stages of a coach, in the general profits of which they are partners, they are not all jointly liable for goods furnished to one partner for the use of the horses drawing the coach along his part of the road. *Barton v. Hanson.* 2 Taunt. 49

7 An agent who is paid by a proportion of the profits of an adventure, does not thereby become a partner in the goods. *Meyer v. Sharpe.* 5 Taunt. 74

II. LIABILITY OF PARTNERS TO THIRD PERSONS FROM ACTS OF CO-PARTNER.

1 One partner cannot bind the other partners by deed. *Harrison v. Jackson.* 7 T. R. 207

2 But he may by drawing or accepting bills of exchange. 7 T. R. 210

3 One of two partners applied trust-money in the trade with the privity of the other partner; afterwards they separated, and the partnership effects were assigned over to the first, who took on him the debts: this was held to be no payment in discharge of the other partner, but both were liable to make good the trust-money. *Smith v. Jameson.* 5 T. R. 601

4 Where A., B., and C. had entered into an agreement to purchase goods in the name of A. only, and take aliquot shares of the purchase, but it did not appear that they were jointly to resell the goods; the Court of C. P. (*Wilson, J. diss.*) held, that, on failure of A. the ostensible buyer, B. and C. were not answerable as partners with him. *Coope v. Eyre.* 1 H. B. 37

5 Two (of three) partners, who had contracted a debt prior to the admission of the third partner into the firm, cannot bind him without his assent by accepting a bill drawn by the creditor in their joint names: but such security is fraudulent, and void as against the third partner, and cannot be recovered in an action against the three, wherein one only of the original partners pleaded to the action. *Shirreff v. Wilkes.* 1 E. R. 48

Vide Gregson v. Hutton;

Marsh v. Vansommer. id. 49, *notis.*

6 If one partner draw or indorse a bill in the partnership firm, it will *prima facie* bind the firm; although passed by the one partner to a separate creditor in discharge of his own debt: unless there be evidence of covin between such separate debtor and creditor; or at least of the want of authority either express or implied in the debtor partner to give the joint security of the firm for his separate debt. But held, that no sufficient circumstance appeared in this case to raise any presumption adverse to the separate creditor taking such joint security in a case where the bill appeared to have been drawn in the name of the firm, to their own order 18 days before the delivery of it to the separate creditor and to have been accepted and indorsed before such delivery, and to have been drawn for a larger amount than the particular debt: and where, though the indorsement was in fact made by the hand of the debtor partner, yet it did not appear that that fact was known to the separate creditor at the time: and this too in a case where direct evidence might have been given of the covin or want of authority if it existed. *Ridley v. Taylor.* 13 E. R. 175

7 But where A., B., and C. were engaged in a cotton trade under the firm of A. and B. (C. not being known to the world as a partner,) and A. and

B. traded under the same firm as grocers, and a bill given to them in the cotton business was indorsed in the firm common to both partnerships and given in payment by *A.* and *B.* for goods received in their grocery business: Held, that *C.* was liable to pay the bill to the holders, though the indorsement was unknown to *C.* of whom the indorsee had no knowledge at the time of the indorsement. *Swan v. Heald* (Clerk). 7 E. R. 209

8 The authority of one partner to bind another by signing bills of exchange and promissory notes in their joint names is only an implied authority, and may be rebutted by express previous notice to the party taking such security from one of them, that the other would not be liable for it. And this, though it were represented to the holder, by the partner signing such security, that the money advanced on it was raised for the purpose of being applied to the payment of partnership debts; and though the greater part of it were in fact so applied. Neither can he recover against the other partner, the amount of the sum so applied to the payment of the partnership debts against such notice. *Gallway* (Lord) *v. Matthew*.

10 E. R. 264

9 *A.* being partner with *B.* in one mercantile house, and with *C.* in another; the house of *A.* and *B.* indorse a bill of exchange to the house of *A.* and *C.*, after which *B.* acting for the house of *A.* and *B.*, receives securities to a large amount from the drawer of the bill upon an agreement by *B.* that the bill should be taken up and liquidated by *B.*'s house, and if not paid by the acceptors when due should be returned to the drawer: The Court held, that the securities being paid, and the money received by *B.* in satisfaction of the bill, *A.* was bound by this act of his partner *B.* in all respects, and therefore that he could not in conjunction with *C.*, his partner in the other house, maintain an action as indorsees and holders of the bill against the acceptors, after such satisfaction received through the medium of, and by agreement with *B.*, in discharge of the same. *Jacaud v. French*.

12 E. R. 817

10 On the dissolution of a partnership

between *A.*, *B.* and *C.*, a power given to *A.* to receive all debts owing to, and to pay all those owing from the late partnership, does not authorize him to indorse a bill of exchange in the name of the partnership, though drawn by him in that name and accepted by a debtor to the partnership, after the dissolution. The person therefore to whom he so indorses it, cannot maintain an action on it against *A.*, *B.* and *C.* as partners. *Kilgour v. Finlyson*. 1 H. B. 155

11 Neither can such indorsee maintain an action against *A.*, *B.* and *C.* for money paid to the use of the partnership, though, in fact, the money advanced by him in discounting the bill be applied by *A.* to the payment of a debt due from the partnership.

1 H. B. 155

12 Where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; the latter has no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills: though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills by way of discount, and not by way of loan to the partnership; and though the banker conceived at the time that all the bills were drawn on the partnership account. *Emly v. Lye*. 15 E. R. 7

13 Where the party sued as a partner for the value of goods furnished for "the owners of a ship," was neither a partner in fact at the time, (having parted with his share some time before,) nor held himself out as such, having before withdrawn his name from the description of the firm at the counting-house, and sent circular letters to the correspondents of the house, notifying the change; he cannot be charged merely because having defectively conveyed his whole share in the ship before that time, he had subsequently joined with the assignees of the bankrupt partners in the ship in

making a good title to it to a purchaser from the assignees. *McIver v. Humble*. 16 E. R. 169

And see SHIP, part-owners, post.

- 14 Three partners, *A. B.* and *C.*, order goods from abroad, and then dissolve partnership, and make over their property to trustees for their creditors, leaving *A.* and *B.* as agents, to settle the affairs of the firm. The goods arrive, and are delivered to *A.* and *B.* in an action against *A. B.* and *C.* for the freight: Held, that *C.* was not liable. *Pinder v. Wilks*.

1 Marsh. 248

- 15 One of several partners in a contract with government, cannot pledge goods consigned to him by another partner for the purpose of performing the contract. *Snaith v. Burridge*.

4 Taunt. 684

III. BANKRUPTCY—EFFECT OF.

- 1 If partners by deed assign all their partnership effects, &c. to trustees for the benefit of their creditors, and some of the separate creditors of one partner do not assent to it, the assignment is fraudulent and void. *Fickhardt v. Wilson*. 8 T. R. 140
- 2 Money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, if it be not so applied, is proveable as a debt under the commission of the bankrupt partner, although the solvent partner were not called upon to pay the debt to the joint creditor till after the bankruptcy of the other. But the solvent partner may recover from the bankrupt his share of such debt, so paid after the bankruptcy to the joint creditor, notwithstanding the certificate, his (the bankrupt's) share of such debt so paid after the bankruptcy to the joint creditor. *Wright v. Hunter*. 1 E. R. 20
- 3 *A.* engages as a partner in a particular transaction with *B. C.* and *D.* who were before partners, and who continued partners among themselves as to their share in the transaction: *B. C.* and *D.* become bankrupts, after which *A.* pays a debt due from himself and them to a joint creditor: Held, that these three partners constituted but one debtor to *A.*, and he might recover from *B.*, not *B.*'s proportion alone, but the whole proportion of *B. C.* and

D. towards the joint debt; *B.* not having pleaded in abatement. *Wright v. Hunter*. 1 E. R. 20

- 4 After an act of bankruptcy committed by one of two partners, joint effects are sent away, which come to the defendant's hands; then the solvent partner dies, leaving the defendant his executor; and afterwards a commission of bankrupt is taken out against the surviving partner, and his estate assigned to the plaintiffs: Held, that they are tenants in common with the solvent partner, and after his decease with his representatives, by relation of law from the act of bankruptcy, and cannot therefore maintain trover against the defendant claiming under such solvent partner. *Smith v. Stokes*.

1 E. R. 363

- 5 After an act of bankruptcy committed by one partner, the other delivers goods of their joint property to a creditor for a joint debt, and dies; afterwards a commission issues against the surviving partner: Held, that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods of the assignees of the bankrupt, by relation from the act of bankruptcy, which was in the lifetime of the solvent partner, and consequently that the assignees cannot maintain trover against such creditor. *Smith v. Orrell*. 1 E. R. 368

- 6 Two of three partners, by deed, without the privity of the third partner, assigned a debt due to the firm from a correspondent abroad, to a creditor at home, and afterwards by direction of such correspondent drew a bill of exchange in the name of the firm upon his agent here, which was accepted, payable to their own order for the amount of the debt; the two partners, after having committed acts of bankruptcy, but before commission issued, indorsed such bill to the creditor of the firm in part satisfaction of his debt; afterwards separate commissions were sued out against the two partners, who were declared bankrupts, and their effects assigned; the other partner being all the time abroad. The Court held, that by such indorsement of the bill, nothing passed to the creditor; for the two bankrupts could not bind either the property of their assignees or of their solvent partner. *Thomason v. Freer*. 10 E. R. 418

7 Where separate commissions of bankruptcy were issued against three of four partners, to which they conformed and passed their examination, and an order was made for allowing the joint creditors to prove their debts under the commission of one of the three; under which commission the plaintiffs proved their joint debt, and afterwards sued all the partners for the same debt, and arrested one of the other two, under whose commission they had not proved: Held, that he was not entitled to be discharged out of custody. *Young v. Hunter*.

16 E. R. 252

8 Money advanced to S. by B., one of several partners, out of the partnership funds, on account of payments to be made on policies of assurance underwritten by S., on account of himself and B., in pursuance of a previous agreement between them to share the profits and loss on such policies, was held not proveable under the commission of S., who became bankrupt, by the surviving partners of B. *Ex-parte Bell*.

1 M. & S. 751

9 A. and B. being partners in trade, A. committed an act of bankruptcy, a few days after which, B. also committed an act of bankruptcy; between these periods a clerk of the house paid to C. a creditor 558*l.* and after both acts of bankruptcy 5*l.* more. The assignees, under a joint commission against A. and B. brought an action against C. for these sums, and declared first, for money had and received to the use of A. and D. before they became bankrupts; secondly, for money had and received to their own use as assignees of A. and B. after the bankruptcy of both; and thirdly, upon an account stated with them as such assignees: Held, that under this declaration they could recover only the 5*l.* *Smith v. Goddard*.

3 B. & P. 465

10 *Semble*, that if they had declared for money had and received to their use, as assignees of A., they might have recovered a moiety of the sum paid between the two acts of bankruptcy.

3 B. & P. 465

11 Where, upon a dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts

and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the non-payment of the same, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill: Held, that by stat. 49 G. 3. c. 121. s. 8. the certificate might be pleaded in discharge of an action brought by the two against the other upon his covenant. *Wood v. Dodgson*.

2 M. & S. 195

12 Where one of three partners in a banking concern, who resided at the place where the banking-house was, and was the only partner who transacted the business, the other two residing at a distance from it, absented himself from the banking-house, shut it up, and stopped payment: Held, that this was not evidence of a joint act of bankruptcy by all three. *Miles v. Bennett*.

2 M. & S. 556

IV. PROCEEDINGS IN ACTIONS, BY AND AGAINST.

1 One partner may maintain an action for money had and received against the other partner for money received to the separate use of the former, and wrongfully carried to the partnership account. *Smith v. Barrow*.

2 T. R. 476

2 Where money is owing to two partners, and after the death of one it is paid to a third person, the surviving partner may maintain an action for money had and received in his own right, and not as survivor.

2 T. R. 476

3 Where two enter into articles of partnership for seven years, in which is a covenant to account yearly, and to adjust, and make a final settlement at the expiration of the partnership, and they dissolve the partnership before the seven years are expired, and account together, and strike a balance which is in favour of the plaintiff, including several items not connected with the partnership, and the defend-

ant promises to pay it; an action of *assumpsit* lies on such express promise. *Foster v. Allanson.* 2 T. R. 479

- 4 An action cannot be maintained by several partners for goods sold by one of them living in *Guernsey*, and packed by him in a particular manner for the purpose of smuggling, though the other partners who resided in *England*, knew nothing of the sale; for the act of one is in this respect the act of all; and it is a contract by subjects of this country, made in contravention of the laws, and this case must be considered in the same light as if all the partners resided in *England*.

Biggs v. Lawrence. 3 T. R. 454

And see *Waynell v. Reed.* 5 T. R. 599

Clugas v. Penahna. 4 T. R. 466

- 5 A contract made by two partners to pay a certain sum of money to a third person, *equally out of their own private cash*, is a joint contract, and they must be jointly sued upon it. *Byers v. Dobey.* 1 H. B. 236

- 6 If three partners (two of whom reside abroad, and one in *England*), be sued for a partnership debt, and the partner resident in *England* appear to the action, but refuse to appear for the partners resident abroad, the sheriff under a *distingas* against the two partners may take partnership effects, though paid for by the partner resident in *England* alone, to whom the partnership was legally indebted; and the Court of C. P. will not relieve him against such distress. *Morley v. Strombon.* 3 B. & P. 25

- 7 The defendant agreed in writing to take one half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills: Held, that the plaintiff having paid the whole price of the goods which were to constitute the partnership stock, to which both parties were to contribute equally, an action lay against the defendant for his moiety of the price, which was to be furnished by him in the first instance, although there might be an account to be taken between them as partners upon the subsequent disposal of the joint stock. *Venning v. Leckie.* 13 E. R. 7

- 8 Where one person purchases goods,

and another is afterwards permitted to share in the adventure, the vendors cannot recover against such other person for the price of the goods. *Young v. Hunter.* 4 Taunt. 582

V. PLEADINGS AND EVIDENCE.

- 1 To *assumpsit* by several partners the defendant may plead in bar the bankruptcy of one of them. *Eckhardt v. Wilson.* 8 T. R. 140

- 2 The nonjoinder of a dormant partner is no ground of nonsuit.

Lloyd v. Archbottle. 2 Taunt. 324

Maxman v. Gillett. 2 Taunt. 325, n.

- 3 And a dormant partner may prove a contract. *id. ibid.*

- 4 Acts subsequent to the time of delivering goods on a contract may be admitted as evidence to shew that the goods were delivered on a partnership account, if it were doubtful at the time of the contract; but if it clearly appear that no partnership existed at the time of the contract, no subsequent act by any person who may afterwards become a partner (not even an acknowledgment that he is liable, or his accepting a bill of exchange drawn on them as partners for the very goods) will make him liable in an action for goods sold and delivered; though he will be liable in an action on the bill of exchange. *Saxille v. Robertson.* 4 T. R. 720

- 5 Where the plaintiffs had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, and furnished them with goods, and received payments on account generally; and previous to the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which, bills had been paid to the plaintiffs by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, and then other goods were furnished as before; yet, as the dishonoured bills were afterwards delivered up by the plaintiffs upon the receipt of the subsequent good bills; which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it: Held, that such delivering up of the old dishonoured bills, upon receipt of the

new good bills, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; of which the secret third partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners. But as the other two partners had suffered judgment to go by default, the plain-

tiffs could not be nonsuited, but the third partner, who defended, was entitled to a verdict. *Newmarch v. Clay.*
14 E. R. 239

6 An admission made by one of two partners, after the dissolution of the partnership, is competent evidence to charge the other partner. *Wood v. Braddick.*
1 Taunt. 104

And see *Lucas v. De La Cour*, ante, 319.

PARTY-WALLS.

1 A lessee for 21 years at a pepper corn rent for the first half-year, and a rack-rent for the rest of the term, who by agreement was to put the premises in repair, and covenanted to pay the land-tax, and all other taxes, rates, assessments, and impositions, having assigned his term for a small sum in gross, was held not to be liable to pay the expense of a party-wall, either by the provisions of stat. 14 G. 3. c. 78. s. 41. or by the covenant: but that charge must in such case be borne by the original landlord. *Southall v. Leadbetter.*
3 T. R. 458

2 The statute 14 G. 3. c. 78. s. 41. intended to throw that burden on persons to whom long leases had been granted with a view to an improvement of the estate, and who afterwards underlet at a considerable increase of rent.
3 T. R. 458

3 The owner of the improved rent, not of the ground rent, is liable to pay the expenses of a party-wall. *Peck v. Wood.*
5 T. R. 130

4 *Semb.*—A lessee of such a term, who afterwards sold the lease for a sum in gross, would also be liable within the Act. *Southall v. Leadbetter.*
3 T. R. 458

5 The lessor of a house at a rack-rent (there being no other person entitled to any kind of rent) is liable to contribute to the expenses of such party-wall, though the lessee has improved the house demised. *Beardmore v. Fox.*
8 T. R. 214

6 But if the lessee of a house at a rack-rent, underlet it at an advanced rent, he is liable to contribute to the expenses of such party-wall: nor is the operation of the statute at all varied by any covenants to repair, entered

into between the landlord and his tenant. *Sungster v. Birkhead.*

1 B. & P. 303

7 The tenant of a house covenanted in his lease to pay a reasonable share and proportion of supporting, repairing, and amending all party-walls, &c. and to pay all taxes, duties, or assessments and impositions, parliamentary and parochial, "it being the intention of the parties that the landlord should receive the clear yearly rent of 60*l.* in net money without any deduction whatever;" during the lease the proprietor of the adjoining house built a party-wall between that house and the house demised: Held, that under the statute 14 G. 3. c. 78., the tenant (not the landlord) was bound to pay the moiety of the expense of the party-wall. *Barrett v. Bedford (Duke).*
8 T. R. 602

8 The three months notice required by s. 38. is only necessary where the person, who at the time when it is necessary to build, &c. is liable to pay, cannot agree with the owner of the adjoining house. *Peck v. Wood.* 5 T. R. 130

9 Where notice of pulling down and rebuilding a party-wall was given under the building Act 14 G. 3. c. 78., and the tenant of the adjoining house, who was under covenant to repair, finding it necessary, in consequence, to shore up his house, and to pull down and replace the wainscot and partitions of it, instead of leaving such expenses to be incurred and paid by the owner of the house, giving notice, in the manner prescribed by the Act, and afterwards paying the same to him upon demand, employed workmen of his own to do those necessary works, and paid them for the same: Held, that he could not recover over against

- his landlord such expenses incurred by his own orders, and paid for by him in the first instance; all the powers and authorities given by the Act in respect of any works to be done, being given to the owner of the house intended to be pulled down and rebuilt, and the landlord of the adjoining house being only liable by the Act to reimburse his tenant money paid by him to the other owner for such works as are authorized to be done by such other owner in respect of such adjoining house. *Robinson v. Lewis.* 10 E. R. 227
- 10 Before an action can be brought on the Building Act to recover a proportion of the expenses of building a party-wall, the accounts prescribed by s 41. must be delivered whether the house be occupied by the owner or by a tenant: and a formal demand of the money must be made 21 days before action brought. *Philip v. Donati.* 2 Taunt. 62
- 11 If two persons have a party-wall, one half of the thickness of which stands on the land of each, they are not therefore tenants in common of the wall, or of the land on which it stands; although the wall was erected at the joint expense of the two proprietors. *Matts v. Hawkins.* 5 Taunt. 20
- 12 The stat. 14 G. 3. c. 78. does not make party-walls common property. And if one proprietor adds to the height of such a party-wall, and the other pulls down the addition, the first may maintain trespass for pulling down so much of it as stood on the half of the wall which was erected on the plaintiff's soil. The property in a wall erected at a joint expense, ensues the property of the land whereon it stands. 5 Taunt. 20
- 13 If the plaintiff declares on a general covenant to repair a messuage, and assigns a breach, *per quod* he was put to expense, it is sufficient for a tenant to plead performance as to all except as to the repairs of a party-wall, and that those repairs were rendered necessary, and were done under the statute 14 G. 3. c. 78., and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent: and if the plaintiff is possessed of any facts to charge the defendant with a proportion of the repairs, he ought to repay them. *Moore v. Clark.* 5 Taunt. 90

PATENT.

- 1 A patent is void if the specification be ambiguous, or give directions which tend to mislead the public. *Turner v. Winter.* 1 T. R. 602
- 2 So if the patentee say that by one process he can produce three things, and he fail in any one. 1 T. R. 602
- 3 So if the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail. 1 T. R. 602
- 4 A patent must not be more extensive than the invention: therefore, if the invention consist in an addition or *improvement* only, and the patent be for the *whole* machine or manufacture, it is void. *Rex v. Elze.* 11 E. R. 109, *n.*
- 5 A patent was granted by the Crown to A. for 14 years, for his "method of lessening the consumption of steam and fuel in fire engines;" the specification stated that "the method consisted of the following principles," (describing the mode in which those principles were applied to the purposes of the invention;) afterwards an Act of Parliament was passed to extend the patentee's term, the title of which was "An Act for vesting the sole property, &c. of certain steam engines called *Fire Engines* of his invention," &c. and after reciting that the patent was "for making and vending certain engines, by him invented for lessening the consumption of steam and fuel in fire engines," &c. it granted him the sole right of "making and selling the said engines." The Court held unanimously, that the invention was the subject of a patent; and the patentee having in his specification described his invention: Held, that the patentee's right under the patent and Act of Parliament was valid. *Hornblower v. Boulton (in error).* 8 T. R. 95
- 6 N. B. This case, though it came from the Court of C. P. was not argued there, that Court having been equally

divided in a former case arising on the same patent. *Eyre, C. J. and Rooke* for the patent, and *Buller and Heath, Justices*, against it. *Boulton v. Bull.*

2 H. B. 463—500

- 7 It seemed admitted, that under the proviso in stat. 21 Jac. 1. c. 3. s. 6. there cannot be a patent for a philosophical principle only, neither organized nor capable of being so: but that a patent for a machine improved by a philosophical principle, though the machine existed before, is good.

8 T. R. 95: 2 H. B. 463, &c.

- 8 *A.* by indenture (reciting that a suit was depending between him and *B.* respecting the infringement of certain patents, and that it was apprehended these patents could not be fully assigned until the determination of the suit, without hazard of defeating it), granted absolutely the said patents, together with some others to *C.*, excepting however until the determination of the said suit, such patents as should be necessary to support *A.*'s legal title: with a covenant that *A.*, upon the determination of the suit, should assign the excepted patents to *C.*, and that until such assignment *A.* should stand legally possessed of the same for the behoof of *C.*: Held, that the legal interest in the excepted patents vested in *C.* upon the determination of the suit, without further assignment, so as to entitle him to maintain an action for the infringement of them. *Cartwright v. Amatt.*

2 B. & P. 43

- 9 One having obtained a patent for a certain manufacturing machine, of which he duly inrolled a specification, afterwards obtained another patent for certain improvements in the said machine, in which the grant of the former patent was recited; and the latter patent contained the usual condition that it should be void, if the patentee did not within one month inroll a specification, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed: Held, that a specification, containing a full description of the whole machine so improved, but not distinguishing the new improved

parts, or referring to the former specification, otherwise than as the second patent recited the first, was a performance of that condition. *Harmer v. Playne.*

11 E. R. 101

- 10 A patent right for the exclusive exercise of an invention obtained from the Crown by an uncertificated bankrupt, is effected by the previous assignment of the commissioners, and vests in the assignees. *Hesse v. Stevenson.*

3 B. & P. 565

- 11 An Act empowering a bankrupt patentee, his executors, administrators, and assigns, to assign the patent right to a greater number of persons than allowed by the letters patent, and declared to be a public Act, does not enable either the bankrupt or his assigns to make a better title than they could before the Act. *Hesse v. Stevenson.*

3 B. & P. 565

- 12 *A.* having obtained a patent for an invention, of which he supposed himself the inventor, agreed to let *B.* use it upon payment of a certain annual sum secured by bond; this sum was paid for several years, when *B.* discovered that *A.* was not the inventor, but that it was in public use before *A.* obtained his patent, brought an action for money had and received to recover back the amount of the annuity paid: Held, that he could not recover. *Taylor v. Hare.*

1 N. R. 260

- 13 In *assumpsit*, the plaintiff on an agreement by the defendant not to avail himself, or take any undue advantage of a communication made to him by the plaintiff of an invention for which the plaintiff intended to take out a patent, and assigned as a breach, that the defendant fraudulently obtained a patent or the invention in his own name. Evidence that the defendant fraudulently obtained a patent in his own name, which the plaintiff afterwards agreed should remain in the defendant's name upon certain terms, which terms the defendant before the commencement of the action had renounced, insisting upon the invention as his own, was held to maintain this breach. *Smith v. Dickenson.*

3 B. & P. 630

PAUPER.

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| <p>1 The lessor of the plaintiff suing in <i>formâ pauperis</i> will be dispaupered in case of vexatious delay. <i>Doe d. Lepingwell v. Trussell.</i> 6 E. R. 505</p> | <p>2 A pauper as such can never pay costs. <i>Rice v. Brown.</i> 1 B. & P. 39 And see <i>Weston v. Withers.</i> 2 T. R. 511, ante, 225</p> |
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PAYMENT.

GENERAL PAYMENTS, HOW APPLIED.

- N. B. When a banker's check given under particular circumstances does not amount to payment, see *Brown v. Kewley.* 2 B. & P. 518, ante, 143
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| <p>1 A. covenants with B. to serve him for certain wages for three years, at the end of which time a balance remains due to him from B. A. then enters into a fresh contract, not under seal, to serve B. at increased wages: and at the end of three years more, it appears that he has received, at different times, sums more than sufficient to cover the</p> | <p>balance due on the former contract: Held, that the last-mentioned sum having been paid generally, without specifying on what account, A. had a right to apply them to the satisfaction of the simple contract debt. <i>Peters v. Anderson.</i> 1 Marsh. 238</p> <p>2 Where a creditor has debts due to him on different accounts, he may apply a payment made to him by his debtor to either of such debts, unless it be specified at the time to which debt it is to be applied. <i>Hall v. Wood.</i> 14 E. R. 243, n.</p> |
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PAYMENT OF MONEY INTO COURT.

I. IN WHAT CASES ALLOWED.

II. WHERE REFUSED.

III. EFFECT OF.

IV. PROCEEDINGS SUBSEQUENT TO PAYMENT.

I. IN WHAT CASES ALLOWED.

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| <p>1 A defendant was permitted to pay into Court, to abide the event of the cause, a sufficient sum to cover the debt and costs, instead of giving bail. <i>Fowell v. Leo.</i> 1 Taunt. 425</p> <p>2 In an action against a carrier who had given notice that he would not be answerable beyond 20l., unless on certain conditions, the Court of C. P. permitted the carrier to pay 20l. into Court. <i>Hutton v. Bolton.</i> 1 H. B. 299, n.</p> <p>3 The Court of C. P. permitted the plaintiff in replevin to pay into Court the rent for which the defendant avowed. <i>Vernon v. Wynne (Bart.)</i> 1 H. B. 24</p> <p>4 If the Court see reason to suspect that a <i>qui tam</i> action is prosecuted merely for the issue money, they will on mo-</p> | <p>tion permit it to be paid into Court to abide the event of the suit. <i>Parker, q. t. v. Macfarlane.</i> 3 T. R. 132</p> <p>5 Claims being made on a prize agent by several persons for the prize money due to a sailor, the agent was permitted as a public officer to pay the money into Court for the benefit of the claimant, who should prove his authority to receive it. <i>Edwards v. Minett.</i> 1 Taunt. 166</p> <p>6 Where, after an action commenced, and before money could regularly be paid into Court, a tender was made of a sum for damages, with costs, up to that time and refused, the Court of C. P. on motion permitted that sum to be paid into Court, and struck out of the declaration, and ordered all subsequent costs to be paid by the plaintiff; although the plaintiff went for other causes of action than those on which the sum was tendered. <i>Roberts v. Lambert.</i> 2 Taunt. 283</p> <p>7 In an action of covenant on an insurance against fire, a tender may be pleaded, and money paid into Court</p> |
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under 19 Geo. 2. c. 37. s. 7. *Solomon v. Bewicke.* 2 Taunt. 317

- 8 Upon setting aside a writ of inquiry, the Court permitted the defendant to pay money to the plaintiff under a rule of Court, with costs of the action up to that time, and ordered that the plaintiff's further proceedings should be at the peril of the subsequent costs. *Day v. Edwards.* 1 Taunt. 491

II. WHERE REFUSED.

- 1 The Court refused to permit a defendant to pay money into Court in an action against the sheriff for a false return to a *fi. fu.* *Boxles v. Fuller.* 7 T. R. 335
- 2 The Court also refused to permit the defendant to pay money into Court in an action for dilapidations. *Salt v. Salt.* 8 T. R. 47
- 3 In *assumpsit* against a carrier for goods spoiled, the defendant was not allowed to pay the invoice price into Court. *Fail v. Pickford.* 2 B. & P. 234
- 4 In an action for breach of a contract to deliver goods at a certain price *per ton*, the Court of C. P. will not allow the defendant to pay money into Court. *Strong v. Simpson.* 3 B. & P. 14
- 5 Action for freight, and cross action for unliquidated damages against a foreign seaman. The Court of C. P. refused to permit the freight to be paid into Court, as a fund liable to payment of the damages when ascertained. *Sherborne v. Siffkin.* 3 Taunt. 525
- 6 The plaintiff having declared on a bond, dated in 1775, for 2,400*l.* proclamation-money of *North Carolina*, averring that it was of a certain value; the Court would not permit the defendant to pay the 2,400*l.* proclamation-money into Court in the year 1792, when the proclamation-money had become depreciated, &c. *Cuning v. Munro.* 5 T. R. 87
- 7 Rule refused to permit the defendant to pay into Court the debt and costs up to a certain day after the action brought, (thereby excluding the costs of the declaration delivered,) upon the ground of an order to pay the debt and costs up to that period, without having made a tender before action, or obtaining the common rule for staying proceedings on payment of the debt and costs up to the time of the application. *Burnester v. Hilch.* 13 E. R. 551

- 8 In an action, for work and labour, the defendants having offered by letter to pay a certain sum for the debt, with the costs up to that time, which was refused by the plaintiff, obtained a rule to shew cause why the sum of 5*l.* and the costs should not be paid into Court, and further proceedings be staid, and why the plaintiff should not pay the costs incurred since the tender; and why if the plaintiff refused to accept it, the 5*l.* should not be paid into Court, and struck out of the declaration. The Court of C. P. discharged the rule, it appearing that there was nothing oppressive in the plaintiff's conduct. *Gibbon v. Cope-man.* 1 Marsh. 392

III. EFFECT OF.

N. B. For Costs on Payment of Money into Court, see *ante*, 219.

- 1 Payment of money into Court is only an acknowledgment by the defendant that the plaintiff is entitled to recover the sum so paid; but it does not preclude him from taking any objection to the legality of the contract, in order to prevent plaintiff from recovering beyond that sum; though unless such sum were paid, such objection would be a bar to the plaintiff's action. *Cox v. Parry.* 1 T. R. 464
- 2 The Court of C. P. held, that payment of money into Court on the whole declaration, in an action on a bill of exchange, is such an admission of the validity of the bill, as to prevent the necessity of proving the drawer's hand-writing. *Gutteridge v. Smith.* 2 H. B. 374
- 3 *Qu.*—Whether a defendant can demur to evidence after having paid money into Court? 1 H. B. 93
Or be non-suited? 2 H. B. 375
- 4 The payment of money into Court upon a count stating a special contract in an admission of such contract, and narrows the inquiry to the *quantum* of damages sustained by the breach thereof: Therefore, if the plaintiff declare as upon a general undertaking by the defendant to carry goods for hire, on which the defendant pays 5*l.* into Court, the latter cannot give in evidence that the contract was that he should not be answerable for goods lost to a greater value than 5*l.* unless entered and paid

for accordingly : though if no money had been paid into Court, the plaintiff must have been nonsuited on such evidence. *Yate v. Willan.*

2 E. R. 128

And *Piggott v. Dunn.* 2 E. R. 128

- 5 Where money is paid into Court generally upon a declaration in contract, it is an admission of the existence of a contract in every transaction which is capable of being converted into a contract by the assent of the parties.

Bennett v. Francis. 2 B. & P. 550

- 6 Therefore, where a defendant who had possessed himself of goods belonging to the plaintiff, and had sold part and kept the residue in specie, paid money into Court generally, upon a declaration containing a count for goods sold and delivered, it was held, that he had thereby admitted the transaction to have been converted into a contract, and that the plaintiff was entitled to recover the value of all the goods under the count for goods sold and delivered.

2 B. & P. 550

- 7 The Court of C. P. held that payment of money into Court is an admission of a legal demand only, if there be a legal demand in the declaration to which it may be applied, though there may be an illegal one also; and that in such case money so paid cannot be applied to an illegal account.

Ribbans v. Cricket. 1 B. & P. 264

- 8 If the defendant pay money into Court generally upon a declaration containing a count on a policy of insurance, together with the money counts, and it appear that the plaintiff, by his conduct previous to the trial, induced the defendant to believe that the only point to be tried was a question of fraud, and suffered him to prepare his evidence accordingly, the Court of C. P. will not allow the plaintiff to object to the receipt of that evidence at the trial, on the ground of the contract having been admitted by payment of money into Court.

Muller v. Hartshorn. 3 B. & P. 556

- 9 Payment of money into Court to the amount of a partial loss upon a valued policy, is not an admission of a total loss.

Rucker v. Palsgrave.

1 Taunt. 419

- 10 Payment of money into Court generally upon a declaration containing a count on a policy of insurance, and the money counts, is only an admission

of the contract, but does not preclude the defendant from disputing his liability, beyond such payment, for goods which were not loaded according to the terms of the policy.

Melish v. Allmutt. 2 M. & S. 106

- 11 The only case where a party shall be bound by the payment of money, though by mistake, is where it is paid into Court under a rule.

Malcolm v. Fullarton. 2 T. R. 645

- 12 The Court of C. P. will not order money paid into Court by the defendant through a mistake to be restored to him.

Vaughan v. Barnes. 2 B. & P. 392

- 13 Though perhaps in case of fraud they would.

2 B. & P. 392

IV. PROCEEDINGS SUBSEQUENT TO PAYMENT.

- 1 Paying money into Court where the demand is for unliquidated damages, by a Judge's order after plea pleaded, is irregular; but if the plaintiff take the money out, he thereby waves the irregularity, and cannot afterwards have a verdict, unless he recover more than the usual sum paid in.

Griffiths v. Williams. 1 T. R. 710

- 2 If defendant bring money into Court on a plea of tender, plaintiff may take it out, though he reply that the tender was not made before action brought.

Le Grew v. Cooke. 1 B. & P. 333

- 3 If a defendant, who pays the debt and 10l. costs to the sheriff in lieu of bail, under 43 G. 3. c. 46., puts in bail above, who, being excepted to, render him instead of justifying, the plaintiff is not entitled to receive out of Court, under s. 2., the money so deposited.

Harford v. Harris. 4 Taunt. 669

- 4 But the defendant may in such case receive back his deposit.

4 Taunt. 669

- 5 If a defendant pay a sum of money into Court, and obtain an order to stay proceedings on payment of that sum and costs, and omit to pay the costs when taxed, the plaintiff after taking the money out of Court may proceed without a previous demand of the costs.

Smith v. Smith. 2 N. R. 473

And see costs, *ante*, 219.

- 6 If money is paid into Court upon one count of a declaration, and the plaintiff takes it out, he is not entitled to the costs of the other counts.

Skar-ratt v. Vaughan. 2 Taunt. 266

PEER.

See *Walker v. The Earl of Grosvenor*, ante, page 94.

1 It is doubtful whether a peer of parliament can be sued in the King's Bench by bill. *Lonsdale*, (Earl), v. *Littledale*, (in *Cam. Scac.*)

2 H. B. 267

2 But having pleaded in chief to a bill filed against him in that Court, he cannot afterwards assign for error that he ought to have been sued by original writ, and not by bill. *Same Parties in Dom. Proc. in error.*

2 H. B. 299

3 If a peer be sued by bill, no objection can be taken to such proceeding, except by plea in abatement. *Hosier v. Lord Arundel.*

3 B. & P. 7

4 *Qu.* Whether even in that mode, such an objection could prevail.

3 B. & P. 7

5 A writ of *latitat* issued against a peer was superseded on motion, grounded on an office copy of the *præcipe*, in which he was styled Baron of *W. Couch v. Lord Arundel.*

3 E. R. 127

6 It lies on the plaintiff to discover whether the defendant be entitled to the privilege of peerage; and although he may have often waived the privilege, that will not make it regular to sue him by common process. *Fortnam v. Lord Rokeby.*

4 Taunt. 668

7 A Roman Catholic peer is not entitled to the privilege of franking. *Lord Petre v. Lord Auckland* (in error.)

2 B. & P. 139

PENAL ACTION.

I. WHEN AND HOW COMPOUNDED.

II. PROCEEDINGS—WHERE STAID.

III. PLEADINGS.

IV. EVIDENCE.

V. VERDICT.

I. WHEN AND HOW COMPOUNDED.

1 The Court under favourable circumstances, gave leave to compound in a penal action for usury, after verdict. *Maughan, q. t. v. Walker.*

5 T. R. 98

2 But the Court of C. P. on such an application said, it lay with the defendant to shew the circumstances which might entitle him to such indulgence. *Crowder, q. t. v. Wagstaff.*

1 B. & P. 18

3 The Court of C. P. will not grant permission to compound a penal action in which part of the penalty goes to the King, unless the consent of the Crown is previously signified, whether a verdict has passed for the plaintiff or not.

Howard, q. t. v. Sowerby.

4 In compounding a penal action on the Post-horse Act (which gives costs to the prosecutor), the prosecutor was allowed to receive the deficient duties

(not amounting to 40s.) and full costs of suit, though together exceeding the 40s. paid to the Crown. *North, q. t. v. Smart.*

1 B. & P. 51

And see POST-HORSE DUTY, post.

5 In compounding an action on a penal statute which gives no costs, the plaintiff having agreed to stay proceedings on payment of a sum, in equal moieties to the Crown and the plaintiff, and the entire costs to the plaintiff, the Crown obtained half the costs also. *Lee v. Cuss.*

2 Taunt. 213

6 The Court of C. P. will not permit the defendant in a *qui tam* action to compound, unless the counsel for the Crown are instructed to consent on behalf of the treasury. *Sheldon v. Mumford.*

5 Taunt. 268

II. PROCEEDINGS, WHERE STAID.

1 Proceedings in a penal action on 25 Ed. 3. st. 4. c. 3. stayed on motion because no affidavit had been filed, that the offence was committed within the county where the action was brought, or within a year, according to 21 Jac. 1. c. 4. *White, q. t. v. Boot.*

2 T. R. 274

2 But in a subsequent case the Court re-

- refused to stay the proceedings in debt on a penal statute *after verdict*, though no such affidavit had been filed. *Leigh v. Kent.* 3 T. R. 362
 3 The stat. 21 Jac. 1. c. 4. only applies to those penal statutes on which proceedings may be had before the justices of assize, justices of the peace, &c. *Leigh, q. t. v. Kent.* 3 T. R. 362
Balls, q. t. v. Atwood. 1 H. B. 546
 4 The statute 21 Jac. 1. c. 4. only restrains the proceedings on penal statutes in the superior Courts, where the informer, before the passing of that statute, might have sued in the inferior as well as the superior Courts by action, bill, plaint, suit, or information. *Shipman v. Henbest.* 4 T. R. 109
 5 The plaintiff in an action for bribery on stat. 2 G. 2. c. 24. is bound by s. 11. to proceed without *wilful delay*; and if he do not proceed to trial till six years after issue joined, and assign no reason for it, the Court will consider the delay to be *wilful*, and even after verdict will stay the proceedings on motion, and will not allow the plaintiff his costs. *Petrie v. White.* 3 T. R. 5
 6 The defendant is entitled to the benefit of the Act, though he do not claim it so soon as he might. 3 T. R. 5
 7 And it appearing that the bill had been taken off the file, the Court permitted it to be supplied from a copy taken by the plaintiff himself. *Petrie v. Benfield.* 3 T. R. 476
 8 The Court will not (before trial) stay proceedings in an action against a sheriff's officer for a penalty on stat. 32 G. 2. c. 28. s. 12. though a similar action has been commenced against the sheriff for the same offence. *Peshell v. Layton.* 2 T. R. 512
 9 But after verdicts in both actions, the Court will stay the proceedings in both on paying one penalty, and the costs in one action. *Peshall v. Layton.* 2 T. R. 712
 10 Not so, where they are contained in a subsequent proviso. 1 T. R. 141
 11 Nor if they are contained in a subsequent statute; in which case the defendant must shew, by way of defence, that he comes within such exceptions. *Rex v. Hall.* 1 T. R. 320
 12 And where a prosecutor in his information negatives some of the exceptions which he need not, they may be rejected as surplusage. 1 T. R. 320
 And see *Gill v. Scrivens.* 7 T. R. 27
 1 In an action on a penal statute, the declaration must allege the fact to be done *contra formam statuti* or *statutorum*, as the case may be; stating that by force of the statute an action accrued, &c. is not sufficient, where the penalty is given by one statute, and the right of action to the informer is given by another. *Lee v. Clarke.* 2 E. R. 333
 2 Where three parish churches have been united by 22 Car. 2. c. 11. the benefice may be described in pleading as one rectory. *Wilson, q. t. v. Van Mildert.* 2 B. & P. 394
 3 In a penal action, if a parish is styled by its popular and well known name, it is well enough, though that is not the name of consecration. *Williams v. Burgess.* 3 Taunt. 127
 4 In debt on stat. 19 G. 2. c. 30. for the penalty of 50*l.* for impressing a mariner in the *West-India* trade, the declaration must aver that he had not deserted from any of his Majesty's ships of war. *Spierces v. Parker.* 1 T. R. 141
 5 The offence prohibited by 3 G. 3. c. 15. s. 1., is the voting as a freeman, not having been twelve months admitted, and not having any other right of voting than that which the character of a freeman confers. And the offence must be so averred in the declaration. *Daman v. Marrett.* 1 Taunt. 128
 6 It is an offence within the statute 28 G. 3. c. 38. s. 31. to press together yarn made of wool; and a declaration or information on this Act need not aver that it was in such a state as might be reduced to and used as wool again. *Dyer v. Hainsworth.* 3 T. R. 611
 7 *Semble*, such averment is only necessary in the case of a prosecution for "*pretended manufactures.*" 3 T. R. 611
 8 It is sufficient in a *qui tam* action to entitle the plea with the names of the parties without the addition of *qui*

III. PLEADINGS.

N.B. The stat. 4 Anne c. 16. which allows double pleading, does not extend to penal actions. *Heyrick v. Foster.*

4 T. R. 701

- 1 The exceptions in the enacting clause of a statute, which creates an offence and gives a penalty, must be negatived by the plaintiff in his declaration. *Spierces v. Parker.* 1 T. R. 141

tam to the plaintiff's name. *Dale, q. t. v. Beer.* 7 E. R. 333
 13 Though the 4th sect. of the stat. 21 Jac. 1. c. 4. enables a defendant to plead the general issue, and give the special matter in evidence, yet he cannot avail himself under such plea of any matter which goes to the jurisdiction of the Court. *Shipman v. Henbest.* 4 T. R. 109

14 A discontinuance is cured by the appearance of the party by stat. 32 Hen. 8. c. 30. in penal as well as civil actions. *Humble v. Bland (in error)*: 6 T. R. 255

IV. EVIDENCE.

1 Though a penal action be removed out of the proper county into another for trial, yet the cause of action must still be proved to have happened within the proper county where the venue is laid. *Robinson v. Garthwaite.* 9 E. R. 296

2 Where a common *capias* is sued out within the time limited by the statute, and the plaintiff declares on it in a *qui tam* action, it is not necessary to connect the declaration with the writ by any other proof than the production of the writ. *Hutchinson v. Piper.* 4 Taunt. 555

V. VERDICT.

1 If the jury find a verdict for the plaintiff with one penalty generally in a penal action, and the plaintiff apply it to one count, he cannot afterwards apply it to another, though the former be bad in law, and though the evidence would have warranted the verdict on any other count. *Halloway, q. t. v. Bennett.* 3 T. R. 448
S. P. Hardy v. Cathcart, Clerk. 5 Taunt. 11

PENAL STATUTES.

RULES AS TO CONSTRUCTION OF.

- (a) 1 Jac. 1. c. 22.
Jurisdiction.—Leather.
- (b) 1 Jac. 1. c. 27.
Game.
- (c) 29 Car. 2. c. 7.
Bakers.
- (d) 9 & 10 W. 3. c. 41.
Naval Stores.
- (e) 3 G. 2. c. 26.
Coals.
- (f) 5 G. 2. c. 20.
Pilots.
- (g) 7 G. 2. c. 19.
Hops.
- (h) 10 G. 2. c. 28.
Stage Entertainment.
- (i) 24 G. 2. c. 40.
Spirituous Liquors.
- (k) 24 G. 3. stat. 2. c. 27.
Carts.

- (l) 28 G. 3. c. 38.
Wool.
- (m) 28 G. 3. c. 88.
Vagrants.
- (n) 29 G. 3. c. 26.
Hawkers.
- (o) 39 G. 3. c. 79.
Printers.
- (p) 39 & 40 G. 3. c. 90.
Pawnbrokers.
- (q) 40 G. 3. c. 18.
Bread.
- (r) 42 & 46 G. 3. c. 38, 139.
Malt.

RULES AS TO CONSTRUCTION OF.

N. B. See post, tit. STATUTES.

- (a) 1 Jac. 1. c. 22.
Jurisdiction.—Leather.

1 The stat. 1 Jac. 1. c. 22. gives certain penalties, to be recovered (by s. 46.) by action of debt or information in the Courts of Westminster; the

50th sect. gives jurisdiction to the justices of assize, of gaol delivery, and of the peace, to inquire of the premises and to hear and determine the same; under the latter clause the inferior Courts can only proceed by indictment or presentment. *Shipman, q. t. v. Henbest.* 4 T. R. 109

2 The informer may bring an action of debt upon this statute in the Courts of Westminster, notwithstanding stat. 21 Jac. 1. c. 4. 4 T. R. 109

3 The stat. 1 Jac. 1. c. 22. s. 40. which gives a penalty of 5*l.* against any person resisting the searchers appointed by that Act, in searching for and seizing goods made of leather, ill tanned or wrought, does not attach upon a tradesman who purchases such goods ready made, though with intent to sell again, but only upon the original makers of such ill-wrought goods. *Mason, q. t. v. Middleton.* 3 E. R. 334

4 If a person carrying on within a borough one of the trades mentioned in the 1 Jac. 1. c. 22., viz. that of a cutter and worker of leather, expose to sale shoes manufactured without the borough, and purchased by him ready made, the searchers may seize them under s. 32. if made of leather insufficiently tanned. *Hodgson v. Rickard.* 2 N. R. 389

5 A condemnation by four out of the six triers of leather, appointed under 1 Jac. 1. c. 22. (the whole number being met for the purpose of trying) must be considered as the condemnation of all six. *Grindley v. Barker.*

1 B. & P. 229

(b) 1 Jac. 1. c. 27.

Game.

1 2*u.*—Whether the stat. 1 Jac. 1. c. 27. (as to killing game) be repealed by the stat. 22 & 23 Car. 2. c. 25. ? *Rex v. Harris.* 7 T. R. 238

(c) 29 Car. 2. c. 7.

Bakers.

1 The stat. 29 Car. 2. c. 7. does not prohibit a baker baking dinners for his customers on a Sunday. *Rex v. Younger.* 5 T. R. 449

2 Though baking bread in the ordinary course of the baker's business is an offence within that Act. 5 T. R. 451 (See stat. 34 G. 3. c. 61.)

(d) 9 & 10 W. 3. c. 41.

Naval Stores.

1 One convicted upon the stat. 9 & 10 W. 3. c. 41. s. 2. of having unlawfully in his possession, or concealing, the King's naval stores, cannot since the stat. 39 & 40 G. 3. c. 89. s. 2. be sentenced to hard labour. *Rex v. Bridges.* 8 E. R. 53

(e) 3 G. 2. c. 26.

Coals.

1 In March 1802, the stat. 3 G. 2. c. 26. s. 13. giving a penalty against dealers in coals within the metropolis, and 10 miles round, for not justly measuring coals sold by the chaldron, according to the lawful bushel directed by the statute 12 Ann. stat. 2. c. 17. s. 11. was a subsisting law; and held, that evidence of such coals proving short upon re-measurement was admissible to prove the charge of their not having been justly measured. But *quare*, whether the statute 3 G. 2. c. 26. were a subsisting law after July 1802, when the stat. 26 G. 3. c. 108. was revived by the stat. 42 G. 3. c. 89 ? *Warren q. t. v. Windle.* 3 E. R. 205

2 A dealer in coals by the chaldron who sold to another by the chaldron a certain quantity as and for 10 chaldrons of coals, pool measure, without justly measuring the same with the lawful bushel of Queen Ann, is liable to the penalty of 50*l.* imposed by the 13th section of the stat. 3 G. 2. c. 26. upon such defaulters who sell coals by the chaldron or lesser quantity without measuring them. *Parish, q. t. v. Thompson.* 3 E. R. 525

(f) 5 G. 2. c. 20.

Pilots.

1 The stat. 5 G. 2. c. 20. which inflicts a penalty of 20*l.* on persons piloting ships down the Thames, &c. only extends to vessels sailing on foreign voyages, and not to those which, having performed their voyages, are steered from one wharf to another on the river, for the purpose of unloading their cargoes. *Rex v. Lambe.*

5 T. R. 76

2 In a subsequent case the Court recognized this judgment; and held ge-

nerally, that under this statute it is only necessary to have a regular pilot when a vessel is sailing on the *Thames* in the course of her voyage in or out: up or down the river. *Rex v. Neale*.

8 T. R. 241

(g) 7 G. 2. c. 19.

Hops.

- 1 It is an offence within the statute 7 G. 2. c. 19. to mix the vapour of sulphur and brimstone with hops. *Rex v. Pack*.

6 T. R. 374

(h) 10 G. 2. c. 28.

Stage Entertainment.

- 1 Tumbling is not an entertainment of the stage within the meaning of statute 10 G. 2. c. 28. *Rex v. Handy*.

6 T. R. 286

And see *Gallini v. Laborie*.

5 T. R. 242, ante, 37

(i) 24 G. 2. c. 40.

Spirituous Liquors.

- 1 The statute 24 G. 2. c. 40. s. 12., making illegal the sale of spirits in less quantities than to 20s. value, unless paid for, extends to spirits mixed with water. *Scott v. Gillmore*.

3 Taunt. 226

(k) 24 G. 3. stat. 2. c. 27.

Caris.

- 1 The owner of a cart who does not reside within the bills of mortality, or within five miles of *Temple Bar*, need not enter his name and place of abode with the commissioners of hackney coaches (under stat. 24 G. 3. stat. 2. c. 27. s. 8.) or have his name or any number upon the cart, though it be driven within those limits. *Rex v. Powell*.

4 T. R. 572

(l) 28 G. 3. c. 38.

Wool.

- 1 The meaning of s. 74. of stat. 28 G. 3. c. 38. (relative to the exportation of wool) which enacts that any information upon it shall be tried by a jury, to be summoned out of another county than that where the fact was committed, is that the trial shall be had in another county. *Dyer v. Hainsworth*.

3 T. R. 611

- 2 And under s. 31. the Court out of which the record issues is to give judgment, and not the Court of *Nisi Prius*, where it is tried.

3 T. R. 611

(m) 28 G. 3. c. 88.

Vagrants.

- 1 A commitment in execution of a rogue and vagabond under statute 28 G. 3. c. 88. should state that the defendant was apprehended with the implements of house-breaking upon him at the time of such apprehension, &c. *Rex v. Brown*.

8 T. R. 26

(n) 29 G. 3. c. 26.

Hawkers.

- 1 No hawker can expose goods to sale in any part of a market-town but the public market-place, by stat. 29 G. 3. c. 26. s. 16, 17. *Rex v. Redfearne*.

4 T. R. 273

(o) 39 G. 3. c. 79.

Printers.

- 1 The stat. 39 G. 3. c. 79. giving a penalty of 20l. for printing papers to be published, without adding the printer's name and place of abode, directs that any penalty imposed by the Act exceeding 20l. may be sued for in the Courts at *Westminster*; and any penalty not exceeding 20l. shall and may be recovered before any justice of peace; but it also gives, in the same clause, a form of declaration, for recovering 20l. in the Courts of *Westminster*. Yet held, that a common informer cannot sue for a penalty of 20l. in the Court of King's Bench: no such power having been given by statute, and there being no power at law for a common informer to sue for any penalty; and that the form of the declaration must be read in blank, as to the sum, such form being otherwise inapplicable to a larger penalty before given: and that no such action lay to recover two or more penalties of 20l. each. *Fleming, q. t. v. Bailey*.

5 E. R. 313

(p) 39 & 40 G. 3. c. 90.

Pawnbrokers.

- 1 The Pawnbrokers' Act 39 & 40 G. 3. c. 90. having enacted that they shall and may take, by way of profit, a

certain rate of interest on pledges, and no more; the taking of more is an offence within the Act, cognizable by a justice of peace on summary information within the 26th section; which (after providing specific penalties for specific offences,) says, that "for every other offence against this Act, where no forfeiture or penalty is provided or imposed on any particular or specific offence against any part of this Act," the pawnbroker offending against this Act shall forfeit not less than 40s. nor more than 10l. in the discretion of the justice. *Rex v. Beard.* 12 E. R. 673

(q) 40 G. 3. c. 18.

Bread.

- 1 It is an offence within the stat. 40 G. 3. c. 18. to sell, by wholesale, bread before it has been baked 24 hours: even though the seller give directions to the person to whom he sells it, not to sell it by retail until the expiration of the 24 hours. *Rex v. Smith.*

8 T. R. 588

(r) 42 & 46 G. 3. c. 38, 139.

Malt.

- 1 The stat. 42 G. 3. c. 38. forbids corn making into malt to be wetted, while it is a-floor, before 12 days from the time when it is emptied out of the cistern. The stat. 46 G. 3. c. 139. s. 1. repeals that provision generally, and enacts (s. 3.) that the corn in that state shall not be wetted till nine days, &c. after the 1st of August, 1806. Then s. 14. enacts that *this Act* shall commence and take effect, as to all matters whereof no special commencement is thereby provided from the 1st of August, 1806, and shall continue in force till the 25th of March, 1807. Held, that incorporating the 14th with the 1st section, this law only operated as a repeal of the former one during the time limited in the 14th section; after which the first resumed its operation during the interval between the 25th of March, 1807, and a subsequent Act reviving and continuing the 46 G. 3. *Rex v. Rogers.* 10 E. R. 569

PENALTY.

See BOND, VI. *ante*, 169.

- 1 In order that a plaintiff may be entitled to a penalty on articles of agreement, he must shew a strict performance on his part. *Duke of St. Alban's v. Shore.* 1 H. B. 270
- 2 By articles of agreement between the plaintiff and defendant, it was agreed that the plaintiff should pay the defendant so much *per week* to perform at his theatres, with her travelling expenses, and that the defendant should perform at the theatres such things as she should be required by the plaintiff, and attend at the theatres beyond the usual hours on any emergency, and at rehearsals, or be subject to such fines as are established at the theatres, and abide by the regulations of the theatres, and pay all fines; and that "either of them neglecting to perform that agreement should pay to the other 200l." The Court of C. P. held, principally on the ground of the stipulation in the agreement for the payment of smaller sums in certain cases, namely, the

fines, that the 200l. was in the nature of a penalty, and not of liquidated damages. *Asley v. Weldon.* 2 B. & P. 346

- 3 If a party agree not to do some specified act under a "penalty" of 1000l. such sum cannot be considered in the nature of liquidated damages. *Smith v. Dickenson.* 3 B. & P. 630

And see *Clarke v. Gray.* 6 E. R. 564

- 4 In *assumpsit* on a memorandum for a charter-party, describing the agreement of the defendant, a ship-owner, to proceed with all convenient speed to a foreign port, there lade a cargo, and therewith return home, and deliver the same under a *certain penalty* for non-performance: the Court held, that the plaintiff might recover damages beyond the amount of the penalty, on defendant's breach of contract, in not permitting the ship to proceed on her outward-bound voyage. *Harrison v. Wright.* 13 E. R. 343

- 5 Where a new offence is created by an Act, and a penalty annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue

- for the penalty, but he may indict on the prior clause as for a misdemeanour. *Rex v. Harris.* 4 T. R. 202
- 6 When a statute creates a penalty, and says that one moiety shall be to the use of the King, and the other to a

common informer, the King may sue for the whole by an information filed in the King's Bench by the Attorney-General, unless a common informer has commenced a *qui tam* suit for the penalty. *Rex v. Hymen.* 7 T. R. 536

PERJURY.

- 1 2a.—Whether any one giving his testimony under a commission issuing out of a Court of Law for the examination of witnesses in Scotland, could

be convicted of perjury? *Calliand v. Vaughan.* 1 B. & P. 240
N. B. *The Cases of Indictments for Perjury are collected in pages 368, &c. ante.*

PEW.

- 1 Possession alone of a pew in a church, though for above sixty years, is not a sufficient title to maintain an action on the case, even against a wrongdoer, for disturbance in the enjoyment of it; but the plaintiff must prove a prescriptive right, or a faculty, and should claim it in his declaration, as *appurtenant to a messuage in the parish.* *Stocks v. Booth.* 1 T. R. 428
- 2 But possession for 36 years, where the pew is claimed as *appurtenant to a messuage*, is a good presumptive evidence of a faculty. *Rogers v. Brooks.* 1 T. R. 431, n.
- 3 An uninterrupted possession of a pew for 30 years, unexplained, is presumptive evidence of a prescriptive right to the pew in an action on the case for a disturbance. But that presumption may be rebutted by proof that prior to that time the pew had no existence. *id. ibid.*
- 4 A person may prescribe for a pew in the chancel of a church. *Griffiths v. Matthews.* 5 T. R. 296

- 5 There cannot be a gift of a pew to a man without a faculty. *Rogers v. Brooks.* 1 T. R. 431, n.
- 6 A faculty to a man and his heirs, is bad. *Stocks v. Booth.* 1 T. R. 432
- 7 If a faculty be annexed to a messuage, it may be transferred with the messuage to another person. 1 T. R. 431
- 8 There may be a faculty for exchanging seats in a church. 1 T. R. 431
- 9 Trespass will not lie for entering into a pew; because the plaintiff has not the exclusive possession, the possession of the church being in the parson. 1 T. R. 430
- 10 Upon a libel in the Consistorial Court for disturbance in the plaintiff's right to a pew, the Court adjudged *the right* to be in the plaintiff, and admonished the defendant not to sit in the pew; the Court of Arches reversed the sentence, but admonished the defendant not to use the pew again: these sentences were held *not conclusive evidence* of the plaintiff's right in an action for a disturbance between the same parties. *Cross v. Salter.* 3 T. R. 639

PHYSICIAN.

- 1 A physician cannot maintain an action for his fees. *Chorley v. Bolcot.* 4 T. R. 317
- 2 A doctor of physic, who has been licensed by the College of Physicians to practise physic in London and

within seven miles, cannot claim, as a matter of right, to be examined by the College in order to his being admitted a fellow of the College. *Rex v. The President and College of Physicians.* 7 T. R. 283

§ The College of Physicians, who have power by their charter (confirmed by Act of Parliament) to make bye-laws, have made bye-laws respecting the qualifications of persons to be admitted into the College; by them it is ordained that no person shall be admitted into the class of candidates before admission into the College, unless he has taken a degree of *M. D.* at Oxford, Cambridge, or Dublin, except in two cases; in one of those cases, the

president may propose once in every other year a Doctor of Physic of a certain standing, and if he be approved by the College, he may be admitted a fellow; in the other, any fellow may propose a Doctor of Physic of a certain age and standing, and if approved at certain meetings he may be admitted a fellow: Held, that these were reasonable bye-laws. *Rex v. The College of Physicians.* 7 T. R. 282

PLEADING.

I. DECLARATION.

- (a) Title.
- (b) Profert.
- (c) *Videlicet.*

II. PLEAS.

- (a) General Issue.
- (b) By Heir.
- (c) Double.
- (d) Sham or Issuable.

III. PRESCRIPTION.

IV. REPLICATION.

V. REJOINDER.

When deemed a Departure.

VI. DEMURRER.

I. DECLARATION.

(a) Title.

N. B. See the Table of Titles prefixed to this Digest, as PLEADING is (as well as EVIDENCE) distributed under the respective heads to which it belongs.

- 1 A declaration, entitled generally of the Term, relates to the first day of the Term; and the promises and breach being laid on the first day of the Term, may be presumed to have been made before the delivery of the declaration; because by a reference to the ancient practice of declaring *ore tenus*, the declaration cannot be supposed to have been delivered till the sitting of the Court on that day. *Pugh v. Robinson.* 1 T. R. 116
- 2 A declaration must be entitled of the Term when the writ is returnable, though in certain cases according to

the practice of the Court it need not actually be filed till the next Term; so that in these latter cases the plaintiff cannot recover any demand arising after the Term when the writ is returnable, though before the declaration is actually filed. *Smith v. Muller.* 3 T. R. 624

- 3 When a plaintiff in possession brings an action on the case against a wrongdoer, it is sufficient to declare generally, without disclosing any title; but when a defendant justifies under a right, it must be set out formally in the plea. *Grimstead v. Marlowe.* 4 T. R. 718

- 4 If the declaration be not entitled of the Term in which the writ is returnable, or of that of appearance, it is irregular; and a judgment signed for want of a plea thereto is also irregular. *Topping v. Fuge.* 1 Marsh. 341

(b) Profert.

- 1 The Court (*dissent. Grose, J.*) held that a deed may be pleaded as *lost by time and accident*, without *profert.* *Read v. Brookman.* 3 T. R. 151
Totty v. Nesbitt. 3 T. R. 153, n.
- 2 But if it appear by the record that defendant had *oyer* of a copy only, it is error. *Matison v. Atkinson.* 3 T. R. 153, n.
- 3 A defendant in trespass cannot plead by way of justification that he was possessed of a right of common over the *locus in quo* under a deed of grant by a former owner, alleged to be since lost or destroyed by accident and length of time, and therefore not *proffered* in Court, of which the date and

names of the parties are unknown.
Hendy v. Stephenson. 10 E. R. 55

- 4 Where there is an assignment of all debts with a power of attorney to the assignee to receive and compound for the same, and to submit them to arbitration, and the assignee on an arbitration has a sum awarded to be paid to him; it is not necessary, in an action upon promises in consequence of the non-payment of such sum, that the assignee, in setting forth the assignment, should make a profert of the same in his declaration. *Banfill v. Leigh.* 8 T. R. 571
- 5 No profert need be made of a deed which is only inducement to the action. 8 T. R. 571
- 6 If profert be made, nothing but the production of the deed will suffice. *Smith v. Woodward.* 4 E. R. 585
- 7 Where in setting forth a conveyance it was stated, that a release was cancelled, "by the seal of the releasor being taken off and destroyed or lost," with a profert of the residue of the deed, the Court of C. P. held this to be good pleading. *Bolton v. Carlisle (Bishop).* 2 H. B. 259

(c) *Videlicet.*

- 1 Where any thing is pleaded under a *videlicet*, the party is not concluded by it: *secus*, where there is no *videlicet*. *Symmons v. Knor.* 3 T. R. 68
- 2 The want of a *videlicet* may in some cases make an averment material, which would not otherwise be so: but the addition of a *videlicet* cannot render a material averment immaterial. *Grimwood v. Barrit.* 6 T. R. 460
- 3 An allegation in pleading which is sensible and consistent in the place where it occurs, and not repugnant to *antecedent* matter, cannot be rejected as surplusage, though laid under a *videlicet*, and however inconsistent with an allegation *subsequent*. *Rex v. Stevens.* 5 E. R. 244

II. PLEAS.

(a) *General issue.*

- 1 The plea of *non-assumpsit* to a declaration in debt may be treated as a nullity. *Brennan v. Egan.* 4 Taunt. 164
- 2 2u. Whether not guilty may be pleaded to an action of debt on a penal statute? *Coppin v. Carter.* 1 T. R. 462

(b) *By Heir.*

- 1 A plea by an heir at law who was sued

by an obligee of his ancestor, that he claimed to retain a certain sum for money laid out in repairing the premises, cannot be supported. *Shettlworth v. Neville.* 1 T. R. 454

2u. Whether necessary repairs might be so pleaded? 1 T. R. 457

(c) *Double Pleas.*

- 1 The stat. 4 Ann. c. 16., which allows double pleading, does not extend to penal actions. *Heyrick v. Foster.* 4 T. R. 701
- 2 To debt on bond, a defendant may plead *non est factum*; and usury. *Lechmere v. Rice.* 2 B. & P. 12
- 3 The Court of C. P. only continues to exercise an authority over applications for pleading several matters (which had originally been the practice of the King's Bench also), in order to prevent an oppressive use being made of the liberty given by the statute. 2 B. & P. 12
- 4 In an action on a deed made beyond seas, the defendant relying in some of his pleas on matters of defence which necessarily imported the execution of the deed, the Court of C. P. would not permit him to plead *non est factum*. *Laughton v. Ritchie.* 3 Taunt. 385
- 5 The pleas of *non est factum* and tender are inconsistent, and cannot be pleaded together. *Orgill v. Kemshead.* 4 Taunt. 459
- 6 In an action on a bond given in the *East Indies*, where the subscribing witness resided, the defendant (after great delays caused by him), under leave to plead several matters, pleaded *non est factum, solvit ad diem*, and *solvit post diem*: The Court, advert- ing to former delays of the defendant, and to the probable delay by sending to the *East-Indies* for the deposition of the subscribing witness, and on affidavit that part-payment had been made on the bond recently before the action, rescinded the rule for pleading double, in order to make the defendant elect to stand either on the plea of *non est factum*, or on the other pleas. *Rama Chitty v. Hume.* 13 E. R. 255
- 7 To *assumpsit* on a bill of exchange, the Court of C. P. will not allow a defendant to plead the general issue; and that the bill was given on a stock-jobbing transaction, contrary to 7 G. 2. c. 8. *Shaw v. Everett.* 1 B. & P. 232
- 8 They will not allow *non assumpsit*; I. 1

and alien enemy, to be pleaded together. *Thyatt v. Young.* 2 B. & P. 72
 9 A plea of tender to one count, and a plea of alien enemy to another, cannot be pleaded together. *Shombeck v. De la Cour.* 10 E. R. 326

10 To trespass and false imprisonment, a plea of alien enemy not allowed to be pleaded, together with a special justification inconsistent therewith, and the general issue. *Truckenbrodt v. Payne.* 12 E. R. 206

11 Non tenure, nothing in arrear, and infancy, may be pleaded together. *Wilson v. Ames.* 5 Taunt. 340

S. C. 1 Marsh. 74

12 The stat. 32 G. 3. c. 58. s. 1., enabling defendants in *quo warranto* to plead double, is, as well as the stat. 9 Ann. c. 20., confined to corporate officers. *Rex v. Richardson.* 9 E. R. 469

(d) *Sham or issuable.*

1 Difficult questions are not allowed to be pleaded as sham pleas. *Charles v. Marsden.* 1 Taunt. 225

And see *Solomons v. Lyon.* 1 E. R. 372

2 A. having privilege of parliament, owes B. a sum of money, for which B. sues him; in consequence of which C. enters into a bond together with A. conditioned for the payment to B. of such sum as B. shall recover in the action against A., in pursuance of the stat. 4 G. 3. c. 33. In that action B. obtains judgment, and puts the bond in suit against C. To the action on the bond, C. (though under terms by a Judge's order to *plead issuably*) may plead in bar that a writ of error is depending on the judgment against A. *Curling v. Innes.* 2 H. B. 372

III. PRESCRIPTION.

1 No one can claim a prescription in his own land. *Cooper v. Barber.* 3 Taunt. 99

2 A party in pleading may prescribe for less than he is entitled to claim. *Tewkesbury, (Corp.) v. Bicknell.* 1 Taunt. 143

3 In an action on the case for not repairing a private road leading through the defendant's close, it is sufficient for the plaintiff to allege that the defendant, as occupier of the close, is bound to repair. But a defendant, who prescribes in right of his own estate, must set forth the estate in right of which he claims the privilege. *Rider v. Smith.* 3 T. R. 766

4 A plea of prescription for common in a *que* estate is good after verdict, though it be not in *express terms* alleged that the owners of the estate have used it from time immemorial. *Clarke v. King.* 3 T. R. 147

IV. REPLICATION.

1 It is a common rule that a replication, when entire, which is bad as to part, is bad as to the whole: see *Trueman v. Hurst.* 1 T. R. 40

2 But the rule cannot apply to any case where the objection is merely on account of surplusage: Therefore, where the replication states matter sufficient for the plaintiff to maintain his action, even though it state something afterwards which is inaccurate, the whole is not vitiated. *Duffield v. Scott.* 3 T. R. 374

3 Where a replication denies the whole substance of the plea, there the plaintiff may tender issue, and conclude to the country: though, indeed, there are exceptions to that rule, where the replication is proper either way; but where the plaintiff selects one out of several facts in the plea, he may traverse that one, and conclude with a verification. *Hedge v. Sandon.* 2 T. R. 442-4;

(And see 3 T. R. 426)

4 To a plea to *scire facias* against bail that the principal died before the return of any *ca. sa.* a replication stating the particular *ca. sa.*, and that the principal was alive at the return of that *ca. sa.* must conclude with an averment. *Henderson v. Withy.* 2 T. R. 576

5 A replication to a plea of *ne unques accouple* in dower alleging a marriage in Scotland, may conclude to the country. *Hlderton v. Hlderton.* 2 H. B. 145

V. REJOINDER.

When deemed a Departure.

N. B. When a plea in bar in *replevin* was considered a departure from a declaration. See *Niblet v. Smith.* 4 T. R. 504 post, tit. REPLEVIN.

1 To debt on an annuity bond, the defendant pleaded no such memorial as the statute requires, to which plaintiff replied that there was a memorial which contained the names of the parties, &c. and the consideration for which the annuity was granted, the defendant rejoined that the consideration was untruly alleged in the memorial to have been paid to both obligors, for

that one of them did not receive any part of it: the rejoinder was held bad because it was a departure from the plea. *Praed v. The Duchess of Cumberland.* 4 T. R. 585

Affirmed in *Cam. Scac.* 2 H. B. 280

- 2 Debt on bond, which was conditioned to perform an award; plea, no award; replication, setting out an award; rejoinder, stating the whole award (in which were recited the bonds of submission, whereby it appeared that the award was not warranted by the submission); and then demurring: Held, that the rejoinder was not inconsistent with, nor a departure from, the plea. *Fisher v. Pimbley.* 11 E. R. 188

- 3 The practice of the Court is pleadable where the very merits of the case depend upon it; therefore, where bail sued in *scire facias* upon their recognizance, pleaded that no *ca. sa.* was duly sued, returned and filed against the principal, according to the custom and practice of the Court; to which the plaintiff in reply shewed a writ of *ca. sa.* issued in *Middlesex*: it is no departure for the defendants to rejoin that the *venue* in the action against the principal was in *London*; for that sustains the plea. *Dudlow v. Watchorn.* 16 E. R. 39

VI. DEMURRER.

- 1 The omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer. *Bolton v. The Bishop of Carlisle.* 2 H. B. 261
- 2 Where a plaintiff in *scire facias* demanded execution for a certain sum recovered by judgment of the King's Bench for damages and costs, with a *prout patet per recordum*, and also a certain other sum adjudged to him in the Exchequer Chamber for his damages and costs of a writ of error, *without a prout patet*, &c.: Held, that the demand being divisible, and no objection lying to the sum first demanded, a demurrer to the *whole* declaration was bad, and the plaintiff was entitled to judgment generally on such demurrer; the objection to the latter sum demanded being merely formal, and not available but on special demurrer. *Powdick v. Lyon.* 11 E. R. 565
- 3 The omission of "and thereupon the said J. S. complains," in the beginning of a declaration in trespass on the case is no cause of special demurrer. *Dobson v. Herne.* 1 B. & P. 366

POOR.

I. OVERSEERS.

- (a) *Appointment.*
- (b) *Number.*
- (c) *Appeal.*
- (d) *Accounts.*

II. RATE.

- (a) *On whom made.*
- (b) *What Property rateable.*
- (c) *Property—where rateable.*
- (d) *In what Proportion made.*
- (e) *Allowance and Publication of.*
- (f) *Appeal.*
- (g) *In Aid.*

III. RELIEF.

IV. SETTLEMENT.

- (a) *By Birth or Parentage.*
- (b) — *Emancipation.*
- (c) — *Hiring and Service.*
- (d) — *Apprenticeship.*
- (e) — *Renting a Tenement.*
- (f) — *Estate.*
- (g) — *Serving an Office.*
- (h) — *Payment of Rates.*
- (i) — *Certificate.*
- (k) — *Relief.*

V. REMOVAL, ORDERS OF.

- (a) *Who may be removed under.*
- (b) *Form, suspension, and effects of.*
- (c) *Appeals against; and when confirmed, quashed, or amended by Sessions.*

I. OVERSEERS.

(a) Appointment.

- 1 An appointment of one overseer alone for a township is bad in law; the stat. 13 and 14 Car. 2. c. 12. requiring at least two. *Rex v. Clifton (Inhab.)* 2 E. R. 168
- 2 The stat. 43 Eliz. c. 2. s. 1. enacting that the churchwardens of every parish, and four, three, or two substantial householders there, to be nominated by the magistrates, shall be overseers of the poor; requires an appointment to be made of two such overseers at the least, exclusive of the existing churchwardens; which body so constituted, or the greater part of them, are empowered to execute certain duties relating to the poor; and therefore the 5th section, which authorizes "the said churchwardens and overseers, or the greater part of them," (by the assent of two justices) to bind out poor children apprentices, is not satisfied by a compulsory binding by two persons styling themselves churchwardens and overseers, who had been appointed the overseers of the parish at a time when one of them was churchwarden; which latter continued sole churchwarden for about two months afterwards, when the other overseer was appointed sole churchwarden in his place: for at all events this power is given to a body constituted of more than two persons, though it may be executed by the major part of the body when well constituted; and therefore, a poor child assumed to be bound apprentice by such an indenture could not gain a settlement by service under it. *Rex v. All Saints, Derby (Inhab.)* 13 E. R. 143
- 3 An order of justices which appointed A., "being a substantial householder of the parish of B., to be overseer of the poor in the hamlet of C. in the said parish," was confirmed generally at the sessions with costs: and both those orders were affirmed in the Court of King's Bench. *Rex v. Morris.* 4 T. R. 550
- 4 The word *substantial* as applied to overseers in stat. 43 Eliz. c. 2. must be understood relatively. *Per Ashhurst, J. Rex v. Stubbs.* 2 T. R. 406
- 5 Where a district contains only three houses, the inhabitants of all three

- may be appointed overseers of the poor, notwithstanding two of them are labourers and poor. *Rex v. Stubbs.* 2 T. R. 395
- 6 A woman may be appointed an overseer of the poor. 2 T. R. 395
 - 7 An officer of the customs is exempted from the appointment. *Rex v. Warner.* 8 T. R. 375
 - 8 An appointment of overseers, dated in October, for a year next ensuing the date, is good, because it shall be understood to be the overseer's year. 2 T. R. 395
And see *Rex v. Burder.* 4 T. R. 778
 - 9 An appointment of overseers under the 43 Eliz. c. 2. signed by two justices separately is bad, for, where magistrates are to execute a judicial act, they must meet and execute it together. *Rex v. Forrest.* 3 T. R. 38
 - 10 After an appointment of four overseers for a parish by the magistrates at one meeting, they are *functi officio*; and no other magistrates can afterwards, upon the claim of one of the persons so appointed to be exempted, appoint another in his place; but the party must appeal to the sessions to get his discharge. *Rex v. Great Marlow (Inhab.)* 2 E. R. 244
 - 11 And this objection to the second appointment may be disclosed to this Court on affidavit, upon the removal of the appointment hither by *certiorari*, who will thereupon quash the same. 2 E. R. 244
 - 12 But overseers need not be appointed by one and the same instrument. *Rex v. Morris.* 4 T. R. 552
- (b) Number.
- 1 To entitle any district of a parish to have separate overseers, it must be shown to be a township; and that the parish cannot have the benefit of stat. 43 Eliz., that is, cannot maintain their own poor as a parish. *Rex v. Sir W. Horton.* 1 T. R. 376, 7
 - 2 Where a parish, consisting of several townships, some of which maintain their own poor, has immemorially had more than four overseers, that is a proof that they cannot have the benefit of stat. 43 Eliz.; and entitles each township to have separate overseers. 1 T. R. 374
 - 3 Wherever there is a constable there is a township. *Rex v. Horton.*

4 Where a township had for sixty or seventy years past (and before, for any thing that appeared to the contrary) had separate overseers, and maintained its own poor separately from the parish at large, it was held, that it was still entitled to the same privilege. *Rex v. Leigh (Inhab.)*

3 T. R. 746

5 Where a parish consisted of two separate districts, each of which immemorially made a separate rate, but the money when raised was blended together in one joint fund, though applied in certain proportions, and the sessions did not find it as a fact that the parish could not reap the benefit of stat. 43 Eliz. it was held, that the districts were not entitled to maintain their own poor separately, though since the year 1648 they had constantly had, on the whole, more than four overseers, some of whom were chosen separately by the hamlet, and though the hamlet part had immemorially had a constable of its own, and since 1709 certificates had been granted to and from the hamlet to third parishes, and orders of removal made to and from it. *Rex v. Newell.*

4 T. R. 266

6 Though a parish had at no time antecedent to the year 1773-5, had the benefit of this statute, but had always had five overseers appointed separately, two each for two districts, and one for a third, and two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period who had been appointed for the whole parish, the Court held, that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the statute. *Lanc v. Cobham.*

7 E. R. 1

7 Whether or not a parish can have the benefit of 43 Eliz. by maintaining its poor with not more than four overseers, is a fact which the sessions ought to find, and not leave it to the Court to presume. *Rex v. Watson.*

7 E. R. 214

8 Although a parish might not have had the benefit of the stat. 43 Eliz. c. 2. before and at the passing of the stats. 13 and 14 Car. 2. c. 12.; but perhaps,

at that period, and certainly for a long course of years antecedent to the years 1773-5 maintained its poor in separate districts, yet it was competent to the parishioners at the latter period to cease acting under the statute of Car. 2., and to recur to the general provision of the stat. 43 Eliz. by maintaining their poor as one entire parish; and having so done from the year 1775, the Court refused a *mandamus* to the justices of peace to appoint separate overseers as before that time. *Rex v. Palmer.* 8 E. R. 416
And see *MANDAMUS, ante, page 470.*

(c) Appeal.

1 The parishioners (as well as the overseers appointed) may appeal to the sessions under stat. 43 Eliz. c. 2. against the appointment of overseers. *Rex v. Forrest.* 3 T. R. 38

(d) Accounts.

See *Rex v. Pascoe.* 2 M. & S. 343, *ante, page 470.*

1 The accounts of an overseer of the poor should be settled at the end of the year; and if a person be appointed overseer for four successive years, and do not make any rate in the three first to reimburse himself what he expends in those years, he cannot in the fourth year make a rate for that purpose. *Rex v. Goodcheap.* 6 T. R. 159
2 If an overseer become bankrupt, the balance is not due till 14 days after his year is expired. *Rex v. Egginton.*

1 T. R. 369

3 Two justices may enforce payment of the balance after appeal, though the sessions did not make any order for payment. *Rex v. Carter.* 4 T. R. 246

4 Where overseers' accounts were not allowed till the last day, when an effective notice of appeal to the then next sessions could have been given, and it did not appear when the party objecting had notice of such allowance: Held, that neither under the stat. 43 Eliz. c. 2. s. 6., nor under the stat. 17 Geo. 2. c. 38. s. 4., (supposing the latter to be a repeal of the other as to giving an appeal to the next sessions after the verification and allowance of such accounts, instead of giving the appeal generally as the stat. of Elizabeth does,) was the appeal too late to the next subsequent sessions, for which an effectual notice of

appeal could be given; particularly where there seemed to be management to defeat the appeal. *Rex v. The Justices of Dorsetshire.*

15 E. R. 200

- 5 The stat. 50 G. 3. c. 49., which requires the churchwardens and overseers to submit their accounts to two justices at special sessions to be holden within the 14 days appointed by the 17 G. 2. c. 38. for delivering in the said accounts to the succeeding overseers, is not a substitution in lieu of that provision in the 17 G. 2., but is cumulative; and if the overseer refuse to deliver in such account to the succeeding overseers within the 14 days, he may be committed by two justices for such refusal. *Lester's case.*

16 E. R. 374

- 6 The Court will not, upon removal of an order of sessions allowing overseers' accounts which is good upon the face of it, go into the merits of those accounts upon affidavit. *Rex v. James.*

2 M. & S. 321

- 7 Overseers cannot charge in their accounts for money paid as a salary to one of the overseers; and where the order of sessions confirming the accounts was in this form, "upon the appeal of G. against the accounts of H. and W., overseers, whereby he the said G. objected to the sum of 12l. 10s. in the said accounts, paid to W. as a salary, it is ordered that the said accounts be confirmed:" this was considered as an order confirming the accounts in respect of the charge for the salary, and therefore the Court quashed the order, but sent the case back to be re-heard as to the nature of the payment. *Rex v. Glyde.*

2 M. & S. 323, n.

II. RATE.

(a) *On whom made.*

- 1 The occupier of land is rateable to the poor, and it is immaterial by what tenure he holds it, or whether he has any title. 1 T. R. 343; 7 T. R. 590
- 2 So the bare possession of personal property is evidence from whence the justices may draw the conclusion that the possessor should be rated. *Rex v. Dursley.*
- 3 Where a corporation was seised in fee of certain unclosed lands, which were stocked with the cattle of the

resident burgesses, or the widows of such; who alone were permitted by the burgesses to claim such right, and also by poor parishioners, who were admitted to such enjoyment from charity; and such lands were altogether omitted out of the poor-rate; the sessions, on appeal by one who had given notice of his objection to the parish officers, and to the corporation as the party interested under the stat. 41 G. 3. c. 23. s. 6., having quashed the rate, the Court confirmed that order. *Rex v. Aberavon (Inhab.)*

5 E. R. 453

- 4 If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person. *Rex v. Mary the Less, Durham (Inhab.)*

4 T. R. 477

- 5 One who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest, and left the key of the house-door with a friend, and had the garden cultivated for his own benefit as usual, is liable to be rated to the relief of the poor, as occupier of the whole house. *Rex v. Aberystwith (Inhab.)*

10 E. R. 354

- 6 The objects of a charitable foundation in the actual occupation of the almshouse and lands for their own benefit in the manner prescribed by the rules of the institution, and liable to be discharged for any breach of such rules, are rateable in respect of such occupation. *Rex v. Munday.*

1 E. R. 581

- 7 A person employed by the Philanthropic Society to superintend the children at annual wages, under an agreement that he shall have "a dwelling free from taxes," &c. with certain other perquisites, and who may be dismissed at a minute's warning on receiving three months' wages, is not rateable as the occupier of the house provided by the Society; she having no distinct apartments in the house but a bedchamber, and her family not being allowed to live there. *Rex v. Field.*

5 T. R. 587

- 8 The Court is not precluded by the sessions stating in the case "that the party rated is the occupier," from examining into the propriety of that

- conclusion, if the sessions also state all the circumstances of the case, and desire to have the opinion of this Court upon the whole. 5 T. R. 587
- 9 A master of a free-school, appointed by the minister and inhabitants of the parish under a charitable trust, whereby a house, garden, &c. were assigned "for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money, or other allowance, whatsoever," for the teaching of ten poor boys of the inhabitants, is rateable for his occupation of the same. *Rex v. Cutt.* 6 T. R. 332
- 10 The ranger of a royal park is rateable as for inclosed lands in the park yielding certain profits. *Lord Bute v. Grindall.* 1 T. R. 338
Affirmed in *Cam. Seac.* 2 H. B. 265
(See *Eyre, C. J.'s observations on the loose and inaccurate statement of the special verdict.*)
- 11 But he is not rateable for the herbage and pannage, which yield no profits. 1 T. R. 338
- 12 The possessions of the Crown, or of the public, are not rateable. *Lord Amherst v. Lord Somers.* 2 T. R. 372
- 13 Stables, rented by the colonel of a regiment by order of the Crown for the use of the regiment, are not liable to be rated. 2 T. R. 372
- 14 But persons holding houses or lands under the Crown, or under any hospital, if for their own separate benefit, are liable to be rated. *Rex v. Hurdiss.* 3 T. R. 497
- 15 The lessees, under the lord of the manor, of lot and free share of all calamine raised within the manor, are liable to be rated to the poor, as occupiers of land, in the parish where the manor lies; none of them being resident in the parish. *Rex v. The Baptist Mill Company.* 1 M. & S. 612
- 16 Where the sessions found that the master gunner at *Seaford* was the occupier of the battery-house there, which was the property of the Crown, and from whence he was removeable at pleasure: it was held that the fact found of his being the occupier precluded any other question, and fixed his liability to be rated. *Rex v. Hurdiss.* 3 T. R. 497
- 17 Where the commanding officer in barracks had distinct apartments allotted to him, one in particular for transacting the business of the regiment, and the others fitted up for the accommodation of himself and his family, who resided there with him, containing amongst others a kitchen, wash-house, and coach-house, together with a stable, yard, and garden: Held, that he was rateable to the relief of the poor for the same, having a beneficial enjoyment of them beyond his necessary accommodation as an officer for the purpose of public service. *Rex v. Terrott.* 3 E. R. 506
See also *Holford v. Copeland.* 3 B. & P. 139
- 18 The trustees of a meeting-house, of which no profit is made, are not rateable. *Rex v. Woodward.* 5 T. R. 79
- 19 The trustees of a Methodist chapel, receiving money annually for the rents of the pews, are rateable for the profits made of the building, though in fact they expended the whole of what they received in making disbursements for repairs, &c., and attendants in the chapel, and in paying the salaries of the preachers; considering that these latter in effect were entitled to receive the surplus profit, after paying all necessary expenses of the chapel; and therefore that the rate was substantially upon them, through the medium of the trustees, who received the profits in the first instance. *Rex v. Agar.* 14 E. R. 256
- 20 Property is not rateable to the poor, unless there be some person in the beneficial occupation of it: Therefore, where by an Act of Parliament the commissioners of a navigation were authorized to take certain tolls, the whole of which were directed to be applied to public purposes, it was held, that the tolls were not rateable to the poor. *Rex v. Salter's Load Sluice Navigation.* 4 T. R. 730
- 21 The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there, deriving profit there from such tolls beyond the rent paid by

- him for the same, which was applicable to the public purposes of the bridge. *Rex v. Eyre*. 12 E. R. 416
- 22 The trustees of a quakers' meeting-house, of which no profit is made by the pews, &c. are not rateable. *Rex v. Woodward*. 5 T. R. 79
- S. P. *Rex v. Sculcoates*. 12 E. R. 40

(b) *What property rateable.*

- 1 Stock in trade is rateable when its value can be ascertained. 6 T. R. 154
6 T. R. 468
and see 4 T. R. 771
- 2 The circumstance of a person's having been rated for his stock in trade one year is *prima facie* evidence that it is productive the next year, and if not contradicted by other evidence is sufficient to warrant the justices to decide that it should be then rated. *Rex v. Darlington (Inhab.)* 6 T. R. 468
- 3 Stock in trade is rateable to the poor, notwithstanding it has never been rated in the parish, unless there be some circumstances to take it out of the general rule; but on appeal against a rate on the ground that *A.* is not rated for his stock in trade, the sessions ought to amend the rate, and not quash it. *Rex v. Ambleside (Inhab.)*
16 E. R. 380
- 4 On an appeal against a poor-rate, because *A.* and *B.* were not rated for their stock in trade, the sessions quashed the rate, and stated that *A.* and *B.* were in possession of so much stock in trade, &c. but that it was not proved at the sessions, whether it belonged to *A.* and *B.*, or whether it produced profit: the Court quashed the order of sessions. *Rex v. Dursley (Inhab.)*
6 T. R. 53
- 5 Silk-throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect, as for their stock in trade. *Rex v. Sherborne (Inhab.)*
8 E. R. 537
- 6 Ships are rateable in the parish to which they belong. *Rex v. White*.
4 T. R. 771
- 7 But household furniture is not. *ib.*
- 8 Neither is money, whether at interest or not. *ib.*
- 9 Nor the pay of officers in the navy, or of merchants' ships. *ib.*
- 10 Nor the salary of officers of the customs, or merchants' clerks. *ib.*

- 11 Nor any attorney in respect of the profits of his profession. *Rex v. Starryant*. 7 T. R. 60
- 12 An exemption in a private statute in 12 Car. 2. of lands given to charitable purposes "from all public taxes, charges, and assessments whatsoever, civil or military," extends to the poor's-rate. *Rex v. Scott*. 3 T. R. 602
- 13 Under a local Act, 10 Ann. c. 6. for rating persons to the relief of the poor in *Norwich* for lands, &c. stock, and personal estates in the parish, &c., and money out at interest; they are not liable to be rated for *Government stocks* or *funds*, which are no more than perpetual annuities, the principal of which can never be recalled by the holder from government, though redeemable at the pleasure of the latter. *Rex v. St. John Maddermarket in Norwich (Churchwardens.)* 6 E. R. 182
- 14 Fish are titheable by custom; and the proprietors of such fisheries are liable to be rated. *Rex v. Carlyon*.
3 T. R. 385
- 15 The lessee of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river *Severn*, between certain limits within a manor bordering on the said river, and of all royal fishes taken between the said limits, put and wheel fishing excepted, under an annual rent, is liable to be rated to the poor for such fishery. *Rex v. Ellis*. 1 M. & S. 652
- 16 *Iron-mines* are not rateable to the relief of the poor; and being rated conjointly with *coal-mines*, the coal whereof was raised by the owner of the lands for his own use in smelting the iron, the order of sessions confirming such rate generally, without ascertaining the proportion at which each was rated, was quashed. *Rex v. Conningham*. 5 E. R. 478
- 17 The lessee of a coal-mine is liable to be rated, though he derive no profit from the mine, the mine being rateable property. *Rex v. Parrot*.
5 T. R. 593
- 18 But where a coal-mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. *Sects*, where the mine is itself produc-

- five, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *Rex v. Bedworth (Inhab.)* 8 E. R. 387
- 19 A person entitled to toll tin and farm dues (which are certain portions of the tin raised by the adventurers in the tin-mines) is liable to be rated in respect thereof. *Rex v. St. Agnes (Inhab.)* 3 T. R. 480
- 20 Landlords not resident within the parish, having leased lead-mines and other minerals, with liberty to the tenants to dig, &c.; reserving a certain annual rent, and also certain proportions of the ore which should be raised, are not at any rate assessable to the relief of the poor for such certain rent, no ore being raised; whatever the question might be as to the proportion of ore reserved when in fact any should be found. *Rex v. Rochester (Bishop.)* 12 E. R. 353
- 21 Lime-works are rateable in the hands of the occupier, though there be risk and expense in the working, and the profits be uncertain. *Rex v. Alderbury (Churchwardens.)* 1 E. R. 534
- 22 A slate-work (or, as improperly called, a slate-mine) is rateable. *Rex v. Woodland (Inhab.)* 2 E. R. 164
- 23 The occupier of a clay-pit is rateable. *Rex v. Brown.* 8 E. R. 528
- 24 Saleable underwoods are rateable annually to the relief of the poor, within the construction of the stat. 43 Eliz. c. 2. in proportion to their value, though they should happen not to be cut down more than once in 21 years; and their annual value may be estimated, amongst other ways, according to the value they may be worth to rent for a lease of the duration of their intended growth. *Rex v. Mirfield (Inhab.)* 10 E. R. 219
- 25 Where a corporation were seised in fee of lands, which by the custom were annually meted out under their controul by a leet jury, according to a certain stint, to such of the resident burgesses who chose to stock the same; they paying 19s. 4d. to each of the other burgesses who did not stock: Held, that the burgesses who so stock-ed were tenants in common of the lands so occupied by them, and as such occupiers were liable to be rated for the same. *Rex v. Watson.* 5 E. R. 480
- 26 An Act of the 48 G. 3. having vested the aftermath of a certain meadow in trustees in trust for the burgesses and principal householders of *Teuokesbury*, freed from all other interest in the same, with power to let the same or any part thereof annually, to any person for the best rent, and also to let it in PASTURES, for horses, cattle, and sheep, to different persons at such rates and subject to such regulations as the trustees should appoint; or by writing under their hands and seals, to demise the same for a term of years, &c. and that the rents and profits should, after payment of all charges, be divided by the trustees, amongst the objects of the trust: Held, that the trustees not having let the aftermath to any persons for any certain term, or in any certain proportions, but having let it out in pastures at so much a head for horses, cattle, and sheep, to various persons, must themselves be taken to be the occupiers of the land, and were consequently rateable for the same. *Rex v. Teuokesbury (Burgesses).* 13 E. R. 155
- 27 If A. has an exclusive right of using a way-leave over land which he holds in common with B., paying B. a certain sum yearly, and has the privilege of using a way-leave occupied by C. paying him so much per ton for the goods carried over it, A. is not liable to be rated in respect of either of such way-leaves; they being mere easements. *Rex v. Jolliffe.* 2 T. R. 90
- 28 Qu.—Whether the owner of the land, who receives a profit for such way-leave, is not liable to be rated for such an increase of value? 2 T. R. 90
- 29 And where A. having granted to B. a lease for years of way-leaves, (for the purpose of carrying coals) and the liberty of erecting bridges, and levelling hills over certain lands, B. made the waggon-ways and inclosed them, thereby excluding all other persons, erected bridges, and built two houses on the land for his servants; it was held, that B. was liable to be rated to the poor for "the ground called the waggon-way." *Rex v. Bell.* 7 T. R. 398
- 30 Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under the farmer his stock of cows to be depastured on the same land, was not rated for

such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independent of the profits made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement, yet that is in respect of the interest in the land; and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to it: or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labour out of the capital stock of another. *Rex v. Brown.*

8 E. R. 528

- 31 Land, of which the annual value is improved by a spring rising within it, may be rated to the poor at such improved value, although the owners of the land, who are also occupiers, do not receive any of the profits derived from the spring, nor does any part become due in the parish where the land lies. *Rex v. The Governor and Company of the New River.*

1 M. & S. 503

- 32 Personal property, if visible, and yielding a certain annual permanent profit, is rateable. *Rex v. Hogg.*

1 T. R. 727

- 33 So that a house and engine for carding cotton, which are rented as one entire subject, and described by the general name of an engine-house, may be rated. *Rex v. Hogg.* 1 T. R. 721

- 34 So may the profits of a weighing-machine house. *Rex v. St. Nicholas, Gloucester (Inhab.)* 1 T. R. 723, n.

- 35 Lands purchased by a company, and converted into a dock, according to an Act of Parliament, which declares that the shares of the proprietors shall be considered as *personal property*, are rateable in proportion to the annual profits. *Rex v. The Dock Co. of Hull.*

1 T. R. 219

- 36 By the construction of the statute 39 and 40 G. 3. c. 47. the London Dock Company are liable, even during the first 12 years of their establishment, to be rated for the fair annual value of their *warehouses* and other works which are finished and productive, though all the works directed by the

Act be not completed. But such completed works must, under such circumstances, be rated for their value at the rate of $8\frac{1}{2}d.$ in the pound; such being the rate calculated upon by the legislature to raise 139l. 8s. 7d. per quarter upon 3,966l. the average rental for 10 years preceding the statute, on the premises destroyed by the Company in making their works; and which quarterly sum the Company were, at all events, bound to pay to the parish during the 12 years, or until the works were completed, whether those works were productive or not. But when productive beyond that sum, the surplus is to be taken in the first instance by the Company; in order to reimburse themselves what they may have advanced to the parish, to make good the deficiencies, before any such productive surplus existed, until the Company shall be reimbursed: Therefore, until these purposes are effected, a rate made on the increased real value of the Dock premises at more than $8\frac{1}{2}d.$ in the pound, or a rate of $8\frac{1}{4}d.$ in the pound on the old average value of the premises before the erection of the Company's works, and below the increased value of the new works, is in either case bad. *Rex v. St. George, Middlesex, (Inhab.)* 9 E. R. 127

- 37 A barge-way and toll-gate in the hamlet of *Hamptonwick*, purchased by the City of London by virtue of stat. 17 G. 3. c. 18. (for completing the navigation of the *Thames*, and empowering the city to levy tolls and duties towards the charges of the navigation) was held to be rateable for such tolls as became due there, notwithstanding the tolls were collected in another parish. *Rex v. Mayor, &c. of London.*

4 T. R. 21

(c) *Where rateable.*

- 1 A person shall be rated for profits where they become due, not where they happen to be received. *Rex v. Aire & Calder Navig.* 2 T. R. 660
- 2 Where a navigation ran from A. to B. through several intervening parishes, and the tolls for the whole navigation were collected in these two parishes, the Court held, they might be assessed in these two parishes for the whole amount, according to the proportion collected in each. 2 T. R. 660

3 An Act of Parliament having empowered the Duke of *Bridgewater* to erect a lock upon the *Rochdale* canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharfs at *Manchester*, which were sacrificed for the public benefit in that navigation: Held, that a poor's-rate on his trustees, occupiers of the "*Rochdale canal, lock, tunnel, dues, or rates*," (which *dues* or *rates* are only other names for the *lock* rated therewith) is good, though the trustees were found not to be *inhabitants* of the township for which the rate was made. *Rex v. Sir A. Macdonald*. 12 E. R. 324

4 The tolls of a lighthouse situated in the township of *Tynemouth*, which tolls were collected out of the township in the several ports at which the vessels passing by the coast afterwards arrived, are not rateable, *quâ* tolls, in the township. *Rex v. Tynemouth (Inhab.)*. 12 E. R. 46

5 And the residence in such lighthouse by one as servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the toll-house.

12 E. R. 46

6 Where by a Navigation Act, the proprietor was entitled to a toll of 4s. *per* ton for goods carried from *A.* to *B.*, or from *B.* to *A.*, and to a proportionable sum for any less distance; and was also enabled to appoint any place of collection; it was held, that the tolls for goods carried the whole voyage from *A.* to *B.* were rateable in *B.* though in fact they were collected in a parish between *A.* and *B.*; because the tolls become due where the voyage is completed. *Rex v. Page*.

4 T. R. 543

7 So where a Navigation Act empowered the proprietors to take so much *per* mile *per* ton for all goods carried along the canal: Held, that they were rateable to the poor for the tolls in the different parishes where the tolls became due, that is, *where the respective voyages finished*, though for their own convenience they were authorized to collect the toll where they pleased, and did in fact collect them in other

parishes. *Rex v. Stafford and Worcester Canal Navigation*.

8 T. R. 340

8 Where goods are carried along two different lines of canal, one of which is by statute exempted from being rated in respect of *tolls*, and the other not; though the voyage happen to finish on the unexempted line, where the tolls became due and are received, yet the Canal Company shall not be rated for more than such proportion of the tolls as accrued in respect of the carriage along the unexempted line. And the toll arising in respect of so much *per* ton *per* mile is to be rated only for so many miles as the goods were carried along the unexempted line. And where the Act directs that the tolls should be exempt from any taxes, rates, &c. other than such as the *land* which should be used for the purpose of the navigation would have been subject to if the Act had not been made; that goes to exempt the *tolls*, *quâ* *tolls*, altogether from being rated in respect of the line so exempted, leaving the *land* rateable as before. *Rex v. Leeds and Liverpool Canal Company*. 5 E. R. 325

9 The stat. 6 G. 3. c. 70. for better supplying the inhabitants of *Bath* with water, reciting that there were springs of water in the neighbourhood belonging to the corporation, enacts that they shall have power and authority to cause the water to be conveyed from such springs to the city, and gives them authority to enter upon and break up the soil of any public highway or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the said springs, and to make reservoirs, and erect conduits, waterhouses, and engines, necessary for keeping and distributing the water, &c. and to lay under ground aqueducts and pipes for the same purpose; and it vests the right and property of all these in the corporation: Held, that, in addition to the springs, the corporation were liable to be rated for the reservoirs made by them in the parish of *Lyncomb* and *Widcomb* under the Act, as for *land* occupied by them, which reservoirs, by means of aqueducts and

pipes laid under ground, partly in the same parish, and through the parish of *St. James* into the parish of *St. Peter* and *St. Paul*, in *Bath*, for the supply of the city, produced to the corporation a clear annual profit of 600*l.*: but that the corporation were not rateable for the whole of the entire profit in the first-mentioned parish, in which the springs were first collected into the reservoirs; a proportion of such entire profit accruing to them from the under-ground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as the occupiers of land yielding annual profit in those parishes: and therefore, a rate upon the entire profits arising out of all the parishes made on the corporation in the first-mentioned parish was held bad. *Rex v. The Corporation of Bath.*

14 E. R. 609

10 Where a company were empowered by Act of Parliament to lay under ground, through the streets of a town, main pipes for the conveyance of water, and the inhabitants, with the Company's consent to lay pipes communicating with such main pipes to their houses, paying to the Company a rate for such privilege: Held, that the Company were rateable to the poor in the parish where the main pipes lay in respect of those pipes, and the rates paid thereon. *Rex v. The Company of Proprietors of Rochdale Waterworks.*

1 M. & S. 634

11 Commissioners under the *Beverley and Barmston Drainage Act*, who purchased land and erected buildings in the parish of *Sculcoates* for the outlet of the drainage, but who received no benefit from such property in *Sculcoates*, but the whole benefit was derived to the owners of lands in other parishes, drained by means of such outlet, are not rateable in *Sculcoates* for such benefit. *Rex v. Sculcoates (Inhab.)*

12 E. R. 40

12 Ships are rateable at their home. *Rex v. White.*

4 T. R. 771

And see *Rex v. Liverpool.*

8 E. R. 455, n.

13 The owners of the packet-boats employed under a personal contract with the post-masters in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable, in respect of the profits ac-

cruing to them from the carriage of passengers and luggage in such boats, to be rated for the same to the relief of the poor in the parish of *Holyhead* where such owners reside, and from and to which the boats sail, where they are repaired, and where the passage-money is in part receivable, and is collected; though they are registered in another place. *Rex v. Jones.*

8 E. R. 451

14 The lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resident within the township in which one of the *termini* of the ferry is situated, is not liable to be rated there for any share of the tolls of such ferry: for supposing a ferry to be real property, it is not such real property as is mentioned in the stat. 43 *Eliz.* c. 2. the occupancy of which subjects the party to be rated to the relief of the poor of the place. And all the cases where parties have been rateable in respect of the occupancy or receipt of tolls (apart from the question of inhabitancy) have been where they at the same time occupied real visible property connected with such tolls in the place where they were rated. *Rex v. Nicholson.*

12 E. R. 330

N. B. *This case contains all the prior decisions on this subject.*

15 The owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, is not rateable for such tolls in the parish where they were so collected, and where one of the *termini* of the ferry was situated, and on which shore the ferry-boats were secured by means of a post in the ground; the soil itself at the landing places being the King's common highway; and the owner of the ferry having no property in, or exclusive possession of it. *Williams v. Jones.*

12 E. R. 346

(d) In what Proportion made.

1 Every person is to be rated according to the present value of his estate, whether that value has or has not been increased by his own improvements. *Rex v. Mast.*

6 T. R. 154

2 A lessee of lands should be rated according to the present value of the lands. *Rex v. Skingle.*

7 T. R. 549

- 3 If the sessions are of opinion that certain persons who are left out of the rate ought to be inserted, they must quash the rate; for the Court will not alter the conclusion drawn by the sessions from the evidence stated. *Rex v. Durlington (Inhab.)* 6 T. R. 468

(e) Allowance and Publication of.

- 1 The justices below are the proper judges of the equality of poor-rates: and the Court will not interfere on the ground of their being unequal, unless the inequality be manifestly apparent on the rate. *Rex v. Aire & Calder Navigation.* 2 T. R. 660
- 2 The allowance of a rate by two justices is merely a ministerial act. *Rex v. Kynaston (Inhab.)* 1 E. R. 118
- 3 The granting of a warrant of distress by magistrates to enforce payment of a poor-rate is a judicial, not a ministerial act; they ought first to summon the party, and hear what he has to say in his defence. *Harper v. Carr.* 7 T. R. 270
- 4 If a poor-rate be not published in the church on the Sunday next after it is allowed, it is a nullity; and payment under it cannot be enforced, though there be an appeal to the sessions which was dismissed. *Rex v. Newcombe.* 4 T. R. 368
- 5 But it is not necessary to state in a reserved case, that the rate was regularly published in the church, if that question was not intended to be referred. 2 T. R. 660

(f) Appeal to the Sessions.

- 1 Notice of an appeal against a poor-rate must be given to the churchwardens or overseers of the parish making the rate, by stat. 17 G. 2. c. 38. *Rex v. Maddern (Inhab.)* 1 T. R. 627
- 2 But it is not necessary for the appellant to give notice to the person whose name is omitted in the rate. 1 T. R. 627
- 3 The appeal may be made to an adjourned sessions. *Rex v. Justices of Sussex.* 7 T. R. 107
- 4 Appeal against a poor-rate must be to the sessions next after the allowance of it. *Rex v. Atkins.* 4 T. R. 12
- 5 And if at a subsequent sessions it be dismissed for not having been made in time, and it be removed by certio-

rari into the Court of King's Bench, they will not go into any objection appearing upon the face of it.

4 T. R. 12

- 6 If a party appeal against a poor-rate on the ground that he has no rateable property in the parish, the respondents must first establish their case. *Rex v. Newbury (Inhab.)* 4 T. R. 475
- 7 Where the appellant disputed before the sessions the quantum of the rate, as well as the rateability of the property for which he was assessed, which was tythe rents and compositions under an Inclosure Act; it is not enough for the parish officers to shew that he was in the receipt of such rents (assuming the property to be rateable), of the probable amount of which, as rated, they gave no evidence. *Rex v. Topham.*

12 E. R. 546

- 8 If a poor-rate be legal on the face of it, though stated to be made for illegal purposes, the Court will not quash the rate, but will leave the parties aggrieved to appeal against the allowance of the overseers' accounts if the money be improperly applied. *Rex v. Gloucester (Mayor, &c.)*

5 T. R. 346

- 9 A private Act, relating to Gloucester, enables the overseers, &c. to make a rate for the relief of the poor, and to include in it such just and reasonable sums as they shall be put to in the execution of their offices: they made a rate, the title of which expressed it to be for both those purposes; and the Court would not quash it, though the sessions on appeal stated in a case that it was partly made to pay a debt incurred by the late overseers; the rate itself appearing on the face of it to be legal. 5 T. R. 346

- 10 If a person rated to the poor has any objection to the rate (e. g.) that it is made for six months, he must appeal to the next sessions, and if he do not appeal, he cannot bring trespass against those who distrain on him for non-payment of the rate. *Durrant v. Boys.*

6 T. R. 580

- 11 The party objecting to a poor-rate may appeal to the next sessions, for which he is in time to give an effective notice of appeal after the publication of the rate, and one intervening day between such publication and the next immediate quarter sessions, is

not sufficient time for the purpose.
Rex v. The Justices of Sussex.

15 E. R. 206

13 Several parties having a joint grievance, such as the omission of persons in the rate who ought to be rated, may join in giving one notice of appeal to the parish officers. 15 E. R. 208

14 An appeal against a poors'-rate in London or Middlesex must be made, as in all other counties, to the next (*i. e.* next practicable,) "general quarter sessions;" though the stat. 17 G. 2. c. 38. s. 4. in its terms gives the appeal to the next general or quarter sessions; it appearing from other parts of the Act, as well as from other Acts *in pari materia*, that those terms are used synonymously; and though in the two counties named there are four general, as well as four general quarter sessions. *Rex v. Justices of London.*

15 E. R. 632

15 The sessions cannot award costs unless the appeal be entered and determined. *Rex v. Justices of Essex.*

8 T. R. 584

(g) Rate *in aid*.

1 County justices cannot rate a parish within their jurisdiction *in aid* of another parish, lying within a borough which has an exclusive jurisdiction, though within the same hundred and county. *Rex v. Holbeche.*

4 T. R. 778

2 An order for taxing one parish in aid of another under the 43 *Eliz.* was held well; although the two parishes, together with others, were incorporated for the maintenance of their poor, with fixed quotas of contribution, between each other, under special officers, who were empowered to purchase land for the erection of poor-houses, and for a burial-ground; there being a proviso in the Act in general terms, that nothing therein contained should extend to repeal or lessen the power of justices of the peace "to tax parishes in aid of others by virtue of the statute 43 *Eliz.* as fully as if this Act had not been made." *Rex v. St. Helen, Worcester (Inhab.)*

2 E. R. 417

III. RELIEF.

1 When relief is granted to a poor person, only such person (and not any of

the rest of the family) is obliged to go into the workhouse, under statute 9 G. 1. c. 7. s. 4. *Rex v. Haigh.*

3 T. R. 637

2 Where an allowance is ordered to be paid weekly to a pauper, it is due at the beginning of the week. *Rex v. Fearnley.*

1 T. R. 320

3 Under stat. 9 G. 1. c. 7. s. 4. which enables the churchwardens and overseers, with the consent of the major part of the parishioners, to contract for the providing for the poor, it is not necessary that all the churchwardens and overseers should concur; the contract of a majority of them will bind the rest. *Rex v. Beeston.*

3 T. R. 592

4 The parish to which the principal militia-man belongs is liable to reimburse the parish of the substitute the expenses of maintaining the substitute's family, though the substitute had more than one child when he was approved by the deputy-lieutenants and inrolled; which under such circumstances he ought not to have been. *Rex v. Willis.*

6 T. R. 179

5 *Semble*, That if a substitute be sworn and actually served in the militia, his family are entitled to be relieved within the meaning of stats. 26 G. 3. c. 107. s. 24.; 33 G. 3. c. 8. s. 3. though the substitute were not previously approved by two deputy-lieutenants, or inrolled. *Rex v. Ledbury.*

7 T. R. 558

6 A substitute in the militia falsely declaring at his inrolment that he had no wife or family, when in fact he had a wife and one child, is not entitled to any parochial allowance for their relief under stat. 43 G. 3. c. 47. ss. 2. 5. *Rex v. Preston (Inhab.)*

13 E. R. 313

7 Where the guardian and visitor of a parish which had adopted the provisions of stat. 22 G. 3. c. 83. upon application to them for relief by a pauper for herself and children, directed them to be received into the poor-house: Held, that one justice had not any jurisdiction upon complaint to him by the pauper, to order relief out of the poor-house; and therefore where defendant was convicted in a penalty for disobeying such order, which conviction was confirmed at the sessions; this Court quashed the order of sessions. *Rex v. Loughton (Inhab.)*

2 M. & S. 324

8 Evidence of a settlement in *A.* by shewing that the pauper's grandfather

came into *B.*, under a certificate from *A.*, is rebutted by shewing that *B.* had relieved the pauper and his family while residing in other places. *Rex v. Stanley-cum-Wrenthorpe (Inhab.)* 15 E. R. 350

IV. SETTLEMENT.

(a) By Birth or Parentage.

- 1 The place of birth is *prima facie* the place of settlement. *Rex v. Heaton Norris (Inhab.)* 6 T. R. 653
- 2 An order of justices, removing nurse children to their derivative settlement without taking notice of the death or settlement of the parents, is good. *Rex v. Bucklebury (Inhab.)* 1 T. R. 164
- 3 The evidence of the father in such case may be dispensed with, where his attendance cannot be procured. 1 T. R. 164
- 4 Proof of the father's settlement is sufficient to establish the settlement of the son in the same parish, if nothing appear to contradict it. *Rex v. Stone (Inhab.)* 6 T. R. 56
- 5 The settlement of a person attained, acquired before the attainder, is communicated to his children born afterwards. *Rex v. St. Mary, Cardigan (Inhab.)* 6 T. R. 116
- 6 An attained felon having been discharged by order of the Secretary of State, under the sign manual, signifying his Majesty's pleasure to grant him an unconditional pardon, and directing his name to be inserted in the next general pardon (of the issuing of which pardon there was some negative evidence); and having afterwards purchased a copyhold for more than 30*l.*, to which he was admitted upon surrender formally made, and resided on and received the issues and profits of it for nine years, without impeachment of his title; gained a settlement by such residence thereon for 40 days, and communicated such his settlement to an unemancipated child, part of his family. *Rex v. Haddenham (Inhab.)* 15 E. R. 463

(b) Emancipation.

- 1 A son, of age, and married, continuing to live with his father, does not follow a settlement subsequently acquired by the father in another parish,

to which the son also accompanied him as part in fact of his household.

- Rex v. Everton (Inhab.)* 1 E. R. 526
- 2 A person cannot gain a settlement by hiring and service with the son of a certificated man continuing to reside in the certificated parish with his mother after the father's death, as part of her family; though the son were of age, and carried on business for himself; such circumstances not amounting to an emancipation. *Rex v. Sowerby (Inhab.)* 2 E. R. 276
 - 3 A settlement gained by a Scotchman some years after his son was emancipated by having left his family and enlisted in the army, is not communicated to the son; and it is immaterial whether the son had gained a settlement for himself or not. *Rex v. Stanwix (Inhab.)* 5 T. R. 670
 - 4 A drummer, under age, entered into the same militia in which his father was serjeant, and lived with his father, the latter receiving the son's pay: Held, that a settlement gained by the father during such time was communicated to the son. *Rex v. Woburn (Inhab.)* 8 T. R. 479
 - 5 A son, sixteen years old, was bound apprentice in *A.* for four years, which he served, and never afterwards returned to his father's family; the indenture was void for want of a stamp, and the father in the mean time gained a settlement at *B.*: Held, that the son was not settled in *A.* by the apprenticeship, and that he was not emancipated, but followed his father's settlement at *B.* *Rex v. Edgeworth (Inhab.)* 3 T. R. 353
And see 4 T. R. 218
 - 6 A child is not emancipated so as to lose the benefit of any settlement which his father may gain, till 21, or marriage, or till he has gained a settlement in his own right, or till he has contracted a relation inconsistent with the idea of his being part of his father's family. *Rex v. Winton cum Twanbrookes (Inhab.)* 3 T. R. 335
 - 7 The infant son of a person living at *A.* under a certificate, served a year at *B.* (an extra-parochial place) under a yearly hiring, and then returned to *A.* under 21, where he was hired and served a year; it was held, that he gained no settlement in *A.* *Rex v. Collingbourne Ducis (Inhab.)* 4 T. R. 199

8 If a son at 16 hire himself for a year, and serve that year, he nevertheless cannot be considered as having been emancipated from the very moment of the hiring. *Rex v. New Forest (Inhab.)*

5 T. R. 478

9 An adult who leaves her father's house, and goes into service, becomes thereby emancipated, and is not entitled to a settlement gained afterwards by the father. *Rex v. Roach (Inhab.)*

6 T. R. 247

10 A widower having a daughter, placed her at 11 years of age with an uncle, by whom she was wholly maintained after that time, and with whom she continued to reside after she came of age, doing service to him, but without any contract of hiring to give her a settlement of her own; the father in the mean time having gone out to service: Held, that on her coming of age she was emancipated, although her father conceived himself bound, as such, to receive and support her if she left her uncle's: and consequently the father was capable of gaining a settlement by hiring and service for a year, as "an unmarried man, not having a child," (i. e. not having a child who would follow his settlement) within the stat. 3 W. & M. c. 11. s. 7. *Rex v. Cowhoneyborne (Inhab.)*

10 E. R. 88

And see *Rex v. Hardwicke (Inhab.)*

11 E. R. 578

(c) *Hiring and Service.*

1 If a servant be unmarried at the time when he is hired for a year, he gains a settlement by a year's service, though he marry before the service commences. *Rex v. Allendale (Inhab.)*

3 T. R. 382

Rex v. Stannington (Inhab.) S. P.

3 T. R. 385

2 A widower, having a son who has no settlement of his own, is prevented by stat. W. & M. c. 11. s. 7., from gaining a settlement by hiring and service for a year, though the son be hired for a year on the same day when the father is hired, and serve that year. *Rex v. New Forest (Inhab.)* 5 T. R. 478

3 A pauper was placed by the parish with a parishioner, who agreed with the parish to find the pauper with board, washing and lodging, at so much per week, and the pauper was

to do what he was set about. After serving nearly a twelvemonth in this way, the parish refused to continue the payments, and the pauper was sent away by his master, but shortly returned, and served him as before near three years. The pauper went twice a year to London to receive a pension: he always told his master he was going, but never asked or received leave from him: Held, that this service did not give a settlement in the parish where the master resided, for there was no contract as between master and servant. *Rex v. Rickinghall Inferior (Inhab.)* 7 E. R. 373

4 A poor boy sent out of the house of industry at 14 years of age to the parish officers, and by them allotted to a parishioner, who handed him over to another person, by whom the boy was told that he was to stay with them a year, and should have clothes, &c. to which the boy made no objection, conceiving himself obliged to accept the service, but made no agreement for wages, or concerning the nature or duration of his service, nor was consulted upon the subject, does not gain a settlement by serving under this supposed obligation for a year; for neither did he consider himself, nor was he considered by the other parties, as a free agent; and such only can contract, or adopt a contract made by others. *Rex v. Stow Market (Inhab.)*

9 E. R. 211

5 A poor boy of A., 16 years of age, offered to serve a parishioner of B., who asked him if he was willing to bind hay, &c. and do whatever else he was bid; to which the boy said he was willing; and the other took him home to B.; but a day or two afterwards told the boy he could not keep him if he could not get better clothes; when the boy said that the overseer of A. would find him clothes; and the next day accompanied his master to the overseer of A., who agreed to find clothes, but stipulated with the master, and the latter agreed to pay the overseer 1s. a week for the parish, on account of the clothes found. The overseer at the same time asked the boy, in the master's presence, if he went willingly into the master's service; to which the boy assented: Held, that this was a contract of hiring by the boy himself, and not merely by the

overseer, under which a settlement might be gained by a year's service. *Rex v. Duntun (Inhab.)* 15 E. R. 352

6 A deserter from the King's marine service cannot gain a settlement under a hiring and service for a year: not being *sui juris*, nor competent lawfully to hire himself within the stat. 3 W. & M. c. 11. s. 7. *Rex v. Norton, juxta Kempsey (Inhab.)* 9 E. R. 206

7 If a husbandman serve for a year, it is strong evidence from which the justices at the Sessions may presume that he served under a yearly hiring. *Rex v. Lyth (Inhab.)* 5 T. R. 327

8 So if a servant, after serving a year, part of which was under a retrospective hiring, so that no settlement could be gained under it, continue in service part of another year, the justices may presume a hiring for a second year. *Rex v. Hales (Inhab.)* 5 T. R. 668

9 Where a pauper had served a master under unstamped articles of agreement, to work with him for three years, at certain rates of weekly wages, and under certain covenants; after which he had continued to serve his master for four years longer, without coming to any new agreement; though such unstamped writing cannot be received as evidence for the purpose of proving the agreement between the parties, yet the sessions may look at it for the purpose of seeing when it ceased to operate, in order to guide them in receiving parol evidence of service for the last four years, at wages, from whence the sessions might presume a yearly contract. *Rex v. Pendleton (Inhab.)* 15 E. R. 449

10 Where a servant had lived three years in service with the same master: Held, that it was evidence from which the justices might infer a yearly hiring, though it appeared that at first the servant was hired only for part of a year. *Rex v. Long Whaddon (Inhab.)* 5 T. R. 447

11 A. went into the service of B. without making any terms at the time; a few days afterwards B. agreed to find A. in meat, drink, and clothes, but no money; A. continued in the service two years and a half, when she was dismissed by B.: Held, that this was a general hiring, and that it con-

ferred a settlement on A. *Rex v. Mayfield (Inhab.)* 5 T. R. 506

12 A servant, having been hired for and served 11 months for 10 guineas, was told by his master, at the expiration of that time; that "he might stay on an end," without mentioning the wages, to which the servant assented; the second agreement was held to be a general hiring, and the party serving a year under it, gained a settlement. *Rex v. Macclesfield (Inhab.)* 3 T. R. 76

13 An agreement by a daughter to live with her father and to do the offices of a servant for a year for her board and lodging and other perquisites, is a good hiring for a year, though the daughter is to be at liberty to earn what she can by her labour; and a service under it will be sufficient to gain a settlement. *Rex v. Chertsey (Inhab.)* 2 T. R. 37

14 A pauper, having lived with his uncle on charity, was afterwards hired as a yearly servant by another person, whom he accordingly served; at the expiration of which he returned to his uncle on an invitation from him, "that if he would come and live with him as before, he would make it better for him than a common service;" and lived with him several years in the parish of A., performing the work of a servant in husbandry; during the time he so lived with his uncle, the latter promised that if he continued with him for his life he would leave him his farm and stock, but he received no wages: it was held, that he gained no settlement in A. *Rex v. Stokesley (Inhab.)* 6 T. R. 757

15 A pauper came to an inn at the request of the waiter, who was ill, to help him, and continued there boarding and lodging for nineteen months; and the waiter went away in thirteen months; after which the pauper continued to serve in the same manner as he had done before, without making any agreement at all with the master, though the master knew of his being in the service the second day: it was held that he did not gain a settlement by such service, because there was no hiring for a year either express or implied: He could only be considered as the servant of the master for the last six months. *Rex v. St. Matt. Ipswich (Inhab.)* 3 T. R. 449

16 A. clubbed with B. for three years,

(which signifies one person contracting to serve another for the purpose of being taught some art or trade), and also agreed to do any work that B. set him about: Held, that A. gained a settlement by serving B. under this contract for a year. *Rex v. Coltishall (Inhab.)* 5 T. R. 193

17 A. clubbed with B. for three years, at a certain rate of weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionable deduction of wages: Held, that A. gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. *Rex v. Martham (Inhab.)* 1 E. R. 239

18 Three months after a pauper, under age, had hired himself generally to a brickmaker for a year, they entered into a written contract, unstamped and without seals, whereby the pauper covenanted and agreed to serve his master for three years, to learn to make bricks, &c. on condition of his master finding him in board, lodging, and clothes, and for him to be decently clothed at the end of the three years, on condition of his attending the kiln at nights: Held, that this contract, (assuming that an infant might bind himself by any contract made for his benefit at the time, if legally framed,) was no proof of an apprenticeship in the contemplation of the parties, but only of a new hiring in the same relation of master and servant as the original hiring; only restraining the service to such employ of the master as would enable the boy to learn the trade; (for the master did not bind himself to teach him the trade.) But if the intention of the parties had appeared to be to contract for an apprenticeship, yet as such contract was illegal and void in the form and manner of it, it would not have done away the original good contract of hiring and service for a year; and therefore the servant would at any rate gain a settlement by serving his master for a year. *Rex v. Skinfield (Inhab.)* 14 E. R. 541

19 Where the father of a pauper contracted with J. S. that his son should be with him, and should work with him for two years, and have what he got, and should allow 2s. per week

out of his gains to J. S., viz. 1s. for teaching him the business of a frame-knitter, 9d. for the rent of a frame, and 3d. for the standing: Held, that this was a contract of hiring and service, and not an apprenticeship; and that the son's having served under it was evidence that he had adopted the contract made by his father: and therefore he was entitled to a settlement by such hiring and service. *Rex v. Burbach (Inhab.)* 1 M. & S. 370

20 Under a hiring from *Whitsuntide* to *Whitsuntide*, a service of 365 days, though less than the period of the contract in the particular year, is sufficient to confer a settlement. *Rex v. Ulverstone (Inhab.)* 7 T. R. 564

21 A statute fair being held yearly on the day after Old Michaelmas, except when Old Michaelmas falls on a Saturday, and then the fair being held on the Monday: Held, that a hiring from such Monday till Old Michaelmas Day following, is not a yearly hiring under which a settlement can be obtained. *Rex v. Standon Massey (Inhab.)* 10 E. R. 576

22 Hiring and service from the day after Old Martinmas Day until the Old Martinmas Day following, is sufficient to give a settlement. *Rex v. Skipland. (Inhab.)* 1 T. R. 490

23 A hiring three days after Michaelmas till the Michaelmas following in leap-year, together with a service till the day after Michaelmas-Day, making 365 days, will not give a settlement. *Rex v. Ackley (Inhab.)* 3 T. R. 250

24 No settlement is gained by a hiring and service for less than a year, though the master tell the servant at the time of the hiring, that he shall not belong to the parish, and the sessions state such contracts to be fraudulent. *Rex v. Mursley (Inhab.)* 1 T. R. 694

25 No settlement can be gained by serving under a contract of hiring for four years, with liberty for the servant to leave for a week every year to see his friends; for that is to be taken distributively, i. e. reserving a week out of each year. *Rex v. Rushulme (Inhab.)* 10 E. R. 325

26 Hiring for a year at 13s. 6d. per week, and to be at liberty to be absent during the sheep-shearing season, but to find a fit man, at his own expense, to do his work during his absence, but

- his own wages to go on during the whole time, will not gain a settlement. *Rex v. Arlington (Inhab.)* 1 M. & S. 622
- 27 A pensioner of the East-India Company, hiring himself as a servant for a year, with a reservation to himself, of two days in each half-year, when he might go for his pension, cannot gain a settlement by service under such a contract. *Rex v. Over (Inhab.)* 1 E. R. 599
- 28 Service under a hiring for seven years, to work only thirteen hours in the day, and *Sundays* excepted, will not give a settlement: The servant must be under the controul of the master for the whole year. *Rex v. Kingswinford (Inhab.)* 4 T. R. 219
- 29 A service under a hiring for five years as a colt-shearman, to work twelve hours each day, will not give a settlement. *Rex v. North Nibley (Inhab.)* 5 T. R. 21
- 30 Under a contract of hiring as a bleacher and crofter for a year at 12s. a week, the servant continuing to work under such a contract for a year, gained a settlement in the parish where he resided, although by the practice of the manufactory in which he was engaged, if he finished his appointed week's work, calculated at so many pieces a day, for six days, in less time, he had the rest of the week to do as he pleased, and he also went where he chose on *Sundays*, without asking leave: for this is an express contract for a year, without any express exception. *Rex v. Horwicks (Inhab.)* 10 E. R. 489
- 31 A hiring at so much *per week* is not an implied hiring for a year.
Rex v. Newton Toney (Inhab.) 2 T. R. 453
Rex v. Odiham (Inhab.) 2 T. R. 622
- 32 If there be any thing in the contract to shew that the hiring was intended to be for a year, there a reservation of weekly wages will not controul that hiring. 2 T. R. 453
- 33 But if the payment of weekly wages be the only circumstance from which the duration of the contract is to be collected, it must be taken to be only a weekly hiring. 2 T. R. 453
- 34 A hiring at so much a week for as long a time as the master and servant could agree, is only a weekly hiring, under which no settlement can be gained. *Rex v. Mitcham (Inhab.)* 12 E. R. 351
- 35 Where nothing is said in a contract of hiring about time but a reservation of *weekly wages*, it is a *weekly hiring* only: Therefore, where a contract was for the servant to live with his master, the latter finding him board and lodging, and *paying him 2s. 6d. per week*, no settlement could be gained by service for more than a year under such contract. *Rex v. Pucklechurch (Inhab.)* 5 E. R. 382
- 36 A hiring at so much a week, meat, drink, washing, and lodging, and to part on a week's notice by either party, will not warrant a conclusion of a general hiring; though the servant continued six years with the master, and the wages were raised during the period: and therefore no settlement can be gained under such hiring and service. *Rex v. Hanbury (Inhab.)* 2 E. R. 423
- 37 Service for a week under a hiring "at 3s. *per week* the year round," with liberty to go on a fortnight's notice, will give a settlement. *Rex v. Birdbrooke (Inhab.)* 4 T. R. 245
- 38 A hiring to serve for 3s. 9d. *per week*, with the liberty of parting on a month's notice, is a general hiring: and the pauper serving a year under it gains a settlement. *Rex v. Hampreston (Inhab.)* 5 T. R. 205
- 39 A retrospective hiring will not give a settlement. *Rex v. Marton (Inhab.)* 4 T. R. 257
- 40 A settlement may be gained by serving a year under different hirings, if one of them be for a year, though there be not 40 days' service under the yearly hiring. *Rex v. Adson (Inhab.)* 5 T. R. 98
- 41 An unmarried man agreed on the 17th of *October*, 1803, to serve a master for the year, at 9s. 6d. a week; and received those wages till the 13th of *October*, 1804; three or four days before which (having in the mean-time married,) he agreed with his master to serve him for another year at 10s. a week, which sum he received on the 20th of *October*, and served more than a year afterwards: Held, that this was evidence upon which the sessions might draw the conclusion that the original hiring was for the space of a year, and not merely for the current year of 1803, and that there was a sufficient service for a year, coupled with such hiring, to gain a settlement. *Rex v. Overmorton (Inhab.)* 15 E. R. 347

- 42 A service under a hiring by the week, (the servant boarding and lodging himself), nothing being said about *Sunday*, but the servant working on that day occasionally, when asked by his master, without additional wages, though he sometimes received victuals, may be joined with service under a yearly hiring as a menial servant, so as to confer a settlement by hiring and service for a year. *Rex v. Sutton (Inhab.)* 1 E. R. 656
- 43 If a servant be hired from *November* to *Michaelmas* following, and before *Michaelmas-day* his master offer to hire him from *Michaelmas* for a year at certain wages, to which he does not agree, but remains in the house till the second day after *Michaelmas*, working as usual, and then accepts the offer, and serves a part of the year; the service under the latter hiring commences on the *Michaelmas-day*, and may be coupled with the former service so as to give a settlement. *Rex v. Sulgrave (Inhab.)* 1 T. R. 778
- 44 *A.* was hired at *Martinmas* to serve in husbandry for a year, at the wages of 8*l.*; in the middle of the year he married, and then agreed to serve his master as a hind, for a year from that time, at the wages of 5*s.* per week, and he was to live out of his master's family, but at another farm, in the same parish, belonging to his master: it was held, that the former agreement was dissolved by the latter, and that *A.* did not gain a settlement by serving under those contracts. *Rex v. Great Chilton (Inhab.)* 5 T. R. 672
- 45 Absence at the beginning, the middle, or the end of the year, may be dispensed with, either with the consent of the master, or for an excusable cause. *Rex v. East Shefford (Inhab.)* 4 T. R. 806
- 46 And a settlement was gained, though the pauper ran away without leave, was brought back by a justice's warrant after thirteen weeks' absence, and then consented to have a deduction made out of his wages for that time. 4 T. R. 806
- 47 If a yearly servant be discharged four or five days before the end of the year on his master's becoming a bankrupt, and receive the full year's wages, the service is sufficient to give him a settlement. *Rex v. St. Andrew, Holborn (Inhab.)* 2 T. R. 627
- 48 If a servant hired for a year give warning eight days before the expiration of the year, to leave his master at the end of the year, and the master discharge him on the same day, paying him his full wages, the servant being willing to stay till the end of the year, the contract is not thereby dissolved so as to prevent the servant's gaining a settlement, but the discharge is merely a dispensation with the remainder of the service. *Rex v. St. Philip in Birmingham (Inhab.)* 2 T. R. 624
- 49 If there be not a voluntary agreement between the parties, and the master *fraudulently* turn away the servant with a view of preventing his gaining a settlement, or *wrongfully* discharge him before the end of the year, that will not defeat the servant's settlement. *Per Ashhurst, J.* 2 T. R. 626
- 50 A master being obliged to leave his house seven days before the end of a year for which he had hired a servant, told the latter that he had no further occasion for her services, and paid her the whole year's wages; the master would otherwise have kept her, and she was unwilling to leave the service: Held, a dispensation of the service for the rest of the year; and the service sufficient to give a settlement. *Rex v. St. Mary, Lambeth (Inhab.)* 8 T. R. 236
- 51 If a master and servant before *Michaelmas* agree for yearly wages, and the master, while he is taking money from his pocket to give earnest, tells him that *he shall be absent a fortnight at Michaelmas because of his settlement*, and that he will give him that time to get what he can, to which the servant assents; this is a mere dispensation of the service for that time, and not such an exception out of the original contract as will make the hiring insufficient for the purpose of gaining a settlement. *Rex v. Sulgrave (Inhab.)* 2 T. R. 376
- 52 The servant's apprehending that his master would not have hired him if he had not agreed to the fortnight's absence, will not alter the case. 2 T. R. 376
And see 2 T. R. 455
(As to dispensing with service or dissolving the contract, see post, tit. SESSIONS.)

53 A *bonâ fide* exception of part of the time at the time of hiring will prevent a settlement, but if there be no exception, then a permissive absence afterwards will not prevent it. *Rex v. Sulgrave (Inhab.)* 2 T. R. 379

54 Where the master died three weeks after hiring the pauper for a year, the latter, abiding in the service with the widow and sons to the end of the year, gains a settlement in the parish where she served. And it is no less an abiding in the service for a year, because one of the sons, on a frivolous pretence, turned her out of doors three weeks before the end of the year, she being willing and offering to stay to the end of the year, but carried away her clothes the next day, and taking what the son insisted was her full wages for the year according to the agreement, though she demanded a larger sum as her full wages. *Rex v. Hardham with Newton (Inhab.)* 12 E. R. 51

55 A servant, eleven weeks before the end of his year, on a quarrel with his master, applied for his *discharge*; which his master refused, unless the servant could get another man to stand in his stead; the servant accordingly procured another, to whom he gave money for the purpose out of his own pocket, in addition to the wages which the new man was to receive from the master; and the servant then left the service, and hired himself as a day-labourer for the remainder of the year: Held, that this was proper evidence from whence the sessions might draw the conclusion of a dissolution of the contract: though it was encountered by the evidence of the servant, that his master said to him at the time, that if the other man did otherwise than well, he could send for the servant, and make him serve out his time; to which the latter assented: which account was, in the judgment of the Sessions, impeached by the master's having no recollection of having so said, and saying that he had not any *intention* to have the servant back, they having parted on bad terms; which latter expression the Court received, not as evidence *per se* of the master's *intention*, but only as a reason assigned by him, why he was

not likely to have said what the servant stated. *Rex v. Mildenhall (Inhab.)* 12 E. R. 482

56 Absence can only be purged where the act itself is doubtful. *Rex v. Gresham. (Inhab.)* 1 T. R. 101

57 Where the master insisted on turning away his servant, and threw down his wages, which the other took up and then went away, and after the expiration of six days, returned at the master's request, and served the remainder of the year, the absence was not purged by the subsequent return. 1 T. R. 101

58 Where a servant, who was ill-treated and turned out of doors by his master three days before the end of the year, refused (on his master's request the next day) to return into the service, it was held, that he did not gain a settlement by his service, though his master paid him his wages for the whole year. *Rex v. Grantham. (Inhab.)* 3 T. R. 754

Rex v. Corsham. 2 E. R. 303

59 A servant, a few days before the end of the year for which he was hired, went away in order to get another place for the next year, without asking his master's consent; on his return, before the end of the year, the master insisted on turning him away, and offered him his wages up to that time, which he accepted without making any objection; this was held to be a dissolution of the contract, and defeated the settlement, though the servant *wished* to stay out the year. *Rex v. Clayhydon (Inhab.)*

4 T. R. 100

60 Where a servant who had been hired for a year, was beaten by her master sixteen days before the end of the year, on which she desired him to dismiss her from his service, threatening to apply to a magistrate for redress, the master paid her the whole year's wages, and told her she might serve the remainder of the year, but the servant went away; it was held, that she gained no settlement. *Rex v. Upwell (Inhab.)* 7 T. R. 438

61 A servant hired for a year, four months before the end of the year, being discharged by her master upon a trivial dispute, applied to a magistrate for redress, being desirous of continuing in the service: The magistrate

ordered, the master to take her back, or pay the whole year's wages; the master refused to take her back, but paid the whole year's wages, (but not some wool which he also had agreed to give her if she behaved well). The servant took the money, and tendered herself as a servant to others: Held, that the contract was thereby dissolved and no settlement gained under it, as in case of a mere dispensation of service. *Rex v. King's Pyon (Inhab.)*

4 E. R. 351

62 A servant, who had been hired for a year, was taken ill five days before the end of the year, on which he went to his brother's, and sent to his master for his money; the latter sent him the whole year's wages, deducting 1s. for the rest of the year, and the servant said he was satisfied: it was held, that this was an agreement by the master and servant to put an end to the contract before the end of the year, and consequently that the servant gained no settlement. *Rex v. Whittlebury (Inhab.)*

6 T. R. 464

63 When before the end of the year the mistress asked the servant whether she chose to go away on a certain day (within the year), assigning as a reason that she had hired a new servant who wished to come to her then, and the servant said it was immaterial to her, and agreed to go then, which she did: the Court thought that was evidence sufficient to find an agreement to dissolve the contract before the end of the year. *Rex v. St. Peter, Mancroft, Norwich, (Inhab.)*

8 T. R. 477

64 A yearly servant, about a fortnight before his year expired, being too ill to work, his master paid him his whole year's wages, when he left the service, and went to an hospital, and never returned into his master's service: Held, a dissolution of the contract; and that no settlement was gained by such hiring and service. *Rex v. Sudbrook (Inhab.)*

4 E. R. 356

65 A pauper desired her mother to look out for a place for her; and the mistress, on the application of the mother some time before *Old Michaelmas*, said she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter;

though she informed her that she had got a place for her if she liked it. About a week after *Old Michaelmas*, the mistress applied to the pauper to know if she liked to come into her service, and they then agreed for the first time for certain yearly wages, (the same as the other servants), with liberty of parting at a month's wages or warning: The Court held, that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas*, or before, when the mother spoke to the mistress: And the pauper having given a month's previous notice to quit at *Old Michaelmas-day*, which the mistress accepted, and procured another servant to come on that day, when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week; to which the mistress said that it did not signify as she had got another servant in her place: Held, that this was a dissolution of the contract before the end of the year, by the notice to quit given and accepted; and not a mere dispensation of the service; and consequently no settlement was gained by such hiring and service. *Rex v. Rushall (Inhab.)*

7 E. R. 471

66 The sessions stated the fact that the pauper was hired on *Michaelmas* day, 10th of Oct. 1797, for a year ending on *Michaelmas* day, 10th Oct. 1798; that he continued to serve till the 8th of October, when he married, and his master consented to his leaving his service, and paid him his wages; and on the 9th the pauper hired himself to and went into the service of another master: Held by one Judge, that these facts would have warranted the sessions in drawing a conclusion of fact, that the master dispensed with the service for the remaining day of the year; but the Sessions having impliedly drawn a different conclusion by quashing the order of removal, all the Court held, that the case, as stated, shewed a dissolution of the contract before the end of the year, and consequently that no settlement could be gained by such hiring and service. *Rex v. Maidstone (Inhab.)*

13 E. R. 550

67 Five days before the end of the year, a servant absented himself by leave one day from his master's service to look out for another place; and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his whole wages, which the servant refused; but was then ready to have accepted his whole wages: though he would rather have staid out his year: and immediately he applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half-a-crown to be deducted; and the servant thereupon hired himself to another master before his first year was out; and, after the year received from his first master his whole wages: The Court held that this was a dissolution of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service. *Rex v. Leigh (Inhab.)*

7 E. R. 539

68 Where a servant under a yearly hiring served two months, and was then committed and imprisoned under stat. 20 G. 2. c. 19. for misbehaviour to his master, and at the instance of his master, and after nine days' imprisonment, was, upon the application of his master discharged, and returned to him and served him as before, and no mention was made of the terms on which he was to serve, and he served in the whole from the time of the hiring for about 19 months: Held, that the commitment and imprisonment were not a dissolution of the contract, or such an interruption of the service, as to prevent a settlement; and therefore he gained a settlement by such hiring and service, although he was married when he returned to his master, and received no wages for the time he was in custody. *Rex v. Barton-upon-Irwell (Inhab.)*

2 M. & S. 329

69 A yearly servant three weeks before the end of his year hired himself to a second master, provided his first would let him go; the former master refused at first, but a week after said, "I have got a new servant, you may go now, I have not work for you both;" and paid him his whole year's wages:

Held, that this was a dissolution of the contract with the first master, and prevented the pauper's gaining a settlement under it. *Rex v. Thistleton (Inhab.)*

6 T. R. 185

70 If a pauper in service at A. under a yearly hiring be removed to B. and does not appeal, but returns in a few days to his master at A., is received by him, serves out the year, and receives his full wage: yet he gains no settlement in A. *Rex v. Kenilworth (Inhab.)*

2 T. R. 598

71 The order of removal in that case put an end to the service. 2 T. R. 598

72 A yearly servant served forty days in A., then forty days in B., and afterwards returned to his father's house in A., for the three last days of the year: Held, that he was settled in A. *Rex v. Under Millbeck (Inhab.)*

5 T. R. 387

73 A yearly servant, being deprived of his reason forty days before the end of the year, was taken home by his father, who lived in another parish, and who received the wages for the whole year: Held, that the servant was settled in the master's parish, though he continued in his father's house during the remainder of the year. *Rex v. Sutton (Inhab.)*

5 T. R. 657

74 The 40 days' residence necessary to confer a settlement by hiring and service, must be within the compass of a year. *Rex v. Denham (Inhab.)*

1 M. & S. 221

75 This Court will not upon a case stated presume a hiring for a year, for that is a fact to be found by the sessions. *Rex v. Seacroft (Inhab.)*

2 M. & S. 472

(d) By Apprenticeship.

See post, tit. STAMPS.

1 A person occupying lands within a parish, is compellable to receive a parish apprentice, though he do not reside within such parish. *Rex v. Clapp.*

3 T. R. 107

2 And if several persons hold lands in partnership, in the parish of A., some of whom reside on such lands, and the others in another parish, the latter, as well as the former, are liable to take parish apprentices in A. *Rex v. Barwick.*

7 T. R. 33

3 So, although it is enacted by stat. 20 G. 3. c. 36. relative to the binding of poor apprentices within particular in-

- corporated districts, that no person shall be bound to receive any such apprentice, unless he be an inhabitant and occupier in the parish where such child lives, it is not necessary that the master should actually reside in the parish: if he be an occupier there it is sufficient; for *inhabitant* and *occupier* are, for this purpose, synonymous terms. *Rex v. Tunstead and Happing Hundreds.* 3 T. R. 523
- 4 Service under an unstamped agreement of apprenticeship, gives no settlement. *Rex v. Ditchingham (Inhab.)* 4 T. R. 769
And see *Rex v. Edgworth.* 3 T. R. 353
- 5 Serving forty days under an indenture of apprenticeship to an infant will give a settlement. *Rex v. St. Petrox, Dartmouth (Inhab.)* 4 T. R. 196
- 6 Where the master and the father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: the Court held, that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master, but the son's service in fact being merely voluntary, was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *Rex v. Cromford (Inhab.)* 8 E. R. 25
- 7 An indenture binding an adult as an apprentice, which was not executed by herself, but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice; and consequently no settlement can be gained by her under such indenture. *Rex v. Ripon (Inhab.)* 9 E. R. 295
- 8 If a poor boy be bound apprentice by the parish officers, with the consent of two justices of the county to a master residing in a different parish and county, and all the parties (except the apprentice) sign the indenture, the apprentice will gain a settlement in the parish of the master by residing there 40 days under the indenture. *Rex v. St. Nicholas, Nottingham (Inhab.)* 2 T. R. 726
- 9 An indenture binding out a poor apprentice, executed by W. S. churchwarden, and J. G. overseer of the poor of a hamlet maintaining its own poor separately from the parish at large, not being impeached by evidence negating its execution by a majority of the churchwardens and overseers of the hamlet, shall be deemed good, by intending that there were two overseers for the hamlet as required by stat. 13 & 14 Car. 2. c. 12. s. 21. and only one churchwarden, by custom, in the same place; and therefore the apprentice serving 40 days under it gains a settlement. *Rex v. Hinckley (Inhab.)* 12 E. R. 361
- 10 Where the parish officers wishing to put out a child of the age of nine years as apprentice, upon the refusal of his mother, withdrew her parish allowance; but two years afterwards, she not being able to support him, went to the parish officer and consented to her son's being put out, and by desire of the parish officer, chose a master, to whom the parish officer agreed to give three guineas, &c. and afterwards all the parties met, and went before the Justices, who thinking that the master had already a sufficient number of apprentices, refused to bind the son; whereupon the parish officer, declaring that if he could not have him bound there he would elsewhere, took the parties to an inn, and procured an indenture, which was filled up and executed, and the son, with his mother's consent, bound himself for seven years: Held, that the sessions were not warranted in finding fraud, so as to defeat the settlement under the indenture. *Rex v. Kilby (Inhab.)* 2 M. & S. 501
- 11 An indenture of a parish apprentice assented to by two justices *separately* is void, and gives no settlement. *Rex v. Hamstall Ridgware (Inhab.)* 3 T. R. 380
- 12 But the assent of two magistrates is sufficiently signified by one of them first signing alone, and being afterwards present when the other signs. *Rex v. Winwick (Inhab.)* 8 T. R. 454
- 13 Since the 13 & 14 Car. 2. c. 12. an indenture of apprenticeship executed by the overseers of a township which has no churchwardens or chapel-wardens, and maintains its own poor separately, is a valid indenture, although neither of the churchwardens of the

- parish at large within which the township is situate join in the execution: therefore, a service, under such indenture was held to confer a settlement. *Rex v. Nantwich (Inhab.)* 16 E. R. 228
- 14 Where an apprentice covenanted in the indentures to provide for himself meat, drink, lodging, and physic in sickness, during the term, for which benefit to the master no additional duty was paid under stat. 8 Ann. c. 9. s. 45. the indentures were nevertheless held good, and a settlement was gained under them; it not appearing whether certain weekly payments, which the master covenanted to make to the apprentice during the term, were not an equivalent. *Rex v. Walton in Le Dale. (Inhab.)* 3 T. R. 515
- 15 If the friends of an apprentice covenant to maintain him, and to provide him with clothes, this is not such a benefit as is liable to the duty imposed by stat. 8 Ann. c. 9. s. 45: And consequently a settlement may be gained by serving 40 days under an indenture of apprenticeship, containing such a covenant, although no additional duty be paid for it. *Rex v. Leighton (Inhab.)* 4 T. R. 732
- 16 A master stipulating for 4d. out of every 1s. of the earnings of his apprentice, is no benefit to him within the stat. of *Anne*, for which an additional duty is to be paid; being by law entitled to the whole. *Rex v. Wantage (Inhab.)* 1 E. R. 601
- 17 Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly, by stat. 8 Ann. c. 9: Held well, though in fact only four guineas were paid; for the full sum received, given, paid, agreed, or contracted for, as required by the Act, was inserted, and the duty paid for it; and the stamp used was of the same description, and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for, supposing that would have sufficed. *Rex v. Keynsham (Inhab.)* 5 E. R. 309
- 18 An indenture binding out an apprentice, with the consent of the trustees of certain funds bequeathed for the binding out poor apprentices, which was executed by the apprentice and the master, and recited the trustees to be parties, and in which the consideration paid by the trustees to the master was stated to be 20l., was held to confer a settlement though it was not executed by the trustees, and though the master actually received only 16l. 15s. 6d., the residue being retained by the agent of the trustees for costs and expenses of the binding. *Rex v. Quainton (Inhab.)* 2 M. & S. 338
- 19 If A. serve seven years as an apprentice, and there be no indenture, he cannot gain a settlement either as an apprentice or as a yearly servant. *Rex v. Margram (Inhab.)* 5 T. R. 153
- 20 It is a general rule that a defective contract of apprenticeship cannot be converted into a contract of hiring and service, so as to give the apprentice a settlement as a yearly servant by serving under it. Whether a contract be a contract of apprenticeship, or of hiring and service, must depend on the intention of the parties, which is to be collected from the whole of their agreement. A contract of apprenticeship may be formed without using the term "apprentice." *Rex v. Laindon (Inhab.)* 8 T. R. 379
And see *Rex v. Shinfield (Inhab.)* 14 E. R. 541
And *Rex v. Burbach (Inhab.)* 1 M. & S. 370. *ante*, page 530
- 21 Where the father agreed with R. that R. should take his son for six years, to teach him the trade of a frame-work knitter, and he was to allow R. 9s. a week for the three first years, for teaching him and his board and lodging: Held, that this was a defective contract of apprenticeship, and therefore the son did not gain a settlement under it. *Rex v. Mountsorrell (Inhab.)* 2 M. & S. 460
- 22 A contract under seal and stamped, to serve another for three years, at so much per week, the master agreeing to learn the other a trade, and the latter agreeing, if he lost any time to the prejudice of his master, to abate so much per day, constitutes an apprenticeship: And, at any rate, the pauper having served under it for more than a year gained a settlement either as an apprentice or as a hired servant. *Rex v. Rainham (Inhab.)* 1 E. R. 531
- 23 Where a pauper agreed with a weaver to serve him for a year and a half, and the master was to teach him to weave, and the pauper was to have half his earnings, and find himself in

- every thing; under which contract the pauper served his master for above a year: Held, that he thereby gained a settlement as by hiring and service; it being the apparent intention of the parties to create the relation of master and *servant*, and not that of master and *apprentice*. *Rex v. Eccleston (Inhab.)* 2 E. R. 298
- 24 Where on account of illness, the apprentice resided with the consent of his master, with a relation, in another parish, and slept there for more than forty nights in the whole, but the last night in his master's parish: Held, that this was not such a residence as an *apprentice*, so as to gain him a settlement in the parish where he so resided on account of illness. *Rex v. Barmby (Inhab.)* 7 E. R. 381
- 25 An apprentice who went to lodge at his mother's, in an adjoining parish to that of his master's, for the purpose of getting cured of a disorder, but who continued to serve his master all the time, by going of errands for him, and attending when wanted, gains a settlement by such service in the parish where he lodged. *Rex v. Stratford-upon-Avon (Inhab.)* 11 E. R. 176
- 26 An apprentice to a ship-owner living at *A.* gains a settlement by residing on board his master's ship for forty days in *B.*, while the ship was staying and trading there in the course of his master's trade and employ, upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.*, where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than forty days before his apprenticeship expired, will not gain him a settlement in *A.* *Rex v. Topsham (Inhab.)* 7 E. R. 466
- 27 An apprentice after serving out most of his time with his master in *S.* obtained a subsequent settlement in *H.* by serving another master there for 40 days by the direction of his first master, who was to receive 3s. a-week from the second master for such service; and being then dismissed by the second master, the apprentice, unknown to the first master, and without any intention of returning into his service again, lodged for one night in the same parish of *S.*, and then went into a third parish, and worked for himself for a month, when, his term being expired, he returned to *S.*, and went with his original master to a common friend, with whom the indenture had been deposited, to take it up; which he did, and carried it away: Held, that the settlement was not brought back to *S.* by such *casual* lodging of the apprentice one night in the same parish of his master, without any resumption of, or even intention to resume, the service with the first master under the indenture. *Rex v. Smarden (Inhab.)* 13 E. R. 452
- 28 Where an apprentice, who worked and slept at his master's works in *C.* at weekly wages, went with their knowledge on *Saturdays* and *Sundays* to *R.* and slept there, and returned to his work on *Mondays*, and was received by them; and on the *Saturday* afternoon before *Shrove Tuesday*, having the night before slept at *C.* received his pay, and never returned again to the service, and slept that and the following night at *R.*; but on quitting the works on *Saturday*, had not formed any intention not to return, nor had he on the *Sunday*; nor could he fix the time when he determined not to return: Held, that his settlement was at *C.*, his service having ended on his quitting on *Saturday*. *Rex v. Ribchester (Inhab.)* 2 M. & S. 135
- 29 If an apprentice live with his master forty days in *A.*, then forty days in *B.*, and then one day in *A.*, he is settled in *A.* *Rex v. Brighthelmstone (Inhab.)* 5 T. R. 188
- 30 Where a master, after giving his apprentice leave to get another master, recommended to him to go to a particular person in the same business, and make an agreement with him for his own good, which he accordingly did, and served his second master two months before his indentures were given up to him by his first master, such service with the second master gained a settlement. *Rex v. Holy Trinity in the Minories (Inhab.)* 3 T. R. 605
- 31 So the mere knowledge of the master of the apprentice serving another person, without a consent to the particular individual, is not sufficient. 3 T. R. 605
- 32 An apprentice offered his master a guinea "to let him off," to which

the master agreed, and was also to give him a suit of clothes when the guinea was paid, but the indentures were not delivered up or cancelled. The guinea not being paid, the indentures still subsisted in law, and a settlement may be gained by serving another master with the consent of the first. The sessions ought properly to find the fact of such consent, and not merely evidence of it: but having found that on application by the apprentice to his original master for leave to serve one *B.* who would not take him without, the master said "he might go with all his heart, and that it would be a good thing for him to learn the trade:" this was holden sufficient evidence to warrant the conclusion of the sessions, that the original master had consented to the particular service. *Rex v. Shebbear (Inhab.)*

1 E. R. 73

- 33 Where the master of an apprentice told him "that he had no further employment for him, and he might go where he pleased;" and the apprentice hearing of another master, was going to him, and being met by his original master, and asked where he was going, answered that he was going to *U.*, to which the master replied, "*he might go there or where he pleased:*" Held, this was not such a particular assent of the original master to the service with *U.* as would enable the apprentice thereby to gain a settlement, though the indentures were not delivered up or cancelled. *Rex v. Crediton (Inhab.)*

1 E. R. 59

- 34 The pauper, an apprentice, being about to marry, told his master that he wished to provide and work for himself, to which the master consented, and said he might do the best he could for himself; but nothing was said about the indentures, and they were not in fact delivered up or cancelled; the pauper afterwards engaged to work with another master, who told the original master that he had got the pauper at work, to which the original master answered, "I am glad of it, he was a bad lad, and I could make nothing of him:" Held, this was not such a consent to the particular service as would confer a settlement in the parish where the pauper then lived

with the second master. *Rex v. St. Helen, Stonegate (Inhab.)* 1 E. R. 285

- 35 Where *J. G.* was bound apprentice by indenture in 1764 in the township of *C.*, and upon the death of his master in 1769 was assigned by the widow by indorsement on the indenture, whereby she acquitted and assigned over her apprentice *J. G.* for all the remainder of his apprenticeship, and *J. G.* served under such assignment in the township of *K.* which township for the last seven years had regularly relieved the family of *J. G.* whilst residing in another parish: Held, that this was evidence from which the sessions ought to have presumed, after such a distance of time, that the widow was executrix and capable of assigning the apprentice, and that *J. G.* had acquired a settlement in *K.*, and consequently that his son, who had gained no settlement for himself, was there settled; and the sessions having drawn a contrary conclusion, the Court quashed the order of sessions. *Rex v. Barnsley (Inhab.)* 1 M. & S. 377

- 36 To enable an apprentice to gain a settlement by serving a second master, the service must be performed with the consent of the first master, and the agreement proved. *Rex v. St. Paul's, Bedford (Inhab.)* 6 T. R. 452

- 37 A parish apprentice who was bound by her original master to another master by a new indenture of apprenticeship, without reference to or recognition of the original indenture, which still subsisted in law, does not gain a settlement by serving her new master, as upon a constructive service of the original master under the first indenture: this being only evidence of the first master's consent to the contract of apprenticeship. *Rex v. Christowe (Inhab.)* 11 E. R. 95

- 38 An apprentice agreed verbally with his master to purchase the rest of his time, and that the indentures should remain with the master till payment of the sum stipulated, part of which only was paid; before the expiration of the time he served another man at the recommendation of his original master above 40 days: this was holden to enure as a service under the indentures. *Rex v. Chipping Warden (Inhab.)*

8 T. R. 108

39 Supposing an infant, who binds himself an apprentice, may put an end to the apprenticeship at his election, yet he does not put an end to it by leaving his master's service and entering into the King's service. *Rex v. Hindringham (Inhab.)* 6 T. R. 557

40 In such a case the indentures continue in force for the term, and no settlement can be gained during that term by hiring and service.

6 T. R. 557

41 An apprentice cannot gain a settlement in a different parish by serving another master, unless there be an express consent of the original master to the particular service: a mere recommendation is not sufficient. *Rex v. Sandford (Inhab.)* 1 T. R. 281

42 The latter part of the service of an apprentice may be joined to the former, notwithstanding an intervening service. 1 T. R. 281

43 Where there has been such an agreement between the master and the apprentice to give up the indentures, as that to an action of covenant brought by the former, the latter could plead the matter in bar; or so as to enable the apprentice to bring *trover* or *detinue* for the indentures on the master's refusing to deliver them up; the indentures are considered as cancelled, for the purpose of enabling the apprentice to gain a settlement by hiring and service, though the indentures still subsist in fact. *Rex v. Harborton (Inhab.)* 1 T. R. 139

44 Since the stat. 32 G. 3. c. 57, for the regulation of parish apprentices; which recites "that on the death of the master during the term of such apprenticeship, the agreement for service on the part of the apprentice is at an end;" but the covenant for maintenance on the part of the master still continues as far as his assets extend, or doubts have arisen with respect thereto, &c.; and then enacts that such covenants for maintenance of parish apprentices, with whom no more than 5*l.* shall be given, shall not continue in force longer than for three calendar months after the death of the master, &c., during which three months the apprentice shall continue to serve the executors, &c. or their appointee; and that within the three

months two justices of the peace, on application of the widow, or certain relatives of the master, may, by indorsement on the indenture, &c. direct such apprentice to serve out his time with the applicant; such applicant having lived with and been part of the family of the master, &c. at his death; but otherwise, that such apprenticeship shall be determined; and then it provides (s. 5.) "that no thing thereinbefore contained shall extend to any parish apprentice, but to such only as shall be living with and make part of the family, or be in the actual employment of the original master, &c., or of any subsequent master, &c. appointed under the provisions of the Act at the time of the death of such master, &c."

Held, that a parish apprentice, who was not living at the time of his mistress's death with her appointee under the provisions of the Act, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress with the consent of the son and assignee of the original mistress, given after the death of the original mistress; the contract of service being declared by the recital of the Act to be at an end upon the death of the original mistress, unless continued in the manner described in the 2d, 3d, and 4th sections of the Act; to which sections the proviso in the 5th section seems properly to apply. *Rex v. Sheephead (Inhab.)*

15 E. R. 59

45 The sessions upon an appeal, presuming that an indenture of apprenticeship executed thirty years before (under which the pauper claimed his settlement, and under which he regularly served seven years,) and which was proved to be lost, was regularly stamped, in proportion to the apprentice-fee received by the master with the pauper, confirmed an order removing the pauper; and though it was proved before the sessions that search had been made at the Stamp Office, where it did not appear that any such indenture had been stamped or enrolled, yet the Court held, that this was not sufficient to rebut the presumption, and therefore confirmed the order of sessions. *Rex v. Long Buckby (Inhab.)* 7 E. R. 45

- 46 To establish a settlement by apprenticeship, it was proved that the indenture was of two parts, that one had been destroyed, that the other had come to the hands of *A.*, who, when asked for it, said he could not find it, but *A.* was not subpoenaed to give evidence; and upon that ground the evidence offered was deemed insufficient to establish the apprenticeship. *Rex v. Custleton (Inhab.)* 6 T. R. 236
- 47 Indenture produced, but no subscribing witnesses thereto; those who call for it from the opposite party need not prove its execution. *Middegay v. Sudbury (Inhab.)* 2 T. R. 41
And see EVIDENCE, ante, 311, &c.

(c) Renting a Tenement.

- 1 An incorporeal hereditament is a tenement within the meaning of the stat. 13 & 14 Car. 2. c. 12. *Rex v. Hollington (Inhab.)* 3 E. R. 113
Rex v. Chipping Norton. (Inhab.) 5 E. R. 239
- 2 The fact of the pauper's taking a tenement of 10l. a-year is sufficient to give a settlement under stat. 13 & 14 C. 2. c. 12. though the lessor may have no title. *Rex v. Old Atresford (Inhab.)* 1 T. R. 358
- 3 Renting a rabbit warren, will give a settlement, though the party taking it have no interest in the soil, except that of entering upon the warren to kill rabbits. *Rex v. Piddletrentnide (Inhab.)* 3 T. R. 772
- 4 Where the pauper rented the fishery of a pond, with the spear-sedge, flags, and rushes growing in and about the same, for 10l. a-year, "the Court understood that the soil passed with it, and that it was a tenement within stat. 9 & 10 W. 3. c. 11." *Rex v. Old Atresford (Inhab.)* 1 T. R. 358
- 5 So repairing gates was held equivalent to payment of rent. *Rex v. Whixley (Inhab.)* 1 T. R. 137
- 6 A cattle-gate is a tenement within that statute, so as to enable the occupier of it to gain a settlement. *Rex v. Whixley (Inhab.)* 1 T. R. 137
- 7 The grazing cattle in a meadow and using a stable and cart-house gratis, under an agreement by which the pauper was to pay certain sums weekly for the liberty of grinding wheat at a mill, was held to be no renting of a tenement. *Rex v. Hammersmith (Inhab.)* 8 T. R. 450, n.
- 8 A settlement may be gained by renting a right of common in gross of the annual value of 10l. that being a tenement within stat. 13 & 14 Car. 2. *Rex v. Dersingham (Inhab.)* 7 T. R. 671
- 9 Where a corporation, by a verbal agreement with a pauper, leased to him the tolls of a market for above 10l. a-year: Held, that he could not gain a settlement thereby, as no interest could pass from a corporation but under their seal; therefore he had no more than a mere licence to collect the toll. But if such toll had been leased to him under seal of the corporation, *semble*, that he would have gained a settlement by residing for 40 days in the same parish where the market was. *Rex v. Chipping Norton (Inhab.)* 5 E. R. 239
- 10 Taking the hay, grass, and aftermath of a meadow for ten months, at the annual value of 10l. is a taking of a tenement within the 13 & 14 Car. 2. c. 12. *Rex v. Stoke (Inhab.)* 2 T. R. 451
- 11 A settlement may be gained by renting the fogs or after-grass of a meadow of the yearly value of 10l. *Rex v. Brampton (Inhab.)* 4 T. R. 348
- 12 Renting a dairy will give a settlement. *Rex v. Piddletrentnide (Inhab.)* 3 T. R. 772
- 13 The pauper rented 20 cows at 3l. 10s. per annum each, and agreed with the farmer that they should be fed in particular fields for a certain part of the year, during which time no other cattle were to depasture there; this was held to be a tenement within stat. 13. & 14 Car. 2. c. 12. *Rex v. Tolpuddle (Inhab.)* 4 T. R. 671
- 14 Renting a dairy (including the cows and their pasture) at above 10l. a year in value, will not confer a settlement, if the annual value of the lands on which the cows were to be depastured were under 10l. *Rex v. Minworth (Inhab.)* 2 E. R. 198
- 15 One who resided on a tenement of 5l. a-year in the parish of *W.* and at the same time rented the *ley* (i. e. pasturage) of two cows from *Mayday* to *Michaelmas* in certain land in *H.* at six guineas, thereby gains a settlement in *W.*, though he were not entitled to the exclusive pasturage of the land in *H.* *Rex v. Hollington (Inhab.)* 3 E. R. 113
- 16 Renting the hire or privilege of

- milking two cows belonging to another, at so much per week, per cow, for 40 weeks; which cows were to be *depastured* by the owner on his farm in common with his other cattle, and were to be milked by the pauper; will gain him a settlement if the pasturage of the cows be worth 10*l.* a year. *Rex v. Stoke-upon-Trent. (Inhab.)* 10 E. R. 496
- 17 Where the pauper applied to the owner of a farm for the *milking of a cow*, which it was agreed that he should have *for the season*, at 9*l.*; and the particular cow was then pointed out; though nothing was said as to how or where the cow was to be fed, further than that he was then told that the owner's farming man would inform him *in what pasture the cow would be first milked*; of which he was afterwards informed; and so from time to time as the pasture was changed: Held, that this was sufficient evidence of a contract for the taking of a *pasture-fed cow*, and by consequence of a tenement within the statute, so as to confer a settlement on the pauper, who rented another tenement at the same time, of the annual value altogether of 10*l.* *Rex v. Darley Abbey (Inhab.)* 14 E. R. 280
- 18 The renting by a needle-maker of two out of six pointing places in another's mill, any two of which he was at liberty to use from time to time at 16*l.* a-year rent, and engaging also to do all his landlord's work in preference to that of others, for which he was to be paid by the piece, is not the taking of a tenement within the statute so as to gain a settlement by it. *Rex v. Dodderhill (Inhab.)* 8 T. R. 449
- 19 The renting by a needle-maker of certain *runners* in another's mill, together with a *packeting-room*, of all which he had the exclusive use (a *runner* being piece of machinery for scouring needles screwed down to the floor of the mill,) the whole being of the annual value of above 10*l.* including the separate value of the *runners*, is not in the taking of a *tenement*, whereby a settlement can be gained. *Rex v. Tardibigg (Inhab.)* 1 E. R. 528
- 20 A contract for a *standing-place* in another's mill for a carding machine, (the party's own property,) which was fastened to the floor and the roof, for the purpose of being worked by the steam-engine of the mill: for which the party was to give 20*l.* a-year, with liberty to quit on giving three months' notice, is not a taking of a tenement, but a mere licence to use the machinery of the mill; and therefore no settlement can be derived under it. *Rex v. Mellor (Inhab.)* 2 E. R. 189
- 21 The taking of a tenement which, by having been cropped by the landlord with clover and grass-seeds, when let to the tenant, was worth 10*l.* a-year, but without that circumstance would have been of much less annual value, will confer a settlement. *Rex v. Purley (Inhab.)* 16 E. R. 126
- 22 The renting an acre of land at 8*l.* from *Easter* to *October*, for planting potatoes, where the land had been previously dug by the landlord for that purpose, and would not have been let for more than half that price if it had not been dug, was considered as a tenement of the yearly value of 8*l.* although the case stated that in a common way an acre of such land would not let for more than 2*l.* *Rex v. Ringwood (Inhab.)* 1 M. & S. 381
- 23 Renting a certain number of lugs of land, at so much per lug, for the purpose of planting potatoes, where the pauper agreed to take the land of the landlord ready ploughed and manured, and when he entered upon it, it was quite prepared, was held to be a renting of land of a yearly value, as it was increased by being ploughed and manured by the landlord, although when the pauper took it, the ploughing and manuring was begun, but not finished. *Rex v. West Cramore (Inhab.)* 2 M. & S. 132
- 24 A pauper rented land in *A.* of the annual value of 6*l.* 10*s.* 6*d.*, and built on part of it a post-windmill at the expense of 120*l.*, which by agreement with his landlord, he was to be at liberty to remove at pleasure: he let the mill for a part of the time at the rent of 9*l.* *per annum*: Held, that this was not the taking of a tenement of 10*l.* a-year, so as to confer a settlement in *A.* *Rex v. Lonthorpe (Inhab.)* 6 T. R. 377
- 25 A tenement found to be of the value of 4*s.* a-week, and to be demisable at all times of the year, if let *by the week*;

- but not to be of the value of 10*l.* a-year, to be let by the year, cannot confer a settlement on the occupier by residence thereon for forty days. *Rex v. Hellingley (Inhab.)* 10 E. R. 41
- 26 Residence for forty days, on a tenement at the yearly rent of 10*l.* the landlord paying rates and taxes, will confer a settlement on the tenant. *Rex v. St. Paul, Deptford (Inhab.)* 13 E. R. 320
- 27 The criterion by which the Court form their judgment is not the ability of the party coming to reside on a tenement of 10*l.* a-year; therefore, living upon a tenement of the value of 10*l.* a-year, although a part thereof is given out in charity, and is in another parish, gains a settlement. *Rex v. Willoughby (Inhab.)* 1 T. R. 458
- 28 Where a pauper rented a tenement of 8*l.* a year in *A.* and held another of 2*l.* 10*s.* per annum in *B.* under a parol demise from his brother to hold as long as the brother pleased, and to be taken by him again when he pleased, and was to pay nothing for it; this was held a sufficient taking of a tenement of 10*l.* per annum under stat. 13 & 14 Car. 2. c. 12., for the purpose of giving the pauper a settlement. *Rex v. Willongley (Inhab.)* 1 T. R. 458
- 29 In order to gain a settlement by coming to settle on a tenement of 10*l.* per annum, it is not necessary that the party should rent such a tenement, or that the whole should lie in one parish; it is sufficient if he occupy 9*l.* per annum of his own in the parish of *A.* and rent a tenement of 1*l.* per annum in the parish of *B.* *Rex v. Culmstock (Inhab.)* 6 T. R. 730
- And see *Rex v. South Lynn (Inhab.)* post. 544.
- 30 Where a pauper having a freehold estate in the parish of *A.* which he had let for 50*s.* per annum, rented a tenement in the parish of *B.* of the value of eight guineas per annum, and resided there 40 days: Held, that he did not gain a settlement in *B.*; as he could not be considered as the occupier of the freehold estate. *Rex v. South Bemfleet (Inhab.)* 1 M. & S. 154
- 31 *A.* agreed with *B.*, on *B.*'s taking a farm of *C.* of the yearly value of 120*l.* to become joint partner with *B.* in the stock and farm; but there was no agreement between *A.* and *C.*; it was held, that *A.*, who lived with *B.* on the farm more than forty days, thereby gained a settlement. *Rex v. Seamer (Inhab.)* 6 T. R. 554
- 32 A pauper took a tenement at 11*l.* a-year which he occupied, still receiving parish pay for six months after; having previously agreed to underlet to another, a part, for 5*l.* a-year, which other guaranteed to the landlord the payment of the rent, without which he would not have let to the pauper; but the pauper paid the whole rent for the first year: Held, that this was a coming to settle upon a tenement of 10*l.* a year within the stat. 13 & 14 Car. 2. c. 12. by occupying which for forty days irremovable, the pauper gained a settlement; though the sessions concluded from the whole of the case that credit was given by the landlord to the pauper for 6*l.* a year only of the rent, and that for the residue the credit was given to the guarantee; for if the pauper were legal tenant of the whole, it was immaterial whether credit were given him for the rent. *Rex v. Hooe (Inhab.)* 4 E. R. 362
- 33 A pauper having agreed to commence tenant of premises of the value of more than 10*l.* a year from the 5th of July, when the former tenant was to quit, by permission of the then tenant put in several of his goods in the shop, of which he received the key, on different days before the 25th of June, and afterwards worked in the shop on that day, finding the key of the house in the outward door, he took it, and put some goods in the house, by permission of the tenant and landlord, and continued to do the same on different days till the third of July, when he and his family went to sleep there; the proper tenant having left the house on the 25th of June: Held, that this putting of goods in the shop and house, by permission of the outgoing tenant and the landlord, and the going to work in the shop, was no occupation of the premises by the pauper, in the relation of tenant of the premises, before the time when his tenancy was agreed to commence; but that he was removable on the 28th of June, when he was actually chargeable to the parish. *Rex v. St. Michael, in Coventry (Inhab.)* 15 E. R. 567
- 34 Where a pauper was permitted by

- several persons, having a right of common, to occupy a tenement of 10l. a-year value, as a reward for his services as a hind, it was held that that gave him a settlement. The service of the pauper was equivalent to his paying rent. *Rex v. Melkredge*. 1 T. R. 598
- 35 The executor of a tenant from year to year of an estate under 10l. a-year may gain a settlement by residing on it forty days, though he had not proved the will at the time. *Rex v. Stone (Inhab.)* 6 T. R. 295
- 36 A. occupied a tenement of 10l. a-year, and died leaving three children, to two of whom he bequeathed 5s. each, and to the other, whom he made executrix, the residue of his property; the pauper, who had before married the executrix, resided on the tenement above 40 days, and paid rent for it; this was held to gain him a settlement, though the wife never proved the will. *Rex v. Neatherscal (Inhab.)* 4 T. R. 258
- 37 The occupation of a cottage for 40 days, by the leave of the former tenant, who then went out, under an agreement with him to pay the same rent to the landlord which he had before done, but without any authority from the landlord (the cottage, together with other premises occupied at the same time, being 10l. a-year and upwards,) was holden to give the occupier a settlement. *Rex v. Aldborough (Inhab.)* 1 E. R. 597
- 38 One may gain a settlement by renting a tenement of above 10l. a-year in the parish where he resided, though such residence be in a turnpike-house, as servant to the collector for whom he received the tolls; for the general Turnpike Act 13 G. 3. c. 84. s. 56. only says that "no gate-keeper or person renting the tolls and residing in the toll-house shall thereby gain a settlement, i. e. by such taking of the toll-house, or renting the toll." *Rex v. Denbigh (Inhab.)* 5 E. R. 333
- 39 A person renting the tolls and residing in the turnpike-house erected by order of the commissioners appointed by the stat. 30 G. 3. c. 67. for paving, lighting, and regulating the streets of Durham, and for other local objects, cannot gain a settlement in the parish, on account of the prohibition in s. 56 of the General Turnpike Act 13 G. 3. c. 84. *Rex v. Elvet (Inhab.)* 11 E. R. 93
- 40 Renting the tolls of a bridge, vested by act of parliament in a company of proprietors who are declared a corporation, will confer a settlement, although the shares of the proprietors are made personal estate, and the renting is not stated to be by deed. *Rex v. Bubwith (Inhab.)* 1 M. & S. 514
- 41 A foreigner may gain a settlement here by occupying a tenement of 10l. a-year for 40 days. *Rex v. Eastbourne (Inhab.)* 4 E. R. 103
- 42 A residence for forty days is indispensably necessary to enable a party to gain a settlement by residing on a tenement of 10l. per annum. *Rex v. Llanbedergoch (Inhab.)* 7 T. R. 105
- 43 So that, if a party after residing on such a tenement for twenty-nine days be forcibly prevented residing there eleven days more, he does not thereby gain a settlement. 7 T. R. 105
- 44 A. took a tenement of 10l. a-year in the parish of B. and after living in it with his family five days he was arrested and sent to prison in the parish of C. but his wife and children continued in it seven weeks longer: Held, that no settlement was gained in B. either by the husband or wife. *Rex v. St. George the Martyr, Southwark (Inhab.)* 7 T. R. 466
- 45 In order to gain a settlement by forty days' residence on a tenement, the party must stand in the relation of tenant of the premises during the whole time. *Rex v. South Lynn (Inhab.)* 5 T. R. 664
- And see *Rex v. St. Paul, Deptford*, 13 E. R. 320, ante, page 543.
- And *Rex v. Culmstock*, 6 T. R. 730, ante, page 543.
- 46 A residence of 33 days by a widow on a tenement of 10l. a-year, cannot be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement. 5 T. R. 664
- 47 In order to gain a settlement by taking a tenement of 10l. per annum, the occupier must reside in the parish where part of the premises lies. *Rex v. Knighton (Inhab.)* 2 T. R. 48
- 48 It is not necessary that a pauper should pay 10l. a-year in money for a tenement, in order to gain a settlement; it is sufficient if he occupy a tenement of the annual value of 10l. as tenant. *Rex v. Fritwell (Inhab.)* 7 T. R. 197

47 A man had a tenement of above 10*l.* a-year in *A.*, in which he generally, and his wife and family constantly resided for several years, but he occasionally slept in *B.*, where he had another tenement under 10*l.* a-year, which he had lately taken for the more conveniently carrying on of his business; and upon the whole he slept in *B.* above 40 nights, and particularly for the last night, when both the tenancies expired: Held, that his settlement was in *B.* *Rex v. St. Mary, Lambeth (Inhab.)* 8 T. R. 240

48 Where a pauper rented separate tenements of the joint yearly value of 10*l.*, in the parishes of *T.* and *R.*, and had a house in each, in one of which in *R.* his family resided, and he sometimes slept in one and sometimes in the other, and on the last night of his holding the tenement in *R.*, having slept the preceding night in *T.* he came, to *R.* to pack up his furniture and fetch back his family, and passed the night there, but did not sleep or go to bed, but was occupied in moving, and left the house with his family very early the next morning: Held, that his settlement was at *R.* *Rex v. Ringwood (Inhab.)*

1 M. & S. 381

49 Where a person renting and residing on a tenement of 10*l.* a-year in *A.* was removed to *B.* by an order of two justices, and afterwards returned to the same tenement without making any new contract, and resided there more than 40 days, he thereby gained a settlement, though the order of removal was unappealed from: for the contract was not thereby dissolved. *Rex v. Fillongly (Inhab.)*

2 T. R. 709

50 A fraudulent renting of 10*l.* per annum will not give a settlement. *Rex v. Woodland (Inhab.)* 1 T. R. 261

51 Where a pauper rented a meadow for ten guineas a-year, and did not stock it, but let the grass for the first half year to *A. B.* for three guineas, who stocked it and paid him, and then the pauper paid his landlord half a year's rent, and then let the mowing of his meadow to his landlord for five guineas, and the after-grass for two guineas, and at the end of the year received two guineas from his landlord on the balance of accounts: the

sessions adjudged this a fraudulent taking, which the Court confirmed.

1 T. R. 261

52 If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l.* per annum, it is decisive in the Court of King's Bench, though they state all the facts, and refer the consideration of those questions to the Court. *Rex v. Llanwinnio (Inhab.)*

4 T. R. 473

And see post, tit. SESSIONS.

53 By stat. 51 G. 3. c. 107. respecting the parish of *Clapham*, where the yearly rent or value of any house in the parish shall not amount to 20*l.*, or where any house (of whatever yearly rent or value) shall be let out to weekly or monthly tenants, at a rent payable at a shorter period than quarterly, or shall be let out in whole or in part in lodgings, the churchwardens, &c. may compound with the landlord for the parochial rates at a reduced rental, and if the landlord shall refuse to compound he shall be deemed the occupier, and shall be rated and pay the same, and his goods, and also the goods of his tenant, shall be distrained for the same, and the tenant shall deduct the same; proviso, that no tenant of any house as before-mentioned shall, by reason of his residing in or occupying the same, or by payment of any such rate in manner aforesaid, or which shall have been compounded for, be deemed to acquire a settlement in the parish, but in every such case the landlord shall be deemed to have paid the same, &c.: Held, that this proviso did not restrain a person from gaining a settlement in the parish, by occupying a house at the yearly rent of 12 guineas, which was not compounded for, nor refused to be compounded for. *Rex v. Streatham (Inhab.)* 2 M. & S. 468

54 Where a person engaged himself as waiter at an hotel, and had the tap or privilege of selling malt liquors there, and the use of the cellar for holding the liquors, which had a separate entrance, and of which he kept the key, and paid for his situation of waiter, and for the tap and cellar, the yearly sum of 60*l.*: Held, that this was not such an occupation of the cellar as to confer a settlement. *Rex v. Seacroft (Inhab.)* 2 M. & S. 473

(f) *By Estate.*

- 1 Where an estate has been enjoyed nearly twenty years without any interruption or claim, the Court will not permit the title to the possession to be examined in a settlement case. *Rex v. Butterson (Inhab.)* 6 T. R. 554
- 2 Residence on an equitable estate will confer a settlement. *Rex v. Offchurch (Inhab.)* 3 T. R. 117
- 3 A voluntary gift of an estate, though under the value of 30*l.* will give a settlement, and this whether the donee be a certificated man or not. *Rex v. Warblington (Inhab.)* 1 T. R. 241
- 4 A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing forty days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out letters of administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect a residence of those 18 days with a residence by such next of kin in the same parish for more than forty days, after the deaths of the intestate and his widow, before such administration granted. *Rex v. Horsley (Inhab.)* 8 E. R. 405
- 5 A husband may gain a settlement by residing on an estate vested in trustees for the separate use of his wife. *Rex v. Offchurch (Inhab.)* 3 T. R. 114
- 6 The settlement of a child five years old, leaving the father's family, and living with different relations, till ten, follows that of the father; if he has not gained any settlement in his own right. 3 T. R. 114
- 7 Where a pauper purchased a leasehold tenement for less than 30*l.*, and afterwards conveyed the whole term to one in trust to let the premises, and out of the rents and profits to repay himself 10*l.* advanced thereon, and then to apply the rents and profits to the separate use of the pauper's wife

during her life, and afterwards to the pauper's own use for life if he survived her, and afterwards amongst their children: and the trustee suffered the pauper to continue to reside in the house above forty days, till becoming chargeable to the parish he was removed: Held, that he gained no settlement by such residence; for he had no immediate interest remaining in him at the time, but at most a doubtful and contingent future interest; it being uncertain whether the 10*l.* would ever be paid off; and even if it were, that not giving him any right to reside upon the premises. *Rex v. Tarrant Launceston (Inhab.)*

3 E. R. 226

- 8 A guardian in socage, residing on the ward's estate for forty days, gains a settlement in the parish; and cannot be removed from the possession of it at any time. *Rex v. Oakley (Inhab.)*

10 E. R. 491

- 9 The mother of an infant copyholder under 14 was holden to be guardian by law of the copyhold, there being no custom of the manor for appointing a guardian, and therefore entitled to reside immoveable on the estate. A grant of parcel of the waste of the manor to hold to B. and his heirs, by way of increase to his copyhold, by such services as the copyhold was subject to, for which B. paid a fine of 10*s.* was held not to enure as copyhold, there being no custom to warrant such grant, nor as an estate in fee-simple. *Rex v. Wilby (Inhab.)*

2 M. & S. 504

- 2*u.* If separate purchases may be added together, to make one purchase of 30*l.* within stat. 9 G. 1. c. 7. s. 5.

2 M. & S. 504

- 10 Under a devise of B. to trustees in fee of a certain farm, upon trust to dispose of the rents, issues, and profits, as to 40*s.* a-year to the poor of the parish, and the residue to be paid to a schoolmaster, to be nominated by them to teach the poor children to read the Bible; the trustees, by an agreement in writing, reciting that they were possessed of and entitled to a schoolhouse, yard, garden, and premises at M. which they had agreed to let to W. S. for the purposes mentioned, thereby agreed with W. S. to let him have the possession, use, and occupa-

tion of the school-house, &c. and premises, for the purpose of teaching the poor children of M. to read in the Bible, pursuant to the will of B.; and in consideration of his agreeing to teach the said children, he was to reside on the premises rent-free, and to be paid a certain annual sum by the trustees; who reserved to themselves a power, for reasonable cause, to suspend his salary, and that in case of his death they should turn his executors out of the premises, and appoint another schoolmaster thereto: Held, that this was an appointment, though irregular in its form, of W. S., under the will, as schoolmaster, so as to give him a life-interest in the school-house, &c. and premises of which he was put in possession, and to enable him to gain a settlement by forty days' residence thereon; though the trustees fraudulently withheld from him part of the rents, issues, and profits of the trust estate: and that the finding of the sessions, "that the appointment was fraudulent and in no respect consistent with the will," was to be understood in that sense only, and not as imputing fraud to the schoolmaster himself, who was thus wronged, and who engaged to execute all the duties of his appointment under the will. *Rex v. Owersby-le Moor (Inhab.)*

15 E. R. 356

11 The mortgagee of several houses, after recovering possession in ejectment, permitted the mortgagor to inhabit one of them for a particular purpose; the latter gained no settlement by such residence, for he was not in possession as mortgagor. *Rex v. Catherine (Inhab.)* 3 T. R. 771

12 If A. residing on a cottage of his own, grant it by lease and release to B. in fee, in consideration of 36l. with a proviso "that A. shall live in, and occupy the said cottage with the appurtenances, as he had theretofore done, for life;" B. only takes a remainder after an estate for life in A., and therefore has not such an interest during A.'s life as will enable him to gain a settlement by a residence on the estate. *Rex v. Eatington (Inhab.)*

4 T. R. 177

13 Secus, if there had not been the word "occupy" in the proviso. *ibid.*

14 The word "occupy" reserved the whole estate. 4 T. R. 177

15 A. agreed to give a cottage to his grandson on his marriage, but there was no conveyance; the grandson entered, fitted it up at his own expense, and lived in it several years; then the grandfather died intestate, leaving an only child (the mother of the grandson) who never entered on the cottage, or received or demanded any rent for it; afterwards the mother died, leaving a husband and an only son (the above-named grandson): It was held that the husband was not tenant by the courtesy; that the son (the above-named grandson) was seised in fee: and consequently that he gained a settlement by residing on it forty days. *Rex v. Great Farrington (Inhab.)*

6 T. R. 679

16 A cottage leased for 99 years, determinable on lives purchased by the pauper's wife before marriage, was in the lifetime of her first husband conveyed by them to a trustee in trust that he should by sale or mortgage raise 10l. (for the benefit of the parish by whom the family had been before relieved to that amount), interest and charges, and after payment of the same, in trust to re-assign the premises: the parties always continued in possession; and it did not appear whether the money was ever paid, or what was the value of the cottage: Held, that on the death of the first husband, the pauper who married the widow gained a settlement by residing forty days in the cottage, of which she had retained the possession. *Rex v. Edington (Inhab.)* 1 E. R. 288

17 A conveyance from a father to his son in consideration of natural love and affection and of 10l. is not a purchase within the stat. 9 G. 1. c. 7., and a residence upon it will give a settlement. *Rex v. Upton (Inhab.)*

3 T. R. 251

18 Purchase in that statute means for a "pecuniary consideration."

3 T. R. 251

19 Taking a grant of a copyhold with 1s. fine, 1s. heriot, and 1s. rent, is a purchase within the stat. 9 G. 1. *Rex v. Warblington (Inhab.)* 1 T. R. 241

20 Where a woman, on her marriage with a copyholder of a manor, in which the widows of husbands dying seised are entitled to their free-bench, gave a bond that the son of her intended husband by a former wife,

should have possession of part of the copyhold estate after the death of her husband, on condition of his repairing the part of the house reserved for her, and after the death of the husband the widow delivered up the possession to the son, according to the bond, he gained a settlement by residing on it forty days. *Rex v. Lopen (Inhab.)*

2 T. R. 577

- 21 One who is resident on an estate granted to him for lives, in consideration of two guineas fine and 1s. rent, cannot be removed therefrom, though actually chargeable. But *semble*, he cannot gain a settlement by forty days' residence as on *his own* estate under the stat. 9 G. 1., the consideration being under 30*l.* *Rex v. Martlet (Inhab.)*

5 E. R. 40

- 22 *A.* agreed to purchase a copyhold estate of *B.* for 60*l.*, which was then mortgaged to *C.* for 50*l.*; he paid the 10*l.* and was admitted, subject to the mortgage interest in *C.*; afterwards he borrowed 50*l.* of *D.* to pay off *C.*'s mortgage, and on *C.*'s mortgage being satisfied, he mortgaged the estate to *D.* for 50*l.*: it was held that *A.* gained a settlement by residing forty days on the estate. *Rex v. Chailey (Inhab.)*

6 T. R. 755

- 23 Where *A.* contracted for the purchase of a copyhold estate for 39*l.*, mortgaged to another person for 32*l.* and paid 7*l.*, and was admitted to the estate, subject to the mortgage, he did not gain a settlement by it under the stat. 9 G. 1. *Rex v. Mattingley (Inhab.)*

2 T. R. 12

- 24 A father having purchased a tenement for less than 30*l.* devised it in trust to be let to farm during his daughter's life, and to pay her the rents, after deducting the expenses: Held, that by forty days' residence thereon by permission of the trustee, after the father's death, she gained a settlement. *Rex v. Holm-east Waver-quarter (Inhab.)*

16 E. R. 127

- 25 Where a son having agreed to purchase a piece of land for 65*l.* applied to his father, who consented to advance 20*l.* left to his wife, on condition that a house should be built by the son on the land, which the father and mother were to have for their lives, and the life of the survivor, and afterwards the same to go to the son, but the father and mother were not

to sell or dispose of it, nor to take any other family into the house; but this agreement was only by parol: and afterwards the father advanced the 20*l.*: and the son completed the purchase, and the land was conveyed to him in fee, and he built a house, of which the father and mother took possession with his consent, and lived in it for three years, without paying any rent, when the father died, and the mother continued in possession: Held, that the father did not gain a settlement, by the residence on the land, nor was the mother entitled to reside on it immoveable. *Rex v. Standon (Inhab.)*

2 M. & S. 461

- 26 Where a pauper purchased a messuage for 52*l.*, under an agreement that the vendor should allow 40*l.* of the purchase-money to remain upon mortgage, and such mortgage was accordingly made, and 12*l.* only paid by the pauper to the vendor, who kept the title-deeds in his hands, but the pauper took possession, and resided in it for some years, but was unable to pay the rest of the purchase-money, and afterwards agreed to sell it to *B.* for 60*l.*, who thereupon paid the 40*l.* to the original vendor, upon his delivering up to him the title-deeds, and the remaining 20*l.* to the pauper, on the execution of the conveyance to him, at which time the pauper quitted the messuage, not having resided on it forty days after the payment of the 40*l.* to the original vendor: Held, that the pauper did not gain a settlement by residence on such estate. *Rex v. Olney (Inhab.)*

1 M. & S. 387

- 27 Where the consideration expressed in the deed of conveyance was 28*l.*, under which the pauper claimed his settlement; *parol* evidence was admitted to prove that 30*l.* was the real consideration. *Rex v. Scammonden.*

3 T. R. 474

- 28 A certificated man may gain a settlement by residing forty days on his own estate. *Rex v. Warblington (Inhab.)*

1 T. R. 241

S. P. *Rex v. Cold Ashton (Inhab.)*

1 T. R. 450, n.

- 29 A pauper having a freehold estate in the parish of *A.*, in the occupation of a tenant to whom he had let it, was deemed to gain a settlement by residing thereon forty days with the li-

cence of his tenant for making some repairs; such residence being considered as equivalent to a residence in any other part of the parish. *Rex v. Houghton le Spring (Inhab.)*

1 E. R. 247

30 While a pauper resided in the parish of *B.*, a freehold estate descended to his wife and her sisters, as coparceners, in the same parish; and in a month after, the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued: Held, that the pauper was thereby settled in *B.*, although the estate during all the time was in the occupation of another. *Rex v. Dorstone (Inhab.)*

1 E. R. 296

31 Where a pauper, as freeman of a town, was entitled, during his residence there, together with the other freemen, to a stinted common of pasture on a neighbouring moor for his own cattle, and also to a right to cut peat for his own use, and get limestones, &c. on the moor, and to put his children to the town-school free of expense, at which two of his children were placed at the time of his removal; but it did not appear that he had ever exercised the common of pasture, or had any cattle with which to exercise it: Held, that these rights did not amount to such an estate as to make him irremovable. *Rex v. Township of Warkworth (Inhab.)*

1 M. & S. 473

(g) Serving an Office.

1 A curate officiating in a parish for above a year, under the bishop's licence to perform the office of curate, at a certain annual stipend, is yet not such an annual officer as is entitled to gain a settlement by virtue of the stat. 3 W. 3. c. 11. s. 6. *Rex v. Wantage (Inhab.)*

2 E. R. 65

2 If a churchyard lie in two parishes, the sexton may gain a settlement in the one in which he resides, although no part of the church lie within that parish. *Rex v. Liverpool (Inhab.)*

3 T. R. 118

3 A settlement was gained by serving the office of hog-ringer for the parish; it being stated that the pauper was

chosen and sworn in at a court-leet; and that it was an office of great antiquity, and serviceable to the parish. *Rex v. Whittlesea (Inhab.)*

4 T. R. 807

4 A settlement may be gained by serving the office of tithing-man.

4 T. R. 808

5 Or that of borsholder.

ib.

6 Or that of ale-taster.

ib.

7 Or that of hayward.

4 T. R. 808

8 The sessions finding that a pauper was legally appointed governor of the workhouse in *I.* at an annual salary, and that the office of governor is a public annual office, and that the pauper served it for a year: Held, that a settlement was thereby gained in *I.* *Rex v. Ilminster (Inhab.)*

1 E. R. 83

9 But it should seem that the authority of the foregoing case is much shaken, if not entirely overturned, by the following, where it was held that the master of a workhouse appointed under 9 G. 1. c. 7. is not a public annual office or charge within the stat. 3 W. & M. c. 11. s. 6. the executing of which for a year will confer a settlement. *Rex v. Mersham (Inhab.)*

7 E. R. 167

10 *A.*, who at an adjournment of a court-leet holden 16th November 1792, was appointed to an annual office "for a year or until he should be discharged," and who executed the office until the adjournment of another court-leet holden 1st November 1793, did not thereby gain a settlement. *Rex v. Bow (Inhab.)*

8 T. R. 445

(h) By Payment of Rates.

1 A person gains a settlement by being rated and paying the poor-rate, though the rate be not regularly made or allowed. *Rex v. Edgbaston (Inhab.)*

6 T. R. 543

2 The stat. 35 G. 3. c. 101. which provides, that after the passing of that Act, no person who shall come into any parish shall gain a settlement by being rated to any tenement under 10l. a-year value, extends to persons who were in the parish at the time of the passing of the Act. *Rex v. Islington (Inhab.)*

1 E. R. 283

3 By stat. 10 Ann. c. 6. the parishes in Norwich are incorporated for the purpose of maintaining the poor out of one joint fund; but as far as respects strangers, those parishes continue se-

parate and distinct: therefore, a person who resides in one parish in *N.* and is rated in another, gains no settlement in either. *Rex v. St. Michael's, Thorn in Norwich (Inhab.)* 6 T. R. 536

4 The town and parish of *Birmingham* is, for the convenience of the overseers, divided into twelve divisions, under the superintendence of so many overseers respectively, each of whom copies the names out of the general rates into a separate book, of such of the inhabitants assessed as are within his district; and it is usual for each overseer to add such names to his book as ought to be inserted in the general rate; such addition is not in fact made till the next year, but in the mean while the general rate is from time to time ordered to be collected with the additions: it was held, that a person paying the rate, whose name is afterwards added in the overseers' book, does not thereby gain a settlement. *Rex v. Edgbaston (Inhab.)*

6 T. R. 540

5 *Secis*, if his name be added before he pays the rate. 6 T. R. 540

6 Where a farm was rated, and the landlord paid the rate, and was allowed it by the tenant, the tenant did not gain a settlement, it being stated that the overseer did not know that the tenant resided there. *Rex v. Llangam-marsh (Inhab.)* 2 T. R. 628

7 For though where a house is rated, it is *prima facie* a rate on the occupier, yet it is not conclusive. 2 T. R. 628

8 A settlement by being rated and paying rates cannot be proved by evidence of paying only, without the production of the rate, or accounting reasonably for the non-production of it; although the payer was both owner and occupier of the estate for which he paid the rate. *Rex v. Coppul (Inhab.)*

2 E. R. 25

9 An exciseman who was rated for his salary, which was in fact paid by the collector, without any deduction from the salary, does not thereby gain a settlement. *Rex v. Weobley (Inhab.)*

2 E. R. 68

10 A custom-house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him before-hand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the pa-

rish in which he is so rated and pays. *Rex v. Axmouth (Inhab.)*

8 E. R. 383

11 Whether the landlord or tenant be rated to the land-tax, (both names being in the rate), is a question of fact which must be found by the justices at sessions; and if they state it as a fact, the Court of King's Bench is precluded from considering whether they have drawn a right conclusion, though they state all the other circumstances of the case. *Rex v. Folkstone (Inhab.)*

3 T. R. 505

12 If they only state the evidence of that fact, the Court will send the case down to be re-stated. *Rex v. Rainham (Inhab.)*

5 T. R. 240

And see *post, tit. SESSIONS.*

13 A pauper being duly rated and having absconded, his landlord desired the collectors to levy a distress on his goods, lest he (the landlord) should lose the money; in consequence of which they went to the house, where the pauper's daughter said a friend of her father would assist them; they then went to this friend, who gave a guinea to the collectors; who thereout received the tax; this was held payment of the rate by the pauper. *Rex v. Bridgwater (Inhab.)*

3 T. R. 550

14 Payment by one who was assessed to a church rate upon householders only, and not upon the parishioners at large, will nevertheless gain him a settlement; for it is not less a public tax, because laid too narrowly; and it is charged and paid within the parish, which is all that is required by the stat. 3 W. 3. c. 11. s. 6. *Rex v. St. Bees (Inhab.)*

9 E. R. 203

(i) *By Certificate.*

1 A certificate directed to the parish of *A.* or any other in *C.* will operate upon delivery to the parish of *B.* which is also in *C.*; and by the stat. 8 & 9 W. 3. c. 30. a certificate need not be directed to any particular parish. *Rex v. Lillington (Inhab.)*

1 E. R. 438

2 A certificate must be signed by a majority of the churchwardens and overseers; if it be signed by two churchwardens and two overseers, where there are six of the former and four of the latter, it is void. *Rex v. Margam (Inhab.)*

1 T. R. 775

- 3 An appointment of one overseer alone for a township is bad in law; the statute 13 & 14 Car. 2. c. 12. requiring at least two; and a certificate granted by such overseer is void, and gives no security to the certificated parish against the gaining of a settlement there by the party named therein; such certificate not being made pursuant to the stat. 8 & 9 W. 3. c. 30., which requires it to be made "by the churchwardens and overseers, or the major part, or by the overseers, where there are no churchwardens." *Rex v. Clifton (Inhab.)* 2 E. R. 168
- 4 Where one of two churchwardens was also appointed overseer of the poor, a certificate of a settlement signed by both is a nullity, and does not prevent an apprentice, serving the certificated man in the certificated parish, from gaining a settlement therein: for the Certificate Act 8 & 9 W. 3. c. 30., requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *Rex v. St. Margaret, Leicester (Inhab.)* 8 E. R. 332
- 5 A certificate must be signed by a majority of the parish officers *de facto*, and must be directed to one parish in particular; and the Court will not inquire into the validity of the titles of the officers who signed the certificate. *Rex v. Wymondham (Inhab.)* 6 T. R. 552
- 6 The parish of *A.* consisted of several hamlets, having separate churchwardens and overseers; and a certificate having been granted by some of them, describing themselves as officers of the parish at large, evidence was admitted to shew that they were the officers of the hamlet in which the pauper was settled; for such evidence does not contradict, it only explains the certificate. *Rex v. Samborn (Inhab.)* 3 T. R. 609
- 7 An allowance of a certificate of a settlement, as having been duly executed written in the margin of the certificate, and signed by two justices, is alone sufficient proof of the certificate, where such certificate is above thirty years old, notwithstanding the allowance does not certify the affidavit of one of the witnesses as to the due execution and attestation of the certificate according to stat. 3 G. 2. c. 29. *Rex v. Farringdon (Inhab.)* 2 T. R. 466
- 8 2*u.*—Whether an allowance of a certificate written in the margin and signed by two justices, which allowance does not certify any affidavit made by one of the witnesses according to stat. 3 G. 2. c. 29. can be connected with a writing on the other side of the same paper, not signed by the justices, certifying that such an affidavit was made, so as to amount to proof of such certificate within the provisions of stat. 3 G. 2. c. 29? 2 T. R. 466
- 9 The parties producing, on an appeal at the sessions, a parish certificate of 30 years' date, need not give any account of it; the bare production of it is sufficient. *Rex v. Ryton (Inhab.)* 5 T. R. 259
- 10 A parish certificate of more than 30 years' date, acknowledging the pauper's grandfather to belong to the appellant's parish, produced by a rated inhabitant who was overseer of the respondent's parish, was held to be evidence, though it was objected that some account should be given of it, and that the witness was not competent to give that account; and it seems that if necessary, he might be examined as to the custody. *Rex v. Netherthong (Inhab.)* 2 M. & S. 337
- 11 A certificate must be delivered to the parish officers at the time of coming into the parish. *Rex v. Wensley (Inhab.)* 5 T. R. 154
- 12 Where the parish officers of *A.* engaged by a certificate to receive the certificated person, therein stated to be an unmarried woman, and the child of which she was stated to be then pregnant, and all other children she might afterwards have, it was ruled that the certificate did not extend to an illegitimate child born several years afterwards. *Rex v. Mathew (Inhab.)* 7 T. R. 362
- S. P. Rex v. Mortlake (Inhab.)* 6 E. R. 397
- 13 Nor does it extend to grandchildren: the word *family* extends only to those who live under the father's roof. *Rex v. Darlington (Inhab.)* 4 T. R. 797
- 14 When the son of a certificated person marries and lives in a house of his own,

he ceases to be under the protection of the certificate, and may gain a settlement in the certificated parish by being rated. *Rex v. Heath (Inhab.)*

5 T. R. 583

15 If a certificate be granted to *A.* and to *B. C.* and *D.*, his children, by name, *B.*'s residence in the certificated parish is protected by it, although he afterwards marry and live separate from his father, not having gained any settlement or lived out of the certificated parish. *Rex v. Testerton (Inhab.)*

5 T. R. 258

16 So under a certificate granted to *A.* and to *B.* and *C.* his children by name, the residence of *B.* and of his family in the certificated parish is protected by it, and a son of *B.* (not having been emancipated) cannot gain a settlement in the certificated parish by hiring and service. *Rex v. Batheaston (Inhab.)*

8 T. R. 446

17 A certificate granted under stat. 8 & 9 W. 3. c. 30. to the head of a family in general, extends to all his children living with him. *Rex v. Storrington (Inhab.)*

7 T. R. 136

And see 4 T. R. 797

18 But if the parties wish it, it may be so framed as to exclude a son of the age of fourteen, who maintains himself by his own labour. 7 T. R. 136

19 A certificate extends to a wife married after it is granted; and no apprentice to such wife, after the husband's death, can gain a settlement in the certificated parish by stat. 12 Ann. stat. 1. c. 18. *Rex v. Hampton (Inhab.)*

5 T. R. 266

20 A certificate granted by the parish of *A.* to the parish of *B.* acknowledging *C.* and *D.* his wife and their children to be their parishioners, is conclusive as between *A.* and *B.*, though *D.* were not the legal wife of *C.* *Rex v. Ullesthorpe (Inhab.)*

8 T. R. 465

21 Where a certificate was granted to a pauper and his wife, which latter appeared afterwards to have had a former husband living at the time, and a child was born during the cohabitation of the pauper and his supposed wife in the certificated parish, and was baptized as their child: this was held sufficient evidence of bastardy to settle the child where born. *Rex v. Lubbenham (Inhab.)*

4 T. R. 251

22 But such certificate is only *prima facie* evidence as to others; and there-

fore where the parish of *A.* granted a certificate to the parish of *B.* acknowledging the pauper and his wife to be their parishioners, it was held to be competent to *A.* as between that parish and *C.* to shew that the woman supposed to be the pauper's wife had a former husband living, at the time of her marriage with the pauper. *Rex v. Lubbenham (Inhab.)*

4 T. R. 251

23 If a person, formerly settled at *A.*, receive a certificate from that parish while living on his own estate at *B.* the certificate is discharged by his subsequent residence on his estate at *B.* *Rex v. Upton (Inhab.)*

3 T. R. 251

24 The settlement of a son, coming into a parish with his father under a certificate, as part of the father's family, not having before gained any settlement of his own, shifts with the settlement of the father in the certificated parish, though such son were named in the certificate. *Rex v. Leeke Wootton (Inhab.)*

16 E. R. 118

25 A certificate given to a pauper is an indemnity to the parish to which the pauper is going, from the consequences of permitting him to reside there. *Rex v. Newington (Inhab.)*

1 T. R. 356

26 A temporary absence for a particular purpose will not discharge a certificate. But if the pauper quit the parish to which the certificate is given without any intention of returning, the certificate is at an end. 1 T. R. 356

27 If a parish are desirous to get rid of a certificate, it is incumbent on them to shew clearly some matter in discharge thereof; and the Court will not presume such discharge from other facts. *Rex v. Warblington (Inhab.)*

1 T. R. 241

28 A certificate is not abandoned by a temporary absence of the certificated person; as where he goes to another parish on a visit, or on occasional business. *Rex v. St. Michael's, Coventry (Inhab.)*

5 T. R. 528

29 But where he leaves the certificated parish with all his family, and takes up his residence in another parish, it is abandoned, though he again return to the certificated parish, after an interval of two years. 5 T. R. 528

30 *Qu.*—Whether a certificate be abandoned by the head of the family returning to the certifying parish, leav-

- ing his children in the parish to which the certificate is granted? *Rex v. Darlington (Inhab.)* 4 T. R. 800, 801
- 31 All the parishes in *Norwich* are consolidated by Act of Parliament for the purpose of maintaining their poor out of one joint fund, but as far as respects strangers they are distinct parishes: therefore a certificate granted to the parish of *A.* in *Norwich* is discharged by the certificated person serving a year under a yearly hiring in the parish of *B.* in *Norwich*, though the certifying parish engage to receive the pauper when he shall become chargeable either to *A.* or to any other parish in *Norwich*. *Rex v. Wymondham (Inhab.)* 6 T. R. 552
- 32 Where the son of a certificated person served a year under a yearly contract in the parish granting the certificate, and then returned under age to the father's house for a short time, and then served another year with another master under a yearly hiring in the certificated parish: Held, that he did not gain a settlement in the latter parish. *Rex v. Ingworth (Inhab.)* 8 T. R. 339
- 33 A certificate, promising to receive the paupers when requested, means only when they shall be legally requested, namely, by two justices when the paupers become chargeable. *Rex v. St. Mary, Westport (Inhab.)* 3 T. R. 44
- 34 If it meant to receive them before they became chargeable, it would be void under the stat. 8 & 9 W. 3. c. 30.; for a certificate is only binding when it is conformable to that statute. 3 T. R. 44
- 35 A second certificate to a pauper discharges a former one given by the same parish. *Rex v. St. Peter, Derby (Inhab.)* 1 T. R. 218
- 36 An apprentice serving a certificated master in the certificated parish, and returning under age after his apprenticeship to his father, must live with the latter. *Rex v. Hardwicke (Inhab.)* 11 E. R. 578
- And see SETTLEMENT BY APPRENTICESHIP, ante.
- 37 If an apprentice to a certificated person be assigned to a second master in the same parish, he cannot gain a settlement in that parish by serving the second master. *Rex v. Hinckley (Inhab.)* 4 T. R. 371
- 38 The son of a certificated person cannot gain a settlement in the certificated parish by apprenticeship, though the father (to whom the certificate was given) died six months before the expiration of the apprenticeship. *Rex v. Alfretton (Inhab.)* 7 T. R. 471
- 39 An apprentice to a master, living at *A.* who has a certificate from *B.*, but not delivered to the parish officers of *A.* may gain a settlement by such apprenticeship. *Rex v. Wensley (Inhab.)* 5 T. R. 154
- 40 Where the son of a certificated person (not named in the certificate otherwise than under the general appellation of the father's family) marries and lives in a house of his own in the certificated parish, he ceases to be under the protection of the certificate as part of his father's family; and an apprentice may gain a settlement by serving such person in the certificated parish. *Rex v. Mortlake (Inhab.)* 6 E. R. 397
- 41 In order to prevent the settlement of an apprentice bound to a master who was residing in the parish under a certificate from a friendly society, by virtue of the stat. 33 G. 3. c. 54. it is not sufficient for the certificated parish merely to produce the certificate upon appeal to the sessions from an order of removal of the apprentice to such parish, but they must also shew that such certificate had been delivered to the parish officers, as mentioned in sec. 17. of the Act, before the service of the apprentice. *Rex v. Egremont (Inhab.)* 14 E. R. 253
- 42 A parish certificate granted to *T. C.* and *J.* his wife, engaging to receive them, their child or children born or to be born, only extends to a son born at the time of granting the certificate, so long as he continues a part of his father's family; therefore, where the son married, and resided with his family apart from his father, in the certificated parish: Held, that his apprentice gained a settlement by serving him in the said parish. *Rex v. Township of Thwaites (Inhab.)* 1 M. & S. 669
- 43 The son of a certificated person who was not named in the certificate upon the death of his father, being then resident with his mother under the certificate, was bound apprentice to the

certifying parish, left his father's family, and served in that parish under the indentures for some years, and then returned, with his master's consent, to serve a person in the certified parish where his mother and family resided under the certificate, and served that person until the expiration of his indentures, at which time, being at the age of 21, his mother still residing in the parish, he hired himself to the same person for a year, and served that and three successive years in the certified parish: Held, that he gained a settlement by such hiring and service. *Rex v. Morley (Inhab.)*

2 M. & S. 417

(k) *By Relief.*

N. B. See RELIEF, *ante*, page 526.

- 1 Where a case from the sessions only stated the bare fact of a pauper's having received relief from the respondent's parish, it was holden that this was not even *prima facie* evidence of a settlement there; since he might have been relieved as casual poor, which the overseers were bound to do if wanted, whether the pauper were settled there or not. *Rex v. Chadderton (Inhab.)*
2 E. R. 27
- 2 Giving parish relief to a pauper within the parish is no evidence of his settlement there: In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period, in the parish workhouse. *Rex v. Chatham (Inhab.)*
8 E. R. 498
- 3 The sessions having decided in favour of a settlement in A. by which the pauper's father was proved to have been relieved while resident in another parish 40 years ago, and before the pauper's birth; and the only evidence to oppose this, being that of the pauper's own birth in B. the Court confirmed the order of sessions on a case reserved. *Rex v. Wakefield (Inhab.)*
5 E. R. 335
- 4 Evidence of a settlement in A. by shewing that the pauper's grandfather came into B., under a certificate from A., is rebutted by shewing that B. had relieved the pauper and his family while residing in other places. *Rex v. Stanley-cum-Wrenthorpe (Inhab.)*
15 E. R. 350

V. REMOVAL, ORDERS OF.

(a) *Who may be removed under.*

- 1 An order of justices removing "*M. F. wife of P. F. a Scotchman*, who never gained a settlement in England," and their children, to the place of her last legal settlement, which order was stated on the face of it to be made on examination of the husband, and with the consent of him and his wife, was holden good. *Rex v. Eltham (Inhab.)*
5 E. R. 113
- 2 A married woman pregnant in the absence of her husband with a child, which when born would by law be a bastard, being removeable as an unmarried woman under sect. 6. of stat. 35 G. 3. c. 101, it has been held that the presumption of her being chargeable arises, by the same clause, from the bare fact of being with child of a bastard, if no circumstances be stated to shew that such presumption is not applicable to a person in the particular situation of the party coming within the general description of the clause. And the order of removal may charge such a person generally as *actually chargeable*, without setting forth in what manner chargeable. *Rex v. Tibbenham (Inhab.)*
9 E. R. 388
- 3 A single woman living in service with her master is not removeable, even since the stat. 35 G. 3. c. 101. s. 6. against the consent of herself and her master, though adjudged by the order of removal to be *with child*, and therefore chargeable to the parish in which she was serving; that statute not extending to make persons removeable who were not proper objects of removal before, but only to leave certain descriptions of persons excepted out of the Act liable to be removed, though not in fact chargeable, if otherwise proper objects of removal. *Rex v. Alveley (Inhab.)*
3 E. R. 563
- 4 An order of removal, merely adjudging that the person removed was *with child and unmarried*, without drawing the conclusion that she was *chargeable*, was held bad: as the statute 35 G. 3. c. 101., which first gives the general rule, that no person shall be removed till actually chargeable, and then (s. 6.) says, that an unmarried

- woman with child shall be deemed to be chargeable within the intent of the Act, only makes the fact of such pregnancy presumptive or *prima facie* evidence of her chargeability; which is open to be rebutted by evidence of her substance or the like; shewing that she was not an object of the poor laws, or that she could secure the parish against the contingent charge of maintaining herself and her bastard. *Rex v. Holm East Waver (Inhab.)* 11 E. R. 381
- 5 An order of removal founded on the stat. 35 G. 3. c. 101. s. 6. stating that *A. E. single woman* was “*by being pregnant deemed to have become chargeable*,” &c. was held good. *Rex v. Diddlebury (Inhab.)* 9 E. R. 398
- 6 And under the above statute an unmarried woman may be removed to the place of her settlement on account of her being pregnant: even though she be residing under a certificate from her own parish. *Rex v. Great Yarmouth (Inhab.)* 8 T. R. 68
- 7 A labourer employed by his master to drive a cart into his parish with one load; and to return with another, and who broke his leg there by accident, which detained him for some time in such parish, by which he was relieved, is to be considered as *casual poor*, and as such, is not removeable either under the stat. 13 & 14 Car. 2. c. 12. or the stat. 35 G. 3. c. 101., as not coming there to *settle or inhabit*; and consequently the expenses of his relief cannot be directed to be paid during the suspension of the order of removal under the latter statute. *Rex v. St. James's in Bury St. Edmunds (Inhab.)* 10 E. R. 25
- 8 A pauper renting a house in the parish of *A.*, where she received occasional relief, and having relations in *B.*, an adjoining parish, but no settlement in either; after having been sent backwards and forwards from one to the other, was at last taken by the parish officer of *A.* into *B.*, by which she was then relieved, and threatened to be sent to prison if she returned again into *A.*: Held, that her residence in *B.* under such circumstances did not prevent her removal from thence by an order of justices to her place of settlement. *Rex v. Birmingham (Inhab.)* 14 E. R. 251
- 9 A husbandman, who has actually served in the militia, and is married, may be removed to his place of settlement before he becomes chargeable to the parish from which he is removed; for by stat. 26 G. 3. c. 107. s. 131., only those militia-men, who exercise any trades, are irremovable. *Rex v. Gwenop (Inhab.)* 3 T. R. 133
- But those who are privileged *morando* are privileged *cundo*. 3 T. R. 133
- 10 Where relief was given to a son and grandson, living in a separate house from the father, it was held to be no ground to remove him and his other children living with him; but that part of the family only which was chargeable was removable. *Rex v. St. Mary, Westport (Inhab.)* 3 T. R. 44
- 11 Where the pauper's father, upon his marriage, obtained from his father-in-law, a spot of ground, though without any conveyance, upon which he built a house, and enjoyed it during his life, and it afterwards descended to his eldest son, who enjoyed it also (in the whole near twenty years), without any interruption or claim from the donor or his heirs; it was held that the younger children of the person who built the house could not be removed from that parish. *Rex v. Butterton (Inhab.)* 6 T. R. 554
- 12 A certificated person cannot be removed under stat. 8 & 9 W. 3. c. 50. till he is *actually* chargeable. *Rex v. St. Mary, Westport (Inhab.)* 3 T. R. 44
- 13 Therefore a *probability* that one of the certificated persons residing together in one family will become chargeable (as if a female be pregnant with a bastard) is no cause for removing them. 3 T. R. 44
- 14 A pauper may be removed from a parish where he is residing under a certificate to a parish in which he gained a settlement before the granting of the certificate, and need not of necessity be removed to the certifying parish. *Rex v. St. Martin at Oak (Inhab.)* 16 E. R. 303
- (b) *Form, Suspension, and Effect of.*
- 1 An order of removal, directed to “the parish of Poole, or town and county of Poole,” is sufficient; though the pro-

per name of the parish be *St. James in Poole*, there being no other parish in the town and county of *Poole*.
Rex v. Topsham (Inhab.)

7 E. R. 466

- 2 An order of removal, signed by two justices separately and in different counties, is only voidable, not void: and the parish wishing to avoid it must appeal to the next sessions.
Rex v. Stortford (Inhab.)

4 T. R. 596

- 3 Where two counties have been mentioned in the antecedent part of an order of removal, the justices making the order must state themselves to be justices of the proper county; and it is not enough to describe themselves justices of the peace in and for the *said county*, although the proper county were named in the margin, and were also named last before such description of the justices. *Rex v. Moor Critchell (Inhab.)*

2 E. R. 66

- 4 Examination taken and order signed by two justices separately, is not void but only voidable if appealed against in due time. *Rex v. Stortford (Inhab.)*

4 T. R. 596

- 5 *Qu.*—If two justices take the examination of a pauper relative to his settlement, but do not remove him, and the pauper afterwards die or become insane, whether two other justices may remove his family on it? *Rex v. Erisswell (Inhab.)*

3 T. R. 707

- 6 Neither the hearsay of a pauper who is dead, nor his *ex-parte* examination in writing taken on oath before two magistrates, touching his settlement, are admissible evidence of such settlement. *Rex v. Ferry Frystone (Inhab.)*

2 E. R. 54

Rex v. Chadderton (Inhab.)

Rex v. Abergwilly (Inhab.)

2 E. R. 64

- 7 Nor in case of his having absconded. *Rex v. Nuncham Courtney (Inhab.)*

1 E. R. 373

- 8 The Mutiny Act enables two justices to take the examination of a soldier respecting his settlement, and directs them to give an attested copy of it to the soldier to be by him delivered to the commanding officer in order to be produced when required, and makes such attested copy evidence; it was held that no other attested copy of the original examination than that

given to the soldier is evidence. *Rex v. Clayton-le-Moors (Inhab.)*

5 T. R. 704

- 9 *Qu.*—Whether such an original examination be admissible as evidence?

5 T. R. 707, 708

- 10 It was held so to be. *Rex v. Warley (Inhab.)*

6 T. R. 534

- 11 The examination of a soldier, touching his settlement, which is made evidence by the Mutiny Act, must be authenticated before it can be received in evidence, and does not prove itself *prima facie*, though the paper appear to be in the form prescribed by the statute. *Rex v. Bilton (Inhab.)*

1 E. R. 13

- 12 *Semble*, the hand-writing of the magistrates signing the examination, ought at least to be proved. 1 E. R. 13

- 13 An order of justices for removing the wife and daughters of a pauper to the place of their settlement, is supported *prima facie*, by shewing that the parish to which the removal was made was the place of the wife's settlement before her marriage; and throws the burthen of proof on the appellants that the husband was settled in another parish. *Rex v. Harberton (Inhab.)*

13 E. R. 311

- 14 The statute 35 G. 3. c. 101. s. 2. after enabling justices to suspend orders of removal of poor persons, and to order the charges thereby incurred to be defrayed by the pauper's parish, and to direct the charges to be levied by warrant of distress, enacts, that if the parties against whom it is issued are out of the jurisdiction of the justice granting the warrant, it shall be indorsed by some other justice within whose jurisdiction they are: this is peremptory upon the latter upon request made. *Rex v. Kynaston (Inhab.)*

1 E. R. 117

- 15 By the stat. 35 G. 3. c. 101. s. 2. the party aggrieved by an order of justices, directing payment, to the amount of above 20*l.* of the charges and costs of the suspension of an order of removal, on account of the illness of the pauper, may appeal to the next sessions, in like manner as against an order of removal, though he omit to give notice of such his appeal within three days after the demand of such charges and costs; by which he makes himself liable to a distress for the amount. And, if on appeal the former order be

vacated, or the amount of the charges to be paid be reduced, the surplus, if before levied by distress, must be refunded. *Rex v. Bradford (Inhab.)*

9 E. R. 97

- 16 Coupling the stat. 35 G. 3. c. 101. (which enables two justices to suspend orders of removal on account of the sickness of the paupers, and to give the costs of such suspension with an appeal against such costs if they amount to 10*l.*) with the stat. 3 W. & M. c. 11. s. 9. (which gives an appeal to the party grieved by any determination of the justices respecting the settlements of paupers by the means there mentioned :) appeals lie against an order of removal which was suspended, and against a subsequent order for costs, notwithstanding the death of the pauper, before any removal of him in fact made, and though the costs were under 10*l.*, such order for costs attaching by consequence a grievance on the parish to which the order of removal was made, if the pauper was not settled in it. *Rex v. St. Mary-le-bone (Inhab.)*

13 E. R. 51

- 17 Under the stat. 35 G. 3. c. 101. s. 2. an order of justices, suspending their order made for the removal of a pauper to his place of settlement, on account of sickness, may be made, though he were not brought before the justices at the time of such orders made: the plain intent and precise object of the statute being to extend the power of suspension to all cases where orders of removal may be made: and orders of removal may be made though the paupers to be removed be not brought personally before the magistrates; however fit that is to be done where it may be done. *Rex v. Everdon (Inhab.)*

9 E. R. 101

- 18 Where husband, wife, and children are removed by order of justices, which order was suspended as to the husband till his recovery from illness, the wife and children were removed on his death without any order to remove the suspension; this is no reason for the sessions to quash the first order on appeal, nor to quash an order for payment of the charges of such suspension. *Rex v. Englefield (Inhab.)*

13 E. R. 317

- 19 An order of removal only prohibits the party thereby removed from re-

turning again in a state of vagrancy to the same parish. *Rex v. Fillongley (Inhab.)*

2 T. R. 711

- (c) Appeals against, when confirmed, quashed, or amended by Sessions.

- 1 On an appeal to the sessions against an order of removal, those justices, who are rated to the relief of the poor in either of the contending parishes cannot vote. *Rex v. Yarpole (Inhab.)*

4 T. R. 71

- 2 If an order of removal be, on appeal, confirmed by a majority of the justices present, and it be afterwards determined on a question reserved for the opinion of the Court that so many of them were disabled to vote as to reduce the number to a minority, the Court will not quash the original order, but will send the case back to the sessions, directing them to enter a continuance to the next sessions, in order that they may quash it.

4 T. R. 71

- 3 If an order of removal be executed three days before the sessions in a parish 20 miles from the place where the sessions are holden, and there is no appeal to those sessions, the justices are not bound to receive an appeal at the following sessions. *Rex v. The Justices of Herefordshire.*

3 T. R. 504

- 4 The sessions refused to receive and adjourn the hearing of an appeal next sessions, thinking the appellant had sufficient time to be prepared to try it, and to give notice to the respondents. *Rex v. The Justices of Yorkshire, (North Riding.)*

3 T. R. 150

- 5 But the foregoing case has been decided not to be law; for if upon an appeal lodged against an order of removal, the Sessions are of opinion that reasonable notice has not been given by the appellant to the respondent parish, they cannot dismiss the appeal, on the ground that notice might have been given in time, but are bound by the direction of the stat. 9 G. 1. c. 7. s. 8. to adjourn the appeal to the next sessions. *Rex v. Buckinghamshire (Inhab.)*

3 E. R. 342

- 6 And the justices are bound by stat. 9 G. 1. c. 7. s. 8. to receive and adjourn an appeal made by the next sessions after an order of removal made, against

- such order, if no notice have been given to the respondent; though they should be of opinion that the order was executed in sufficient time before the sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents. *Rex v. The Justices of Staffordshire.* 7 E. R. 549
- 7 Where an appeal against an order of removal had been entered and adjourned once by virtue of the statute 9 G. 1. c. 7. s. 8.; though the justices in sessions have a discretionary power to determine whether reasonable notice has been given of the appellant's intention to proceed on the trial of such adjourned appeal; yet, as they dismissed the appeal at such adjourned sessions, without hearing it, on the ground that they had no authority to try it for want of a sufficient length of notice to the respondents, according to a new rule of practice promulgated two sessions before, but then first acted upon, and which was not known to the appellant's attorney, who had given the former usual notice: the Court granted a mandamus to the sessions to enter continuances and hear the appeal. *Rex v. The Justices of Wiltshire.* 10 E. R. 404
The justices are to judge of the reasonableness of the time. 3 T. R. 150
- 8 Where the Quarter Sessions are holden at two different places in the county, the one being an adjournment only from the other, and an order of removal is executed after the beginning of the original sessions, but before the adjourned sessions, an appeal at the next ensuing adjourned sessions, is in time and ought to be received. *Rex v. The Justices of Sussex.* 7 T. R. 107
- 9 An appeal against an order of removal may be entered at the next sessions but one after the order is executed, if there be not time between the execution of the order and the next sessions to make inquiries respecting the pauper's settlement. *Rex v. The Justices of Flintshire.* 7 T. R. 200
- 10 An order of removal, adjudging that the pauper was settled at *A.* by virtue of a certificate, was confirmed at the sessions on the merits; on its being stated by the sessions, according to direction from the Court, that the certificate was not signed by a majority of the churchwardens and overseers of *A.*, the Court quashed the orders. *Rex v. Margam (Inhab.)* 1 T. R. 775
- 11 An order of removal may be executed a year after it is signed, if the pauper's circumstances be not altered in the interval. *Rex v. Llanwinio (Inhab.)* 4 T. R. 473
- 12 An alteration in an order of removal by one justice in the presence of the other, before it is delivered to the parish officers, does not vitiate it. 4 T. R. 473
- 13 If it do not distinctly appear on an order of removal, that the justices who made it had jurisdiction, it is a nullity, and not merely voidable: and the parish to which it is directed may object to it at any distance of time, though they never appealed against it, and though they have acted under it for 20 years. *Rex v. Chilverscoton (Inhab.)* 8 T. R. 178
- 14 The Quarter Sessions can only amend an order of removal as to mere defects, or want of form under stat. 5 G. 2. c. 19. 8 T. R. 181
- 15 The parish, in whose favour an order of removal is made, may by consent abandon it, without waiting to appeal to the sessions, and having it quashed there. And after such order cancelled by the removing magistrates, with the consent of both parishes before the time of appeal, another order made by them, removing the pauper to a different parish, was held good. *Rex v. Diddlebury (Inhab.)* 12 E. R. 359
- 16 An order of removal unappealed from is conclusive, not only on the parties removed, but also as to all derivative settlements under them. *Rex v. St. Mary, Lambeth (Inhab.)* 6 T. R. 615
- 17 Therefore if *A.* and *B.* be removed as man and wife from *X.* to *Y.*, and there be no appeal against the order, it is conclusive not only as to *A.* and *B.*, though they be not married, but also as to their children, though illegitimate. 6 T. R. 615
 (See *Rex v. South Owrarn.*) 4 T. R. 353
- 18 If a *feme covert* be removed by an order of two justices from *A.* to *B.*, describing her as "widow," and there be no appeal against it, it is conclusive not only as to her settlement, but

- as to that of her husband also. *Rex v. Rudgeley (Inhab.)* 8 T. R. 620
- 19 An order of removal of J. S. and his wife, made upon the examination of the wife, adjudging that they *lately* came into the parish of K., and *are* likely to become chargeable to it, and were last legally settled in M., is good and conclusive upon the parish of M. as to the marriage and settlement of the husband and wife: so that upon the subsequent removal of the wife describing her as B. S., single woman, from M. to B., M. cannot shew in evidence that the marriage was null and void. *Rex v. Binegar (Inhab.)* 7 E. R. 377
- 20 After an order of removal unappealed from, a new settlement can only be gained by some act altogether subsequent to the removal. *Rex v. Kenilworth (Inhab.)* 2 T. R. 598
- 21 An order of removal, executed and unappealed against, is conclusive as to the settlement of the pauper at the time of such order, even as between third parishes, no parties to the former order. *Rex v. Corsham (Inhab.)* 11 E. R. 388
- 22 An order of removal quashed for form is not conclusive on the parties. *Rex v. St. Andrew, Holborn (Inhab.)* 6 T. R. 613
- 23 Where the justices making the order want jurisdiction, it is a matter of *substance* and not of *form*, and such an order although not appealed against, is totally void and cannot be amended. *Rex v. Chilverscoton (Inhab.)* 8 T. R. 178
- 24 If an order of removal be confirmed at the sessions, and both orders be afterwards removed into the Court of King's Bench by *certiorari* on a case reserved, and the Court disapprove of the orders, for want of jurisdiction of the removing magistrates appearing on the face of the original order; they will quash both the orders, without remitting the matter back to the Sessions to quash the original order for the purpose of enabling them to give maintenance according to stat. 9 G. 1. c. 7. s. 9. and at any rate they will not admit an application for amending their judgment for quashing both orders made in the Term subsequent to the judgment so pronounced. *Rex v. Moor Critchell (Inhab.)* 2 E. R. 223

POST-HORSE DUTY.

See PENAL ACTION I, *ante*, page 505.

- 1 The letting of a horse to hire for the purpose of going upon business from one town to another and back again in the compass of a day's journey, is not a letting to hire for the purpose of *travelling post* within statute 25 G. 3. c. 51. *Rex v. Tooley.* 3 T. R. 69
- 2 The words "*travelling post*" in that Act are to be construed according to the popular acceptance of them. 3 T. R. 69
- 3 A person who lets an horse to hire to carry a *private* express, must take out a licence under that statute. *Rex v. Webber.* 3 T. R. 72
- 4 *Secus* in the case of a *public* express. *Rex v. Cooke.* 3 T. R. 519
- 5 In an action for penalties brought by the farmer of the post-horse tax, on stat. 27 G. 3. c. 26. (whereby the duties on post-horses leviable under 25 G. 3. c. 51. were transferred from the King to the farmers of the tax) the offence may be laid to have been committed *with intent to defraud the farmer*, and not his Majesty. *Redford v. McIntosh.* 3 T. R. 632
- 6 If the offence charged be the letting and not accounting for divers, *to wit*, eight horses, proof that defendant let and did not account for *five* will support the declaration. 3 T. R. 632
- 7 The statute requires that the account shall contain the number of horses and miles, and the names of the drivers, but no penalty is inflicted for not inserting *the amount of the duties* received by the post-master: therefore, if the declaration only charge that the defendant made *false* accounts, *to wit*, by not inserting *the amount of duties received*, judgment may be arrested after verdict for the plaintiff. 3 T. R. 632
- 8 *Semble*, it would not have been sufficient to state generally that the defendant had been guilty of delivering

a false account, without specifying in what particular. *Radford v. McIntosh*. 3 T. R. 632

9 In such an action it is not necessary for the plaintiff to give in evidence his appointment by the lords of the treasury or the commissioners of the stamp duties authorized by them; proof that the defendant has accounted with him as farmer for the duties, is sufficient. 3 T. R. 632

10 In an action against such farmer for a neglect of duty, it is necessary to aver that he is the farmer appointed under and by virtue of that Act; alleging that he is the collector of the rates and duties recited in that Act, is not sufficient. *Short v. Pruen*. 6 T. R. 163

11 Neither is it necessary to shew the licence itself of the defendant but as against him other evidence is sufficient, as that he had written over his door, "licensed to let post horses." *Radford v. Briggs*. 3 T. R. 637

12 A person cannot be convicted of a penalty under 25 G. 3. c. 47. for not delivering to the assessors a list of his horses liable to the duty, &c. "until after the expiration of fourteen days from the time of giving notice by the assessors, and until a demand made by the assessors. *Rex v. Benwell*. 6 T. R. 75

13 By stat. 44 G. 3. c. 98. schedule B., the duty, which before was laid on horses let to hire for travelling post by the mile or stage, is there laid on horses let to hire to travel by the mile or stage: and persons licensed by schedule A. of that Act to let horses to hire to travel post, by the mile or stage, must account for the duty according to schedule B. on such lettings to hire as are therein mentioned. But, quære, as to lettings to hire for the day to go to certain places and back again? *Welsford v. Todd*. 8 E. R. 580

14 The same construction was put upon

a hiring of a hackney coach under the Liverpool Act. *Rex v. Swift*. 8 E. R. 584, n.

15 By the Post Horse Duty Act of the 44 G. 3. c. 98. schedule B., if the hiring be by the day and the distance be ascertained; as where the hiring is to go from one certain place to another; the duty is payable by the mile: if the distance be not ascertained, it is then payable by the day; and the post-master letting the horses, and not accounting for the duty accordingly in the stamp-office weekly account, is liable to a penalty of 10l. *Sergeant v. White*. 11 E. R. 530

16 A person letting a horse to hire, to go a certain stage and back again within the day, is required to take out a licence by schedule A. of stat. 44 G. 3. c. 98., requiring a licence to be taken out by every person, "who shall let to hire any horse for the purpose of travelling post by the mile or from stage to stage," &c., the same Act imposing the duty by schedule B. on every horse hired by the mile or stage, to be used in travelling, (omitting the word post, which seems therefore to have been accidentally retained, without any definite meaning in schedule A.) such Act having been passed to repeal a prior statute, in which the word post was introduced on both occasions. *Henley v. Cubberley*. 15 E. R. 257

17 In an action against a person licensed to let horses to recover a penalty for not inserting in his weekly account the time for which he let to hire two horses, nor the amount of the duty payable in respect of such hiring, where the declaration alleged that the defendant let to hire for a period of time less than 28 successive days, to wit, for eight days, &c.: Held, that the letting need not be proved to have been for the exact number of days laid under the *videlicet*. *Sergeant v. Tilbury*. 16 E. R. 416

POST-OFFICE.

1 The statute 9 Ann. c. 13. s. 40. which inflicts a penalty of 20l. on persons who willingly open or detain letters, after they have been delivered at the Post-office, only extends to persons in

the employment of the Post-office. *Martin v. Ford*. 5 T. R. 101

2 It seems that it is not a felony within 7 G. 3. c. 50. s. 1. for a person employed in the Post-office to steal out of

a letter entrusted to his care, a draft on a *London* banker, purporting to be drawn in *London*, but actually drawn about 10 miles from *London*, on unstamped paper. *Rex v. Pooley*.

3 B. & P. 311

3 It seems also that s. 2. of the same

Act does not apply to persons employed in the Post-office; and that a person of that description therefore, who steals a letter out of the Post-office, is not guilty of felony under that section.

3 B. & P. 311

POUND.

- I A pound-keeper is bound to receive every thing offered to his custody, and is not answerable whether the thing were legally impounded or not. *Branding v. Kent*. 1 T. R. 62
- 2 It is no answer to an action for treble

damages on stat. 2 *W. & M. c. 5.*, for a pound breach, that the rent and demand were tendered after the distress and impounding. *Firth v. Purvis*.

5 T. R. 432

POWER.

- I. CREATION AND CONSTRUCTION OF.
- II. OF APPOINTMENT.
- III. TO MAKE LEASES.
- IV. EXECUTION AND REVOCATION OF.

I. CREATION AND CONSTRUCTION OF.

- 1 Devise in fee to a *feme covert* with a power to dispose of an estate without the controul of her husband: the Court of C. P. held that such a power was void, as being inconsistent with the fee given to her in the first instance, and that she could not convey without fine. *Goodell v. Brigham*. 1 B. & P. 192
- 2 Where an estate was conveyed to a trustee, *habendum* to him and his heirs, to the use of such person, and for such estate, as *W.* should by deed, &c. appoint; and for want of such limitation to the use of *W.* and his heirs; and the same conveyance reserved a certain fee-farm rent to the chief lord, and contained a covenant by *W.*, his heirs and assigns, for the payment of it: Held, that *W.* took a vested fee, liable to be divested by the execution of his power of appointment. And *W.* having contracted to sell the estate afterwards by *indentures of lease and release*, to which he and his trustee were parties, after reciting the former conveyance, *the trustees, by defection of W. did grant, bargain, sell, and release; and W. did grant, bargain, sell, alien, release, ratify, and confirm, and also, direct, limit, and*

appoint, to the purchaser and his heirs, all their estate, title, interest, use, trust, &c. in law and equity, subject to the reserved rent, and to the performance of covenants on the part of *W.* to be performed; and the purchaser also covenanted with *W.* to pay the said rent, and to *indemnify and save him harmless*: Held, that the purchaser took the estate by the appointment of, and not by conveyance from *W.*: the instruments (a lease and release) though more commonly and properly adapted to pass an interest, and containing words of grant for that purpose, yet professing in terms to be an appointment; and the trustee having joined in it by the direction of *W.*, which was unnecessary if it had been intended that the purchaser should take an estate derived only out of the interest of *W.*; and it being obviously for the benefit of the purchaser to take by appointment, and such appearing upon the whole to have been the intention of the parties: and held in consequence, that the defendant (the heir, devisee, and executor of the purchaser) was not liable in covenant for rent in arrear, either as executor, or assignee of the land, which was not bound in the hands of *W.*'s appointee by *W.*'s covenant. *Rouch v. Wadham*. 6 E. R. 289

- 3 Under a devise of seven different estates to a sister, brothers, and nephews, respectively, one to each stock; in-

cluding, as to six of the estates, three several lives in succession on each estate; and as to the seventh (which in the first instance was only limited to two persons for life in succession), giving those two a power "to add another life or lives to make three, in like manner as after-mentioned for other persons to do the same;" and then giving this general power, "that *when and so often* as the lives on either of the estates before given shall be *by death reduced to two*, that then it shall be in the power of the person or persons then enjoying the said estate or estates to *renew* the same with the person or persons to whom the reversion thereof shall belong, by adding a third life in such estate, and paying such reversioner two years' purchase for such renewal; and also to *exchange* either of the said two lives on payment of one year's purchase." Held, that the power of renewal only authorized the addition of one life to the three on each estate, and of making one exchange of a life. *Doe d. Hardwicke v. Hardwicke.* 10 E. R. 549

- 4 One, after devising certain lands to trustees and their heirs, to pay debts in aid of the personal estate, devised the surplus, and all his other lands, &c. to his 1st, 2d, 3d, and other sons, successively, for life; with successive remainders to trustees and their heirs, to preserve subsequent estates during the lives of the several tenants for life; with several remainders successively to the first and other sons of the bodies of the testator's several sons in tail male; with like remainders to his daughter S. for life, to trustees, &c. and to her first and other sons, successively, in tail male: with a proviso, that each of the testator's sons, as he came into possession, might from time to time grant or appoint all or any part of the lands whereof he should be so seized and possessed to trustees, on trust by the rents and profits to pay a jointure to any wife, &c. *for the term of each such wife's natural life only.* There were also powers by deed to charge the lands with portions for daughters and younger children, and to lease for twenty-one years. The eldest son, having married, by deed, reciting the will and power, conveyed certain of the lands to trustees and their heirs, on

trust by the rents and profits to raise and pay a jointure to his wife *during her natural life only*; and charged the lands with portions for younger children, if any; which deed also contained a covenant for quiet enjoyment *during the wife's life*: The Court held that by such deed the trustees took a *fee*. *Wykham v. Wykham.* 11 E. R. 458
5 But the Court of C. P. held, that the trustees of the jointure took no legal estate. *Wykham v. Wykham.*

3 Taunt. 316

II. OF APPOINTMENT.

- And see EXECUTION OF, *post*, pages 565, 6
And see *Roach v. Wadham*, page 561
1 Under a power of appointing a real estate to the use of such *child and children*; &c. and where in default of appointment the estate was settled "to the use of all and every the child and children," an exclusive appointment to one is good. *Swift d. Huntley & Ux. v. Gregson.* 1 T. R. 432
2 Under a power of appointing real and personal estate "to and amongst *such of the testator's relations as shall be living at the time of his death, in such parts, shares, and proportions, &c.*" an exclusive appointment to one is good. *Spring d. Titcher v. Biles.* 1 T. R. 435, n.
3 A power to appoint to children was held to extend to grandchildren; because the Court thought that it was the intention of the person creating the power that it should be so executed; and there being no rule of law against it, as all the objects of the appointment were in existence when the power was created. *Doe d. Devonshire (Duke) v. Cavendish (Lord.)* 4 T. R. 741, n.
4 A power of appointment under a marriage settlement unto and among all or any the child or children of the marriage, for such estates as the husband and wife, or the survivor of them, should from time to time, either with or without power of revocation, direct, limit, or appoint, may be executed by the survivor, after a joint appointment, reserving to them, and the survivor, a power of revocation and appointment. But under such power, if the second appointment be to the daughter of the marriage for life, remainder to the eldest son for life, remainder to trustees to preserve contingent remainders, remainder to the

first and other sons in tail, &c. remainder to the daughter in fee; all the limitations subsequent to that to the eldest son for life are void, as being an excess beyond the power; and the ultimate remainder dependant upon such intermediate limitations, though made in favour of one of the objects of the power, is also void, and shall not be accelerated by the event of such void intermediate limitations not having taken effect, for want of issue male of the eldest son, &c. to whom the appointment was made. For an appointment not good in its creation will not become so by subsequent circumstances: and such an appointment being by deed cannot be construed *cy pres*, so as to give the sons estates tail, as perhaps might have been the case if the appointment had been by will. *Brudenell v. Elwes*.

1 E. R. 442

III. TO MAKE LEASES.

And see EXECUTION OF, *post*, page 566.

- 1 Under a devise to trustees, their heirs, &c. of freehold and leasehold estate, on trust to *permit and suffer the testator's wife to receive and take the rents and profits until his son should attain 21*, and then to the use of his son in fee: and a devise of other lands to the trustees, upon trust to receive the rents and profits till his son attained 21; and in the mean time to apply the profits in discharging the interest of a bond of 3,000*l.*; and on the son's attaining 21, upon trust by sale, lease, or mortgage of the last-mentioned premises, to raise the 3,000*l.*, and discharge the bond; and subject thereto, to the use of his son in fee on his attaining 21. And a third devise of other lands, and the residue of his real and personal estate, to the use of the same trustees, on trust by sale, lease, or mortgage of the same, to raise 3,000*l.* and pay it to his daughter *Elizabeth*: and after payment thereof, absolutely to sell and dispose of so much of the residue of his said lands, &c. as they should think proper, to raise money to pay his debts, legacies, and funeral expenses, and then upon trust to pay the interest and produce of his real and personal estate to his then wife, for the maintenance of herself and two children, till the latter should attain 21, if she con-

tinued his widow; but if not, then for the benefit of the two children till 21; and then to transfer to those children such residue; with further trusts if either or both of them died under 21: With a

Proviso, "that it should be lawful for the trustees, and the survivor, at any time or times till all the said lands, &c. devised to them should actually become vested in any other person or persons by virtue of the will, or until the same or any part thereof should be absolutely sold as aforesaid, to lease the same or any part thereof, for any term of years not exceeding fourteen, at the best rent."

Held, that the devise in the first clause to the trustees, upon trust to *permit and suffer the testator's wife to receive and take the rents and profits* of the lands there described until his son attained 21, vested the legal estate of those lands in her, and was not affected by the subsequent leasing proviso given to the trustees; which was confined to premises originally vested in them as trustees, or over which, when afterwards becoming vested in others, the trustees retained a power of sale. *Right d. Phillips v. Smith*.

12 E. R. 455

- 2 A lease made, under a special power by a tenant for life, for a longer term than his own life, is void on his death, unless the power be strictly pursued. *Doc d. Ellis v. Sandham*. 1 T. R. 705
- 3 So, that under a power to a tenant for life to lease for years, reserving the usual covenant, &c. a lease made by him, containing a proviso that in case the premises were blown down or burned, the lessor should rebuild, otherwise the rent should cease, is void; the jury finding that such covenant is unusual. 1 T. R. 705
- 4 Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had not been let before was held void. *Pomery v. Partington*. 3 T. R. 665
- 5 N. B. In these cases, the intention of the parties is to govern the Court in construing the power. 3 T. R. 665
- 5 The lease of a tenant for life, who has power of leasing under certain conditions, must strictly comply with the

conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainder-man. *Doe d. Pultney v. Lady Cavan.* 5 T. R. 567

N.B. This judgment was affirmed in *Dom. Proc.*

- 6 By a marriage settlement, an estate was settled to the use of the wife for life, remainder to such persons and for such estates as she should by deed or will attested by three witnesses appoint, and for want of such appointment, reversion to herself in fee: during her husband's life she made a will in pursuance of the power, devising her estate to *A.* in fee; after which she and her husband executed a lease of part of the settled estate to the defendant, not executed pursuant to the power; and after the husband's death she received rent from the defendant: Held, that such lease was avoidable only by her upon her husband's death, and that her receipt of rent accruing afterwards was a confirmation of it against *A.* who claimed under the appointment by the will. *Doe d. Collins v. Weller.* 7 T. R. 478

- 7 Under a power of leasing for one, two, or three lives, or for any term of years, determinable on one, two, or three lives, such lands as were then demised for any such term, lands are not included which were then held under a demise to "*W.* and *G.* 99 years, if *W.* and his widow and any eldest son living or *in ventre sa mere*, at the time of his (*W.*'s) death, or if no son, any eldest daughter then living or *in ventre sa mere*, or any other of those three, *viz.* of the said *W.* and such his wife, son, or daughter should so long live, remainder to the said *G.* and his widow, son, or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in successions, three at a time, to come in under the lease; for under such a general power the three lives must be certain and co-existing. *Doe d. Wyndham v. Halcombe.* 7 T. R. 713

- 8 Under a power in a will to lease, *in possession and not in reversion*, a lease for years executed the 29th of *March*, to the then tenant in possession, *habendum* as to the arable from the 13th of *February* preceding, and as to the pas-

ture from the 5th of *April then next*, &c. under a yearly rent payable quarterly, on the 10th of *July*, 10th of *October*, 10th of *January*, and 10th of *April*, is void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power. *Doe d. Allen v. Calvert.* 2 E. R. 376

- 9 An estate, the greater part of which was in lease, either for years certain not exceeding 21, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail: with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding 21 years, or for the life or lives of any one, two, or three person or persons: so as no greater estate than for three lives be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. be reserved," &c. the Court held 1st, that the power only authorized either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives; and that a lease by tenant for life for 99 years determinable on lives, as it might exceed 21 years, was void at law, and was not even good *pro tanto* for the 21 years. *Roe d. Brune v. Prideaux.* 10 E. R. 158

- 10 But the special verdict finding that the tenant in tail had received the rent reserved by such lease, accruing after the death of the tenant for life who made it, and who had not given any notice to quit: Held, 2dly, that the receipt of rent was evidence of a tenancy, the particular description of which it was for the jury to decide upon; and for the defect of the special verdict in this respect a *venire de novo* was awarded: But the Court intimated, that under the circumstances of the case, and the disparity of the rent reserved, being 4l. 2s., while the rack-rent value was 60l. a year,

(though one of the lessees had been presented by the homage as tenant after the death of the tenant for life, and admitted by the lord's steward; and the 4l. 2s. reserved was more than the ancient rent); a jury would be strongly advised to decide against a tenancy from year to year.

10 E. R. 158

- 11 A lease at 43l. a-year, granted under a power directing the best rent to be reserved, cannot be impeached merely by shewing that the lessor rejected two specific offers, one of 50l. and another from 50 to 60l. from other tenants, though the responsibility of such other tenants could not be disproved: for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded, as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shown. *Semble*, that the best rent means the best rack-rent that can reasonably be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account. *Doe v. Radcliffe*. 10 E. R. 278

- 12 Under a power to demise for 21 years in possession, and not in reversion, a lease dated in fact on the 17th of February, 1802, *habendum* from the 25th of March next ensuing the date thereof is good, if not executed and delivered till after the 25th of March; for it then takes effect as a lease in possession, with reference back to the date actually expressed. *Doe d. Cox v. Day*. 10 E. R. 427

- 13 Under a power to lease for 21 years reserving the best rent, so as the lease should not contain any clause whereby authority should be given to the lessee to commit waste, or whereby he should be exempted from punishment for committing waste; and so as such lease should contain such other conditions, covenants, and restrictions, as were generally inserted according to the usage of the counties where the premises were: Held, that a lease was good, though the lessor thereby took the repairs of the mansion-house (excepting the glass windows) on himself, and covenanted if he did

not repair it within three months after notice, the tenant might, and deduct the charges out of the rent reserved to the lessor; and though the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repair of the premises in the first instance, to renew during his (the lessor's) life, at the request of the lessee, his executors, &c. on the same terms; because the covenant only bound the lessor himself, and if the best rent were not reserved upon such renewal, the lease would be void against the remainder-man. *Doe d. Bromley, Bart. v. Bettison*. 12 E. R. 305

- 14 The sufficiency of the rent must be governed by the consideration on whom the onus of repair is thrown.

12 E. R. 305

- 15 Where a power of leasing was given to the father, tenant for life, and after his decease, to the son, tenant for life: and the son obtained a grant from the father of his life estate (without noticing the power) subject to a certain rent, with power of re-entry for non-payment, &c.: Held, that the son during the lifetime of the father could not lease under the power. *Core (an infant) v. Day*. 13 E. R. 118

IV. EXECUTION AND REVOCATION OF.

- 1 Every execution of a power must have a reference to the original instrument creating that power; and whoever claims under the execution must make title under the power itself. *Robinson v. Hardcastle*. 2 T. R. 241, 380, 781
- 2 So that where a power was given to A. on his marriage, to appoint to and amongst the children of the marriage, in such proportions, &c. and in default of such appointment, the estate was limited to the first and other sons of the marriage in tail, and A. by will appointed to his eldest son C. for life, remainder to trustees, &c. remainder to the first and other sons of C. in tail, and in default of such issue to D., another child of A.; the limitation of a life-estate to a person not in being at the original creation of the power being void, the subsequent limitations depending thereon are void also, and C., the eldest son, took an estate-tail either under the execution of the power, or the original settlement. 2 T. R. 241, 380, 781

- 3 A power to raise portions may be exe-

cuted at several times, provided the first execution be not meant as a complete execution, and that the party in the whole execution do not transgress the limits of their power. *Doe v. Milborne*. 2 T. R. 721

4 A power given to an *executrix* to raise a portion for a younger child does not extend to real estates, of which she was also trustee. 2 T. R. 721

5 A power to appoint a schoolmaster to an ancient foundation given to the vicar and churchwardens (of whom there were eleven) and in case of their neglect in appointing, then to devolve to two corporate bodies in succession, and to result, in the dernier resort, to the same vicar and churchwardens, to whom also the general power of managing the trust was committed, is well executed by the vicar and a majority of the churchwardens; especially if such an election be supported by usage. *Withnell v. Gartham*. 6 T. R. 388

6 A power of appointment by will is not executed by a mere devise of the residue. *Buckland v. Barton*. 2 H. R. 136

Doe d. Hellings v. Bird. 1 E. R. 49

7 Where, in a marriage settlement made by tenant in tail, he settled the same to himself for life and to the children of the marriage in strict settlement; with a proviso that it should be lawful for him by deed or instrument in writing attested by three witnesses, and to be enrolled, with the consent in writing of certain trustees, to revoke the old, and declare new uses: Held, that a deed of revocation executed by him and all the trustees in person except one, and the consent of that one being given by means of a general power of attorney before made by him to the settlor to consent to any such deed he might think proper to make, by virtue of which the settlor executed the deed for and in the name of such trustees, is bad, though properly attested and inrolled; and that another deed of revocation properly executed and assented to, but not inrolled till after the settlor's death, was also void; for that every thing required to be done in the execution of such a power must be strictly complied with, and must be completed in the lifetime of the person by whom it is to be exe-

cuted: and also held, that the defect of the one deed could not be supplied by the other. *Hawkins v. Kemp*. 3 E. R. 410

8 If a power of a public nature be committed to several, who all meet for the purpose of executing it, the act of the majority will bind the minority. *Grindley v. Barker*. 1 B. & P. 229

9 Under a leasing power with a condition of re-entry on non-payment of rent, for 21 days, a lease granted with condition of re-entry on non-payment of rent for 20 days, in case no sufficient distress can be taken on the premises whereby to levy the rent, &c. is not a good execution of the leasing power, such conditional power of re-entry being less beneficial to the remainder-man than an absolute power of re-entry on non-payment of rent. *Coxe v. Day*. 13 E. R. 118

And see *ante*, 563, &c.

10 A power to trustees with the consent of the *cestui que trusts*, testified by writing under their hands and seals, attested by two or more credible witnesses to make sale of lands, is not well pursued if the attestation be only sealed and delivered in the presence of the two witnesses. *Per Heath, Lawrence, and Chambre, contra Mansfield, C. J. Wright v. Wakeford*. 4 Taunt. 213

11 And an attestation added after many years, witnessing the signing, sealing, and delivery at the time of making the deed, will not supply the defect. 4 Taunt. 213

12 Where lands were settled to the use of such person or persons, &c. as *R. P.* and *T. P.* should, during their joint lives, by any deed or writing under both their hands and seals, to be by them duly executed in the presence of, and to be attested by, two witnesses, limit and appoint, and until such appointment to the use of *R. P.* for life, remainder to the use of *T. P.* for life, and they, by deed, signed, sealed, and delivered by them, in the presence of two witnesses, appointed the land to *J. M.* but the attestation indorsed on the deed, and subscribed by the witnesses, only specified that it was sealed and delivered by *R. P.* and *T. P.* in their presence, but not that it was signed: Held, that this was not a due attestation as required by the power; and that a subsequent attestation by the witnesses, after the death of *R. P.*,

certifying that the deed was signed as well as sealed and delivered in their presence, did not cure the defect in the original attestation. *Doe d. Mansfield v. Peach.* 2 M. & S. 576

- 13 The defendant's ancestor and devisor gave a bond in a penal sum, conditioned to pay, after *Mary Territt's* death, 1000*l.* to such person or persons as she should, by deed or will, appoint: Held, 1st, that such an alternative power to appoint a sum of money, (not necessarily working a transmutation of property like an appointment of land,) was meant to be ambulatory during the life of the person who was to make the appointment: and therefore, that an execution of it by deed (which in fact was retained in her own possession) might be revoked by cancellation *animo cancellandi*, though it contained no power of revocation.

But, 2dly, That as the mere act of cutting off her name and seal from the deed was equivocal, it might be explained, and its effect done away, by shewing, from what was said by her at the time, that she did it under

a mistaken notion that she had provided an effectual appointment by her will made after the deed, and that the deed was therefore useless: whereas, in truth, her will could not operate as an appointment; as it contained no direction for raising the money upon the obligor's estate; but proceeded upon the supposition, as therein expressed, that the children of her appointee (who was dead at the time of the will made) "would acquire the "said 1000*l.* under and by virtue of the "deed of appointment," and giving all the rest and residue of her estates and effects to them and others, "on the "express condition that they (the "children) should bring into hotchpot "with such residue, &c. the said "1000*l.*" And whether she mistook the contents of her will at the time she cut off her name and seal, and made the declaration before-mentioned; (which would be a mistake *in fact*,) or whether she mistook the legal operation of her will, (which would be a mistake *in law*,) in either case the mistake annulled the cancellation. *Perrott v. Perrott.* 14 E. R. 423

PRACTICE.

I. RELATIVE TO PROCESS.

- (a) *By Original.*
- (b) — *Bill.*
- (c) *Notice to appear.*

II. APPEARANCE.

III. PLEADINGS.

- (a) *Declaration.*
- (b) *Imparlance, and Time for Pleading.*
- (c) *Rule to plead.*
- (d) *Demand of Plea.*
- (e) *Pleas issuable.*
- (f) — *Puis darrein continuance.*
- (g) *Filing, Signature, and abiding by Pleas.*

IV. RULES, ORDERS, AND NOTICES.

V. IRREGULARITY.

- (a) *Where waived.*

VI. PROCEEDINGS.

- (a) *Where staid.*
- (b) *When set aside.*

VII. JUDGMENT.

- (a) *By Default.*
- (b) *Of Non-Pros.*
- (c) — *Nonsuit, and as in Case of.*
- (d) *When and how entered.*
- (e) *Where arrested.*
- (f) *In Criminal Cases.*

VIII. OF CONSOLIDATING ACTIONS, AND STRIKING OUT COUNTS.

IX. OF MAKING UP AND ENTERING THE ISSUE.

X. SPECIAL CASES AND DEMURRERS—WHEN AND HOW ARGUED.

XI. TRIAL.

- (a) *Notice of.*
- (b) *When put off.*
- (c) *By Proviso.*
- (d) *At Bar—or by record.*
- (e) *Jury Process, and Venire de Novo.*
- (f) *Verdict and Damages.*

I. RELATIVE TO PROCESS.

(a) *By Original.*

See IRREGULARITY, where waved, post, page 576.

- 1 By the long established and recognized practice of the King's Bench, a writ of *capias*, with a *non omittas* clause, may issue in the first instance, and be executed by the sheriff within a particular liberty (such as the honour of *Pontefract* in the county of *York*), the bailiff of which has the execution and return of writs, without a prior writ of *latitat* first issued, and a return made by the sheriff of *mandavi ballivo qui nullum dedit responsum*. *Carret v. Smallpage*. 9 E. R. 330
- 2 After possession once given under a writ of possession, the plaintiff cannot sue out another writ of possession, though he be disturbed by the same defendant, and though the sheriff have not yet returned the former writ. *Doe d. Pate v. Roe*. 1 Taunt. 55
- 3 On all writs of *distringas* returnable on the last day of Term, plaintiff may, at the rising of the Court, move to increase issues on the *alias* or *pluries*, to be thereupon issued next day; or to sell the issues where they have been levied on such *distringas*. *Reg. Gen. C. P. T. 38 G. 3.* 1 B. & P. 312
- 4 It is in the discretion of the Court, to put a defendant under terms who moves to have the issues levied under several *distringas's* restored to him on his appearance, according to 10 G. 3. c. 50. s. 4. *Cazalet v. Dubois*. 1 B. & P. 81
- 5 Defendant, before the action commenced, quitted the kingdom, leaving another in possession of his house and goods; plaintiff having served a summons to appear at the house, distrained the goods to compel an appearance: and held regular. *Staine v. Johannot*. 1 B. & P. 200
- 6 After a summons and *distringas* issued against a privileged defendant in the county where the action is brought, but in which he did not reside, and of which process he had no notice, and returns of *non est inventus* and *nulla bona*, a *testatum distringas* may regularly issue into the county in which he resides and has property, without any new summons in such county; but the sheriff ought not to levy more than 40s. under such *testatum distringas* in the first instance, according to the usual course. *Bloxam v. Surtees*. 4 E. R. 162
- 7 If a plaintiff sues a defendant who is out of the country, for a debt contracted here by his wife in his absence, and proceeds by *distringas*, the Court of C. P. will order the issues to be restored and set aside that writ. *Greaves v. Stokes*. 1 Taunt. 485
- 8 But a plaintiff who did not know at the time of giving credit, that the defendant was out of the realm, may proceed notwithstanding his absence, to compel an appearance by *distringas*. So if the defendant, residing abroad, carries on trade in *England*. *Gurney v. Hardenburgh*. 1 Taunt. 487
- 9 On motion for leave to issue a *distringas* under stat. 51 G. 3. c. 124, the party moving must swear, that he believes that the defendant absconds, or keeps out of the way, to avoid being served with process: and also his reason for such belief. *Downe v. Crewe*. 1 Marsh. 267
S. P. determined in *Scott v. Gould*. 4 Taunt. 156
- 10 The affidavit of service of a summons, made in order to move for a *distringas*, must set forth the tenor of the summons served. *Hill v. Wilkinson*. 4 Taunt. 619
- 11 The Court will not grant a *distringas* to compel an appearance on the ground that the defendant is out of the kingdom. *Jordan v. Bell*. 1 Marsh. 292
- 12 An inferior officer, in justifying under a warrant of attachment issued by a sheriff under a *justicies*, need not shew any return of the writ or warrant. Neither need he shew that a summons issued before the *distringas*. *Moore v. Taylor*. 5 Taunt. 72
- 13 The statute 51 G. 3. c. 124. s. 2. regulating process by summons and *distringas*, does not extend to counties palatine. *ibid.* 71
- 14 *Secus*, as to the Court of Exchequer. *id.* 71, n.
- 15 The taking an unreasonable quantity of goods under process of attachment,

does not make the officer a trespasser *ab initio*. *Moore v. Taylor*.

5 Taunt. 71

16 The instructions called a *præcipe*, given by the attorney to the *filazer*, are not process in the cause; and it is not necessary that they should contain a clause of *ac etiam*. *Boyd v. Durand*.

2 Taunt. 161

17 It is not necessary to add the name of the *filazer* to a common *capias* in C. P. *Frost v. Eyles*.

1 H. B. 120

18 Affidavit of defendant against *A. capias* against *A.* and *B.* and declaration against *A.* only, by whom bail was put in, held regular. *Forbes v. Phillips*.

2 N. R. 98

19 The return day of a *clausum fregit* and the *quarto die post*, are both reckoned inclusively: There is no difference whether the return day be on a Sunday or any other day; if it is on a Sunday the plaintiff must appear on Wednesday. *Fuso v. Coken*.

1 H. B. 9

20 If a defendant be arrested after the writ is returnable, the officer cannot legally detain him (though for the shortest time) until the writ be continued. *Loveridge v. Plaistow*.

2 H. B. 29

21 A *capias* directed to the sheriff of *Middlesex*, held bad when served in *London*. *Willis v. Pendrill*.

2 N. R. 167

22 The Court of C. P. will not quash a writ, on the ground of its having been served in a wrong county. *Watson v. Stedman*.

1 Marsh. 9

23 A plaintiff in a penal action may sue in his own name, without an attorney, and subscribe the process with his own name as attorney for the plaintiff, in any action, which is no irregularity. *La Grue, q. t. v. Penny*.

2 H. B. 690

(b) By Bill.

See IRREGULARITY, where waved, *post*, page 576.

1 The *custos brevium* is to indorse on every writ on what day and at what hour it is filed. *Reg. Gen. T.* 33 G. 3.

3 T. R. 787

2 Process issued out of the Courts at *Westminster* into the Isle of *Ely*, goes in the first instance to the sheriff of

Cambridgeshire, who thereupon issues his mandate to the bailiff of the franchise. *Grant v. Bagge*.

3 E. R. 128

3 Writs issued out of the Court of King's Bench against persons within the borough of *Southwark*, are to be directed to the sheriff of the county, who issues his mandate thereupon to the bailiff of the borough; and not to the bailiff in the first instance. *Bowring v. Pritchard*.

14 E. R. 289

4 The Court will take notice in pleading of the issuing of the bill of *Middlesex* on a day in vacation, though it be not pleaded to have issued as of the preceding Term. *Harrington v. Taylor*.

15 E. R. 378

5 Only the defendant or defendants in one action can be included in a bailable writ: *secus* if the writ be not bailable. *Holland v. Johnson*.

4 T. R. 695

6 The plaintiff, after suing out common process, may sue out a bailable writ for the same cause, and arrest the defendant, before he discontinues the first action. *Bishop v. Powell*.

6 T. R. 616

7 *Secus*, if the first writ be bailable.

6 T. R. 616

8 An omission in the *ac etiam* part of the writ of the sum for which the defendant is arrested on bailable process is irregular, and he cannot be holden to special bail thereon. *Davidson v. Frost*.

2 E. R. 305

9 A bill of *Middlesex* may be returnable the same day that it is sued out. *Orlade v. Davidson*.

4 T. R. 610

10 The Court will quash a writ for irregularity if it have an informal return, although the day of the return be equally certain as in the common form. *Reubel v. Preston*.

5 E. R. 291

11 If the plaintiff prove a cause of action before the bill filed, though after the writ sued out, it is sufficient, as well in the case of bailable as common writs. *Best v. Wilding*.

7 T. R. 4

12 The plaintiff is entitled to recover for goods sold and delivered upon credit for a certain time; it appearing by the special memorandum that the bill was filed on a day subsequent to the expiration of the credit, though the writ appeared to have issued before. But if the defendant were actually arrested

- before the credit expired, *semble*, that he has his remedy in damages. *Swan-cott v. Westgarth.* 4 E. R. 75
- 13 Evidence of an account stated, whereby the defendant admitted a certain balance due to the plaintiff, is not done away, but confirmed by evidence of a foreign judgment recovered by the plaintiff for the same sum, with a stay of execution for six months to enable the defendant to prove a counter demand, if he had any: and the plaintiff not having declared till after that period, it was held no objection that the writ was sued out and the defendant arrested before. *Hall v. Odber.* 11 E. R. 118
- 14 Where an action must be brought within a limited time, it is sufficient for the plaintiff to prove a writ sued out within such time, and his declaration within a year afterwards, without shewing such writ returned. *Parsons v. King.* 7 T. R. 6
- 15 But if a first writ be sued out within the time, and continued by a subsequent writ sued out after the time, he must shew the first writ to have been returned. *Harris v. Woolford.* 6 T. R. 617
- 16 And where the first writ issued within the time, but was neither served or returned, and in the same Term, but after the expiration of the limited time, a writ by continuance issued and was duly served, and the declaration was of the same Term: Held, that the first writ, not having been served, could not support the declaration, and not having been returned, could not be connected with the second writ so as to support the action. *Stanway, v. Perry.* 2 B. & P. 157
- 17 But if the first writ be returned, the continuances may be entered at any time. *Harris v. Woolford.* 6 T. R. 617
- 18 An attachment of privilege is not a continuance of a bill of *Middlesex*, so as to avoid the statute of limitations. *Smith v. Bower.* 3 T. R. 662
- 19 Service of a *latitat* at eight o'clock in the evening of that day when it is returnable is good, though the declaration be left in the office in the course of the same day. *Robertson v. Douglas.* 1 T. R. 191
- 20 So is service of a *latitat*, though the defendant afterwards applied to settle the debt, and do not take the objection till served with a rule to plead. *Taylor v. Philips.* 3 E. R. 155
- 21 Service of a writ (directed to the sheriff of *Northumberland*) in *Newcastle-upon-Tyne*, was held good. *Busby v. Fearon.* 8 T. R. 235
- 22 A writ may be served on the day on which it is returnable, and notice of declaration may be given at the same time. *Haynes v. Jones.* 3 Taunt. 404 See *Pope v. Turner.* 4 Taunt. 818. *post*, p. 572
- 23 Delivery of process, sealed up in a letter, in the absence of the person to whom it is addressed, is no service but from the time when the letter is opened. *Arrowsmith v. Ingle.* 3 Taunt. 234
- 24 If a person who has corresponded on the subject of the action, and to whom process is sent inclosed in a letter by the post, wilfully refuse to receive the letter, it shall be deemed good service on him though he never read it. *Al-dred v. Hicks.* 5 Taunt. 186 S. C. 1 Marsh. 8
- 25 Service of notice of plea filed on a *Sunday* is void, by construction of the stat. 29 Car. 2. c. 7. s. 6. which avoids all process, &c. served on that day. *Roberts v. Monkhouse.* 8 E. R. 547

(c) Notice to appear.

- 1 The *English* notice to appear, required by 5 G. 2 c. 27. s. 4. must be added to all common process where the defendant is not holden to bail, whether the cause of action do or do not amount to 10*l.* *Lumley v. Fitz.* 7 T. R. 337
- 2 The notice is to be on the copy of the process, and not on the writ itself: and the service of such copy without the notice is irregular and will be set aside: though the Court discharged a rule for quashing the writ itself on this account. *Lloyd v. Maurice.* 9 E. R. 528
- 3 Notice subscribed to process to appear on the *quarto die post*, is good. *Sumner v. Brady.* 1 H. B. 630
- 4 But the Court of C.P. have since ordered that the *return-day* should be inserted; which they said was the practice previous to the case of *Sumner v. Brady*, and more conformable to the statutes. *Rushton v. Chapman.* 2 B. & P. 340
- 5 If the *English* notice at the foot of common process require the defendant to appear at a return day in an im-

possible year, it is not such an irregularity for which the Court will set aside the proceedings. *Steel v. Campbell.*

1 Taunt. 424

- 6 The notice to appear annexed to common process must contain the name of the defendant on whom it is served. *Worgman v. Plank.* 1 H. B. 100

- 7 Summons and *English* notice to appear at the return of the writ being from *Easter-day* in one month, is bad. *Ingle v. Trotter.* 4 Taunt. 751

- 8 The *English* notice to appear at the foot of a writ of attachment must contain the date of the day of appearance in words at length, not figures. *Pinerd, v. Hudson.* 1 M. & S. 119

- 9 In the notice to appear, required by 5 G. 2. c. 27. s. 1. to be written at the bottom of the copy of process served on the defendant, the year, as well as the day of the month, must be in words at length. *Rogan v. Lec.*

1 Marsh. 272

- 10 The leaving *with a woman at the defendant's house*, whom the witness believed to be a menial servant of the defendant, a copy of the summons to appear and answer to the offence charged, (to which woman the original was also shewn,) is a sufficient summons within the stat. 32 G. 3. c. 17. *Ilex v. Chandler.*

14 E. R. 267

II. APPEARANCE.

See BAIL, ante 97, &c.

- 1 Where proceedings are by original, plaintiff in error cannot be ruled to appear before the *quarto die post* of the return day of the *alias scire facias*, where *nihil* had been returned. *Sharp v. Clark.* 13 E. R. 391

- 2 An appearance entered after the *essoin* day, and before the day of full Term, may be entered as of the preceding Term; and therefore, a *non pros* entered after the second Term for want of declaring before the end of such second Term is good. *Prigmore v. Bradley.* 6 E. R. 314

- 3 The rule that a voluntary appearance shall be of none effect unless some process be sued out within 14 days after such appearance, cannot be taken advantage of by any but the defendant, unless some particular fraud is alleged. *Mackreth v. Jackson.*

1 M. & S. 408

III. PLEADINGS.

(a) Declaration.

See PLEADING I. ante, 512.

REPLEVIN, VARIANCE, post.

- 1 If the plaintiff sue the defendant by a wrong christian name, and the defendant appear by his right name, the plaintiff may declare against him by such right name. *Doe v. Butcher.*

3 T. R. 611

- 2 *Secus*, if the plaintiff file common bail for him according to the statute by his right name. 3 T. R. 611

- 3 It is irregular to hold a defendant to bail in *assumpsit*, and then to declare in *trover*. *Tetherington v. Golding.* 7 T. R. 80

- 4 Arrest by the name of *Weston*; declaration *de bene esse* against '*Wason*,' sue by the name of *Weston*: Held regular by C. P. *Symmers v. Wason.*

1 B. & P. 105

- 5 Defendant was served with a writ styling him "*John*," he did not appear, but plaintiff entered a common appearance for him, and declared against him conditionally by the name of "*William*, sued by the name of *John*:" Held irregular. *Greenslade v. Rotheroe.*

2 N. R. 132

- 6 In process not bailable, if the writ be joint and the declaration several, it is regular. *Secus* in bailable process. *Stable v. Ashley.*

1 B. & P. 49

- 7 In bailable process the plaintiff cannot declare against one defendant separately upon joint process and affidavit to hold to bail against two, though they were sued upon a joint and separate promissory note. *Lewen v. Smith.*

4 East. 589

- 8 If plaintiffs sue out joint and bailable process against four defendants, they cannot declare against one separately, though the others are out of the jurisdiction of the Court. *Thompson v. Cotter.*

1 M. & S. 55

- 9 It is irregular to file a declaration in the office, when the defendant's place of residence is known to the plaintiff. *Oldham v. Burrel.*

7 T. R. 26

- 10 The plaintiff may deliver a declaration against the defendant conditionally before the time for his appearing is past, and file common bail for him; but after that time he must bring the defendant into Court before he can declare. *Smith v. Painter.* 2 T. R. 719

- 11 Where process is returnable on the last return of the Term, a declaration *de*

- bene esse* may be filed, with notice to plead within the four first days of the next Term. *Abbey v. Martin.* 1 H. B. 533
- 12 The plaintiff cannot deliver a declaration *de bene esse* after the time for the defendant's appearance is expired. *Baker v. Cooper.* 6 T. R. 548
- 13 If one of three defendants in a joint action appear to a *quare clausum fregit*, and the two others, being arrested on bailable process, have till the ensuing Term to justify bail, and the plaintiff previous to that time deliver a declaration against all three, indorsed "conditionally until special bail is perfected." This is irregular. *Turner v. Portall.* 2 N. R. 231
- 14 And the practice is the same whether the process be bailable or not bailable. *Kenman v. Bean.* 2 N. R. 433
- 15 One of two defendants having been holden to bail in *Trinity* Term, the plaintiff proceeded to outlawry against the other, and delivered a declaration against the former on the first day of *Easter* Term, not having obtained a rule for time to declare: Held, that the cause was out of Court. *Sykes v. Bauwens.* 2 N. R. 404
- 16 Defendant having been arrested on a *capias*, returnable on the first return of the Term, on the day before the essoin day, took out a summons to stay proceedings upon payment of the debt and costs; on the essoin day plaintiff filed a declaration *de bene esse*, and on the day after the essoin day defendant obtained an order to stay proceedings: Held, that the plaintiff was entitled to the costs of the declaration. *Fawcett v. Christie.* 2 B. & P. 515
- 17 If a writ be returnable in the first return of the Term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the plaintiff is not entitled to the costs of a declaration delivered *de bene esse*. *Partington v. Williams.* 2 N. R. 398
- 18 If, after a plea in abatement, the plaintiff enter on the roll *quod billa cassetur et defendens eat sine die*, he may at any time during the same Term in which the writ is returnable, deliver a declaration by the bye against the defendant. *Milles v. Andrews.* 5 T. R. 634
- 19 A plaintiff in a *qui tam* writ cannot declare by the bye in his own name, before he has declared in chief. *Delves, v. Strange.* 6 T. R. 158
- 20 Nor can a plaintiff in any case declare by the bye before he has declared in chief. *Tetherington v. Golding.* 7 T. R. 80
- 21 But the taking out of the office a declaration by the bye, which was delivered before any declaration in chief, is a waiver of the irregularity. *Archer v. Barnes.* 3 E. R. 342
- 22 In C. P. notice of declaration is not necessary in bailable actions. *Holins v. Burgus.* 2 B. & P. 42
- 23 Notice of declaration for *Saturday*, *Sunday* being the essoin day of the Term, held a nullity. *Moffat v. Carter.* 2 N. R. 75
- 24 Where the declaration filed in the office before defendant's appearance was indorsed, "*filed conditionally*," and judgment afterwards signed for want of a plea, the Court held it regular: though the notice served on the defendant was of a declaration generally. *Cort v. Jacques.* 8 T. R. 77
- 25 Serving notice of declaration filed together with the writ at the same time is irregular. *Stewart v. Lund.* 12 E. R. 116
- 26 It is not sufficient to stick up a notice of declaration in the office, if the defendant's last place of abode is known, for it ought to be served there. *Holsten v. Culliford.* 1 B. & P. 214
- 27 If a defendant's place of abode be unknown, application must be made to the Court that affixing the declaration in the office may be deemed good service. *Weller v. Robinson.* 1 Taunt. 433
- 28 Service of notice of a declaration on a *Sunday* is bad, though the defendant accept it knowing it to be irregular. *Morgan v. Johnson.* 1 H. B. 628
- 29 A defendant who is served with process and notice of declaration both on the return-day of the writ, may treat the declaration and notice as a nullity. *Pope v. Turner.* 4 Taunt. 818

(b) *Impar lance, and Time for Pleading.*

- 1 On all process returnable in C. P. the last return of any Term, if plaintiff declares in *London* or *Middlesex*, and defendant lives within twenty miles of *London*, defendant shall plead within

four days after declaration filed or delivered with notice to plead, without any impar lance: provided declaration is filed, &c. on the return-day or the day after, or if the return-day is a *Saturday*, on the *Monday* following. In the country eight days are given to plead in like manner. *Reg. Gen. C. P. H. 35 G. 3.* 2 H. B. 552

2 If a writ be returnable the last day of one Term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an impar lance to the third Term, though the plaintiff do not deliver a declaration *de bene esse*, before the *essoin* day of the second Term. *Rolleston v. Scott.* 5 T. R. 372

3 And where, in such case, the plaintiff declared after the bail had justified, and signed judgment in the same Term for want of a plea, the Court of C. P. held the judgment to be regular. *Bailey v. Hantler.* 2 B. & P. 126

4 But if the writ by which a replevin is removed, be returnable on the first return of the Term, and the plaintiff do not declare within four days before the end of that Term, the defendant is entitled to an impar lance, though he has not appeared within the Term. *Thomson v. Jordan.* 2 B. & P. 137

5 When the defendant removes the cause by *habeas corpus* from an inferior Court, and the plaintiff does not declare until the next Term, the defendant is not entitled to an impar lance. *Smith v. James.* 6 T. R. 752

6 Attendance on a Judge's summons for half an hour next immediately following the return thereof shall be deemed sufficient. *Reg. Gen. T. 35 G. 3.* 6 T. R. 402

7 If the plaintiff do not declare within two Terms after the return of the writ, the defendant may sign judgment of *non pros*; but if no such judgment be signed, the plaintiff may declare within a year. *Worley v. Lee.* 2 T. R. 112:

And *Penny v. Harvey.* 3 T. R. 123

8 In trover for goods, where the defence is that they were sold by the plaintiff, the Court will give the defendant time to plead, in order that he may obtain a discovery from the Court of Chancery in the mean time. *Whit-ter v. Cazelet.* 2 T. R. 683

9 In an order to enlarge the time for

pleading, the Court of C. P. held that the time was reckoned inclusive of the date of the order, but exclusive of the day when it expired. *Kay v. Whitehead.* 1 H. B. 35

10 But in a subsequent case it appears that the officers of the Court considered that the first and last days are both to be reckoned inclusively. *Freeman v. Jackson.* 1 B. & P. 479

11 If a plea be demanded on a *Saturday*, the defendant has twenty-four hours to plead after the demand, exclusive of *Sunday*. *Solomons v. Freeman.* 4 T. R. 557

12 Both in K. B. and C. P. a plea of tender may now be pleaded after a judge's order for time to plead. *Noone v. Smith.* 1 H. B. 369

13 If a declaration be indorsed "to plead in —," it must be understood to mean within the number of days allowed by the rules of the Court. *Hifferman v. Langel.* 2 B. & P. 363

14 If a declaration be filed on the *essoin* day, with the usual notice indorsed, the defendant must plead in eight days from that time; although, by the rules of the office, no person is allowed to search for a declaration till the first day in full Term. *Hutchinson v. Best.* 1 Taunt. 22

15 A defendant has the same time to plead after a delivery of a bill of particulars as he had when the summons for it was returnable. *Mowbray v. Schubert.* 13 E. R. 508

16 The defendant in a country cause is entitled to eight days' notice to plead, although he has appeared and is resident about two miles from *London*. *Holland v. Cooke.* 1 M. & S. 566

(c) Rule to Plead.

1 The rule to plead to an amended declaration must be a four days' rule. *Barton v. Moore.* 8 T. R. 87

2 Though a rule to plead expires on a *dies non juridicus*, the defendant is bound to plead on or before that day, and if he does not, judgment may be signed on the next day. *Mezure v. Britten.* 2 H. B. 616

3 On a four-day rule for bail in *scire facias* to appear and plead, in Term,

- Sunday*, though an intermediate day, is not to be reckoned. *Wathen v. Beaumont*. 11 E. R. 271
- 4 A summons for further time to plead not attended by the party taking it out, does not waive the necessity of a rule to plead. *Decker v. Shedden*. 3 B. & P. 180
- 5 On a rule to plead, reply, &c. in four days, if the party on whom the rule is made, delay complying with it till the morning of the fifth day, the adverse party may refuse to receive it, and sign judgment. *Thomson v. Ryall*. 4 T. R. 195
- 6 When time to plead has been obtained, if the defendant plead and give a rule to reply before the expiration of such time, the rule to reply will be of no avail unless he give notice of his plea. *Gandy v. Barrowdale*. 1 N. R. 273

(d) Demand of Plea.

- 1 A demand of a plea before the defendant has appeared, or the plaintiff filed common bail for him, is a nullity. *Cooke v. Raven*. 1 T. R. 635
- 2 A demand of a plea may be made at the time of delivering the declaration. *Edmonton (Churchward.) v. Osborne*. 6 T. R. 689
- 3 No demand of a plea is necessary when the defendant is in custody of a sheriff. *Wilkinson v. Brown*. 6 T. R. 524
- 4 Nor is it necessary, in cases where the plaintiff sues the defendant in the custody of a sheriff, and the defendant, without notice to the plaintiff, procures himself to be removed to a different custody. 6 T. R. 524
- 5 So no demand of a plea is necessary, after a judge's order for time to plead. *Pearson v. Reynolds*. 4 E. R. 571
- S. P. Baker v. Hall*. 1 Taunt. 538
- 6 Where the defendant is joined with his wife in the writ, he may enter an appearance for himself only; and in such case the plaintiff cannot sign judgment for want of a plea, without demanding a plea. *Clark v. Norris & Ux.* 1 H. B. 235
- and if he plead such a plea, the Court will set it aside on motion. *Stadholme v. Hodgson*. 2 T. R. 390
- 2 But this case was afterwards overruled, and the Court held that a defendant might in such case plead the general issue, and the Statute of Limitations. *Rucker v. Hunnay*. 3 T. R. 124
- 3 And the Court of C. P. refused to restrain a defendant from pleading the statute, on setting aside a regular interlocutory judgment. *Maddocks v. Holmes*. 1 B. & P. 228
- 4 The defendant cannot put in a special demurrer when he is under terms of pleading issuably. *Berry v. Anderson*. 7 T. R. 530
- 5 A defendant who is under terms to plead issuably, is not at liberty to take advantage of any objections upon special demurrer, of which he could not have availed himself upon general demurrer. *Bell v. Da Costa*. 2 B. & P. 446
- 6 Under a judge's order to plead issuably, the defendant can only put in a plea which goes to the merits.—The plea of *alien enemy* is not such a plea. *Simeon v. Thompson*. 8 T. R. 71
- 7 Under the conditions of pleading issuably and taking short notice of trial, if a declaration is delivered after the sittings have begun, but so early that there would be time for notice of trial for the adjournment day, upon the defendant pleading *instantly*, that is, within twenty-four hours, he must so plead. *Price v. Simpson*. 1 Taunt. 343

(f) *Puis Darrein Continuance*.

- 1 Defendant, after a verdict against him, obtained a rule for a new trial, which, after argument on a subsequent day, was discharged; he then pleaded a plea *puis darrein continuance*, intitled of the Term generally; and the Court refused to order a special memorandum of the day when it was filed, under these circumstances. *Lovell v. Eastaff*. 3 T. R. 554
- 2 If a plea *puis darrein continuance* be filed and verified on oath, the Court cannot set it aside on motion, but are bound to receive it. 3 T. R. 554
- 3 A plea *puis darrein continuance* may be pleaded at *nisi prius*, although there has been time to plead it in bank

(e) Issuable Pleas.

See PLEADING. II. (d) *ante*, 514.

- 1 After a defendant has obtained an order for time to plead on the terms of pleading issuably, he cannot plead the Statute of Limitations, or any other plea which does not go to the merits:

- since the last continuance. *Prince v. Nicholson.* 5 Taunt. 333
- 4 If it be verified by an affidavit which refers to the plea, and the plea is in the cause, the affidavit is sufficient, though not specially entitled in the cause. 5 Taunt. 337
- 5 It is not discretionary with the judge at *nisi prius*, to reject a plea pleaded *puis darrein continuance*. 5 Taunt. 337 S. C. 1 Marsh. 70
- (g) *Filing, Signature, and abiding by Pleas.*
- 1 If a plea be filed before the bail are perfected, it is a nullity, and does not become a good plea by perfecting the bail afterwards. *Venn v. Calvert.* 4 T. R. 578
- 2 All double pleas must be filed, and not merely delivered to the plaintiff's attorney; though two pleas be pleaded, which separately need only have been delivered. *Harrison v. Franco.* 2 E. R. 225
- 3 In C. P. a replication *taking issue* on a plea of payment to debt on an annuity bond, must be signed by a serjeant. *Ellis v. Gorey.* 1 B. & P. 469
- 4 Where a plea is signed by a serjeant, the replication should be signed also: though to this rule a *similiter* is an exception, for no judgment is required in merely joining issue. 1 B. & P. 469
- 5 Although a defendant conducts his cause in person, if he files a special plea, it is a nullity, unless it be signed by a serjeant or counsel. *Samuels v. Dunne.* 3 Taunt. 386
- 6 A demurrer must be signed by a serjeant. *Douglas v. Child.* 2 B. & P. 336, n.
- 7 So must a joinder in demurrer; for a serjeant ought to be met by a serjeant. *Broker v. Simpson.* 2 B. & P. 336 *Douglas v. Child. ib. n.*
- 8 After a rule to abide by a special plea, or plead such other plea as the defendant will abide by, he can only plead the general issue. *Hare v. Lloyd.* 1 T. R. 693 *Prout v. Dewar.* 1 T. R. 693, n.
- 9 But after such a rule the defendant may plead the general issue, and give notice of set-off. *Cockran v. Robertson.* 1 T. R. 693, n.
- ter 10 o'clock at night, not valid. *Reg. Gen. K. B. M. 41 G. 3.* 1 E. R. 132
- 2 No rules entered in the peremptory paper shall be enlarged during the Term, or put off from the appointed day, by the consent of counsel, or of the attornies, without leave of the Court. *Reg. Gen. K B. East. 41 G. 3.* 1 E. R. 497
- 3 The rule for judgment must have four clear days, exclusive of the first and last, and of *Sunday*, before judgment entered. *Roberts v. Stacey.* 13 E. R. 21
- 4 Serving a rule to discontinue does not of itself discontinue an action; there must be an appointment to tax the costs. *Whitmore v. Williams.* 6 T. R. 765
- 5 On every appointment by the master, the party served shall attend such appointment without waiting for a second: otherwise the master shall proceed *ex-parte* on the first appointment. *Reg. Gen. H. 32 G. 3.* 4 T. R. 580
- 6 The rule that final judgment cannot be signed till four days after the return of the *habeas corpora juratorum* does not extend to the case where the Term closes before the four days are expired. *Thomas v. Ward.* 2 B. & P. 393
- 7 Evidence given upon trial by the defendant of his having paid money into Court under a rule, does not entitle the plaintiff to a reply. *Reg. Gen. Hil. 50 G. 3.* 2 Taunt. 267
- 8 If cause is shewn against a rule in the first instance, the counsel who obtains the rule has a reply in support of his rule. *Anonymous.* 4 Taunt. 690
- 9 If a party obtaining a rule, do not choose to proceed on it, the other party cannot compel him. *Doe d. Harcourt v. Roe.* 4 Taunt. 883
- 10 An enlarged rule may be made absolute at any time on the last day to which it stands enlarged. *Shaw v. Masters.* 2 Taunt. 174
- 11 The Court of C.P. will not grant a rule to quash an insensible plea. The plaintiff may, at his own peril, sign judgment. *Thomas v. Smithies.* 4 Taunt. 668
- 12 After judgment on the defendant for a libel, the Court refused to make an order on the prosecutor, to deposit the original libellous papers, with the officer of the Court. *Rex v. Cator.* 2 E. R. 361

IV. RULES, ORDERS, AND NOTICES.

- 1 Service of rules, orders, or notices af-

13 A judge's order "that upon payment of debt and costs by a certain day all proceedings should be stayed," is only conditional on the defendant. *Frieker v. Eastman.* 11 E. R. 319

14 Where, pending a suit, a party obtains a Judge's order for changing his attorney, it is unnecessary to file a new warrant. *Wood v. Plant.* 1 Taunt. 44

15 The Court of C. P. will relieve a party from the terms of filing no bill in equity, if the evidence of an answer in equity is necessary to attain the justice of the case. *Grinstone v. Bell.*

4 Taunt. 254

16 A consent indorsed on a Judge's summons binds neither party, unless the order be drawn up and served pursuant thereto. *Joddrel v. —.*

4 Taunt. 253

17 Upon the death of the attorney in the cause, notice must be given to the opposite party of the appointment of the new attorney, before he can proceed in the cause. *Ryland v. Noaks.*

1 Taunt. 342

18 A party called on to shew cause may oppose the rule in person, or by a new attorney, without notice to the other party of the order to change his attorney. *Lovegrove v. Diamond.*

4 Taunt. 669

19 Notice of motion for the next day served after nine o'clock at night is not sufficient. *Chessell v. Parkin.*

2 Taunt. 48

20 Where a statute requiring any notice to be served, refers to the time of pleading, or other legal proceeding in a suit, service on the party's attorney is good service. *Howard v. Ramsbottom.*

3 Taunt. 530

V. IRREGULARITY.

Where waved.

1 A defendant who complains of irregularity in process must, if he has an opportunity, apply to have it set aside before the plaintiff has taken any further steps in the cause. *Downes v. Witherington.*

2 Taunt. 243

2 The defendant must take advantage of an irregularity in the writ before appearance. *For v. Money.*

1 B. & P. 250

3 It is irregular if a *capias* be served after the date of the return, and if there be not 15 days between the *teste* and the return. But if the defendant take the declaration out of the

office, he thereby waves all preceding irregularity. *Whale v. Fuller.*

1 H. B. 222

4 A special *capias* issued upon an affidavit, sworn at the Bill of Middlesex Office, is irregular; but if the defendant be arrested under it, and put in special bail, he thereby waves the irregularity. *Dalton v. Barnes.*

1 M. & S. 230

5 Where the debt was paid after an *alias pluries* writ issued, the defendant cannot object at the trial that the *latitat* was not returned; for at any rate if the *alias pluries* were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet having been once waved, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid, the defendant had no notice of any action commenced or costs incurred. *Toms v. Powell.*

7 E. R. 536

6 Where the defendant was summoned to appear before the King's Justices at Westminster upon the morrow of Saint —: the Court held that the defect might be waved by his subsequent conduct. *Harris v. Mullet.*

1 Taunt. 59

7 Taking out a summons before a Judge, to stay proceedings on the bail bond, is a waiver of an irregularity in the notice of the declaration. *Davis v. Owen.*

1 B. & P. 342

8 It is a matter of public policy that no proceedings of the nature described in the statute should be had on a Sunday; their irregularity, therefore, cannot depend on the assent of the party to wave the objection to proceedings absolutely avoided by the statute. *Taylor v. Phillips.* 3 E. R. 156

9 If plaintiff take a plea out of the office and keep it, he waves any objection to the plea, on the ground of its having been pleaded by a new attorney, without any order to change the attorney. *Margerem v. Makilwaine.*

2 N. R. 509

VI. PROCEEDINGS.

(a) Where staid.

1 If default be made in payment of the interest on a bond, the principal whereof is not yet due; the Court of C. P. will not

- stay proceedings on payment of the interest and costs. *Tighe v. Crafton*. 2 Taunt. 387
- 2 C., by virtue of an order from B. to receive all money due to him on a particular account, obtains three out of four instalments due from A. to B. on that account; these payments are afterwards questioned by B., who brings his action against A. for the whole sum, and at the same time C. demands his fourth instalment; an application to the Court of C. P. by A. to stay proceedings in an action against him by B., on his paying the fourth instalment to such person as the Court shall appoint, was refused. *Macdonald v. Pasley*. 1 B. & P. 161
- 3 If separate actions be brought against the acceptors and indorsers of a bill of exchange, the Court will stay the proceedings against any of the indorsers, on payment of the bill and costs of that action; but not against the acceptor, without payment of costs in all the actions. *Smith v. Woodcock*. 4 T. R. 691
- 4 Upon a note of hand, the payee indorsed that if the interest was paid on stipulated days during her life, the note should be given up. A payment of the interest being omitted, and action commenced on the note: Held, that the Court of C. P. had no power to stay proceedings on payment of the interest and costs. *Steel v. Bradfield*. 4 Taunt. 227
- 5 Trying a feigned issue without the consent of the Court is a contempt of the Court; and after such a trial they will stay the proceedings. *Hoskins v. Berkeley*. 4 T. R. 402
- 6 Proceedings in an action stayed, it being sworn by the defendant, and not denied by the plaintiff, that the debt was under 40s. *Wellington v. Arters*. 5 T. R. 64
- 7 If it appear to the Court that the debt sued for is under 40s. they will, on motion, stay the proceedings before trial. *Kennard v. Jones*. 4 T. R. 495 See costs II. (b) ante, 215. X. 224.
- 8 If a party proceed by action and indictment for the same assault, the Court of C. P. will not compel him to make his election: Nor will they stay proceedings in an action on the ground of a bill depending in Chancery for the same cause. *Jones v. Clay*. 1 B. & P. 191
Murphy v. Cadell. 3 B. & P. 137
- 9 A. delivered goods under the value of 40s. to a carrier in London, pursuant to an order from B. resident in Leicestershire, and received the goods in the latter county: Held, that no action for the goods could be maintained in the County Court of Leicestershire, and that the Court of Common Pleas, therefore, could not stay proceedings in an action commenced in that Court. *Harwood v. Lester*. 3 B. & P. 617
- 10 If an action on the case for an injury to a house for which the plaintiff has delivered a bill of 1l. 10s. be commenced in the superior Courts, proceedings therein may be stayed, the plaintiff's remedy being in the County Courts. *Melton v. Garment*. 2 N. R. 84
- 11 The Court of C. P. will not stay proceedings in an action for the escape of a certificated bankrupt taken in execution, and released by the sheriff upon production of his certificate. *Sherwood v. Benson*. 4 Taunt. 631
- 12 The Court will not stay judgment and execution on a summary application, because the plaintiffs after verdict became alien enemies. *Vanbrynen v. Wilson*. 9 E. R. 321
- 13 A summons for time to enter the issue when returnable is a stay of proceedings. *Anthill v. Metcalfe*. 2 N. R. 169
- 14 If a plaintiff deposit a negotiable instrument on which he is suing; at the same time giving notice of the action, he does not thereby part with his right of action; and if the depositary sues on the same instrument, the Court of C. P. will not, at the instance of the defendant, stay the proceedings in the first action. *Semb*. That the Court would restrain the depositary from suing on the instrument, on the ground that he receiving it with notice of the suit then pending, must be considered as having consented that the first action shall proceed. *Marsh v. Newell*. 1 Taunt. 109
- 15 If a plaintiff discontinue an action stayed in another Court by a consolidation rule, and commence an action against the same defendant for the same cause in C. P. the latter Court will stay proceedings until after the trial of the cause mentioned in the consolidation rule. *Parkin v. Scott*. 1 Taunt. 565
- 16 The plaintiff being indicted for felony, sued a banker for money the plaintiff had paid him, which was surmised to be the produce of the felony; the Court

of C. P. on application will stay the proceedings until after the trial of the indictment. *Deakin v. Praed.*

4 Taunt. 825

(b) *When set aside.*

See PROCESS, ante, 568, 9.

And see the *Table of Titles prefixed to this Digest.*

- 1 If a rule to set aside proceedings for irregularity with costs be discharged, it must be understood that the rule is discharged with costs. *Reg. Gen. (K.B.) M. 37 G. 3.* 7 T. R. 82
- 2 A defendant may move to set aside the service of a writ for irregularity, at any time before a new step is taken in the cause. *Dand v. Barnes.* 1 Marsh. 403
- 3 If the Court of C. P. directs any proceedings to be set aside on terms, the terms are a condition precedent, and till performance of the terms the proceedings stand, and the plaintiff may pursue them without application to the Court. *Dodsley v. Lady Hamilton.* 5 Taunt. 1
- 4 If a plaintiff, having served an irregular process, the defendant gives him notice of the irregularity, and that if he proceeds thereon, the defendant will move to set aside the proceedings; this is an exception to the ordinary rule, that the party applying to set aside irregular proceedings, must come before the other party has taken any further step in the cause. *Topping v. Fuge.* 5 Taunt. 330
- 5 The Court set aside a *distringas* executed upon the goods of the wife of a surgeon in the navy, serving on a foreign station, the debt not being contracted in the wife's trade. *Wilson v. Spilsbury.* 3 Taunt. 145
- 6 A plaintiff having sued out writs of *capias* into two counties and arrested the defendant in both, who gave bail in both, the Court of C. P. directed that the bail first given should stand; the proceedings on the second arrest were set aside, and the plaintiff ordered to pay the costs of those proceedings. *Bullock v. Morris.* 2 Taunt. 67 See BAIL, ante, 105.
- 7 Proceedings set aside because the bill of *Middlesex* was served in the city of London. *Borman v. Bellamy.* 1 T. R. 187
- 8 The Court refused to set aside a bill of *Middlesex*, which was to answer plaintiff in a plea of *debt*, instead of *trespass*. *Barber v. Lloyd.* 2 T. R. 513

9 But the Court refused to set aside the proceedings merely because the defendant was served with a *latitat* in *Middlesex*; service is sufficient if it gives personal notice to the party, provided it be not aailable process. *Kelly v. Shaw.* 6 T. R. 74

10 The Court set aside a *latitat* directed to the sheriff of *Middlesex*, for irregularity. *Price v. Jackson.*

1 M. & S. 442

11 The Court refused to set aside the proceedings, though the notice of declaration was not served till half after ten at night. 1 T. R. 192, n.

12 If the plaintiff hold two defendants to bail on a joint writ, and declare against them severally, the Court will set aside the proceedings. *Moss v. Birch.* 5 T. R. 722

13 Bailable process against two, declaration against one only, the Court set aside the declaration for irregularity, though it had been taken out of the office by him against whom it was filed. *Chapman v. Eland.*

2 N. R. 89

14 If the *latitat* be sued out against the defendant by one christian name and the *alias* by another, and the plaintiff afterwards proceed, the Court will set aside the proceedings for irregularity. *Corbet v. Bates.*

3 T. R. 660

15 If a defendant be served with process by a wrong christian name, and afterwards the plaintiff enter an appearance for him and serve him with notice of declaration by his *right* name, and proceed to judgment and execution, the Court will not set aside the proceeding for irregularity merely on the ground that the defendant never appeared, because he ought to have pleaded such misnomer in abatement. But he was afterwards let in to defend on payment of costs, and swearing to a mistake of the practice and to merits. *Oakley v. Giles.* 3 E. R. 167

16 If a defendant be served with a writ by a wrong christian name of *W.*, and do not appear to it, the plaintiff cannot file common bail for him in his right name of *E.* sued by the name of *W.*, nor declare against him *de bene esse* in that form: and the proceedings were set aside for irregularity, after interlocutory judgment signed for want of a plea. *Dring v. Dickenson.*

11 E. R. 225

- 17 After a writ sued out, and common bail filed, against a defendant by the name of *J.*, it is irregular for the plaintiff to declare against him by the name of *R.*, sued by the name of *J.*, (he not having then appeared), and the defendant may set aside the proceedings before plea. *DeLanoy v. Cannon.* 10 E. R. 328
- 18 So if the defendant's name be properly inserted in the copy of the process served, but a quite different name in the notice at the foot thereof. *Jones v. Armytage.* 2 B. & P. 38
- 19 The defendant, having given a bail-bond to the sheriff on his arrest, and being afterwards served with notice of declaration; if he do not plead in abatement for a misnomer within the four first days, the Court will not afterwards (though before pleading in chief) set aside the proceedings upon motion, on the ground that he had been arrested and declared against by a wrong christian name. *Binfield v. Maxwell.* 15 E. R. 159
- 20 If in a joint action against two, it appear that one of the defendants has been outlawed upon different process from that by which the other was brought into Court, and no connexion be shewn between the several writs of *capias* issued against each, as referable to the same original; as where the one was outlawed upon process by original, tested the 10th of *April*, returnable on the first return of *Easter Term*, and continued regularly down to the time of the outlawry; and the other was arrested upon a special *testatum capias* issued on the 24th of *April* in *Hilary* vacation, and tested in the preceding *Hilary Term*; to which bail was put in, and the plaintiff declared against him alone, alleging the outlawry of the other defendant in the same *suit*; the Court will set aside the declaration for irregularity. *Haigh v. Conway.* 15 E. R. 1
- 21 Where a defendant is held to bail on a writ issued against himself and another, and the plaintiff declares against one only, the Court of C. P. will set aside the declaration and subsequent proceedings. *Jonge v. Murray.* 1 Marsh. 274
- 22 If *A.* sue *C.*, the printer, and *B.* sue *D.* the proprietor of a newspaper for two libels, and respectively recover judgments; and then *A.* commence an action against *D.*, and *B.* against *C.* for the same libels, the Court will not set aside the proceedings in the latter actions. *Martin v. Kennedy, Bunning v. Perry.* 2 B. & P. 69
- 23 Upon a motion to set aside an ejectment and restore the possession upon payment of the rent due, and costs, the rent must be calculated only to the last rent day, not to the day of computing. *Doe d. Harcourt v. Roe.* 4 Taunt. 883
- 24 If an action be brought on a judgment, which is irregular, the whole proceedings may be set aside in one rule. *Barlow v. Kaye.* 4 T. R. 638
- 25 The irregularity of giving a rule to plead before the delivery of the declaration, is waived by putting in any plea, though a nullity: but such inoperative plea having been put in without authority by a new attorney for the defendant, without any order to change the attorney, the judgment which had been signed as for want of a plea was set aside. *Perry v. Fisher.* 6 E. R. 549
- 26 If two defendants in trespass suffer judgment by default, and the plaintiff execute writs of inquiry against them separately, and take several damages against them, it is irregular. And if the plaintiff enter up final judgment with those several damages against the defendants, it is erroneous. But the Court will permit the plaintiff to set aside his own proceedings before final judgment on payment of costs. *Mitchell v. Milbank.* 6 T. R. 199
- 27 If a defendant accept a declaration, and act as if an appearance has been entered for him, the Court of C. P. will not afterwards permit him to set aside a judgment for want of an appearance having been entered. *Williams v. Strahan.* 1 N. R. 309
- 28 If a declaration be delivered, indorsed "delivered conditionally," a rule to plead given, and a demand of plea served, and judgment be signed for want of a plea, the Court of C. P. will set it aside as irregular, there being no notice to plead. *Heath v. Rose.* 2 N. R. 223
- 29 Where the defendant and his attorney had been informed that a notice of declaration was stuck up in the office, the office, Court of C. P. refused to set aside a judgment for want of service of the

notice at the defendant's last place of abode. *Losemore v. Cohen*. 1 N. R. 279

- 30 If an appearance be entered in the name of an agent to the attorney for the defendant, and the plea be delivered in the name of the attorney, and the plaintiff thereupon enter up judgment for want of a plea, the Court will set aside that judgment for irregularity. *Buckler v. Rawlins*.

3 B. & P. 111

- 31 If a defendant die on the night before the trial of a cause at the sittings in Term, a verdict obtained in such cause, and the judgment entered up thereon, will be set aside upon application to the Court. *Taylor v. Harris*.

3 B. & P. 549

- 32 A defendant executor against whom a judgment had been signed, and who had a good legal defence, having refused equitable terms of compromise, the Court of C. P. denied him the indulgence of setting aside the judgment and permitting him to plead. *Anonymous*.

4 Taunt. 885

- 33 A young man gave bills for the amount of a gaming debt; and when they were due he renewed them with the then holder, and, for the last bills, when due, he confessed a judgment. The Court of C. P. would not set aside the judgment, unless he could affect the holder of the bills with notice, but permitted him to try that fact in an issue. *George v. Stanley*. 4 Taunt. 683

- 34 A plaintiff having tendered an issue to a plea, and demanded a rejoinder, where the defendant was under terms to rejoin *gratis*, and signed judgment for want of a rejoinder; the Court of C. P. held the judgment regular; but set it aside without costs, because the plaintiff might have added the *similiter* himself. *Wye v. Fisher*. 3 B. & P. 43

- 35 Where usurious securities have been acted upon, and the money partly paid by the borrower, the Court of C. P. will not set aside a judgment and execution but upon the terms of the defendant repaying the principal and legal interest. *Hindle v. O'Brien*. 1 Taunt. 413

- 36 The Court of C. P. will set aside a regular interlocutory judgment, on affidavit of merits, though it be the defendant's intention to plead his infancy. *Delafield v. Tanner*. 1 Marsh. 391

- 37 Where judgment has been given for the defendant on demurrer to a plea, the Court of C. P. will not, in a subse-

quent Term, set aside that judgment, and suffer the plaintiff to reply, by confessing the matters contained in the plea, and taking judgment of assets *quando acciderint*. *Prince v. Nicholson*.

1 Marsh. 401

- 38 Notice having been given for the trial of a cause at *Monmouth*, which arose in *Glamorganshire*, as being in fact the next *English* county since the stat. 27 II. 8. c. 26. s. 4. though *Hereford* be the common place of trial; the Court refused to set aside the verdict as for a mis-trial, on motion; the question being open on the record. *Ambrose v. Rees*. 11 E. R. 370

- 39 The Court of C. P. will not set aside a nonsuit, on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff at the trial of the cause. *Kindred v. Bagg*.

VII. JUDGMENTS.

(a) By Default.

When judgments are set aside for irregularity, see ante, 579, &c.

- 1 *Semble*—That judgment on a general demurrer to a plea in bar, the matter of which, even if well pleaded, would be no defence to the action, is to be considered as a judgment by default. *Goodtitle v. Otway*. 2 II. B. 523

- 2 The general rule respecting signing judgments for non-appearance is, that where by the writ each party has a day in Court, and the defendant may be damaged by not appearing, he may appear and demand the plaintiff; and if the plaintiff does not appear, the defendant is entitled to sign judgment, and to have his costs; and this even though the writ be not returned, as upon a *capias*, *exigent*, or *distringas*. *Davies v. James*. 1 T. R. 373

- 3 Where plaintiff files common bail for the defendant on any day between the 2d and 6th *November*, and he is in other respects entitled to sign judgment, it is signed as on the day preceding the assign day of *Michaelmas* Term. *Wansey v. Moore*. 5 T. R. 65

- 4 No proceedings having been had for above a year, the plaintiff, two days before *Hilary* Term, gave notice of his intention to proceed; two days after the Term, he served a rule to plead, and in the same vacation judgment was signed for want of a plea, which was held to be regular; and the judg-

- ment appearing to be signed as of *Hilary* Term makes no difference. *Milbourne v. Nixon.* 2 T. R. 40
- 5 Judgment may be signed for want of a plea at any time after twenty-four hours from the time of the plea demanded. *Dyche v. Burgoyne.* 1 T. R. 454
- 6 But plaintiff cannot sign judgment for want of a plea till the expiration of twenty-four hours after demand of a plea, whether the time for pleading be or be not expired when such demand is made. *Bowles v. Edwards.* 4 T. R. 118
- 7 If the defendant however suffer plaintiff to file common bail for him under the statute, the latter may, upon the expiration of the rule to plead, sign judgment for want of a plea, without any demand of plea. *Palk v. Rendle.* 8 T. R. 465
- North v. Lambert.* 2 B. & P. 218
- 8 *Secus*, where the defendant enters an appearance, though he does not take the declaration out of the office. *White v. Dent.* 1 B. & P. 341
- And see ante*, 574.
- 9 Plaintiff is not entitled to sign judgment for want of a plea till the expiration of twenty-four hours after the delivery of a bill of particulars, though the time for pleading be out, and a demand of a plea given, above twenty-four hours before that time. *Ramsay v. Reay.* 2 N. R. 361
- 10 If, after the time for pleading is out, but before judgment signed by the defendant, the Court of C. P. on his application, stay proceedings till the plaintiff give security for costs, to be approved by the prothonotary, the plaintiff, though he give security *instantly*, which is accepted by the defendant, is not at liberty to sign judgment before the opening of the office on the next morning. *Decker v. Thompson.* 3 B. & P. 319
- 11 The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made. *Sedgewick v. Allerton.* 7 E. R. 542
- 12 If defendant, being under an order to plead issuably, plead several pleas, one of which is not issuable, the plaintiff may sign judgment as for want of a plea, though the others be issuable pleas; for the plea which was pleaded in disobedience to the order vitiated all the others. *Waterfall v. Glode.* 3 T. R. 305
- 13 Where a defendant, under an order to plead issuably, puts in a sham demurrer to some of the counts in the declaration, and plead issuably as to the rest, the plaintiff may consider the whole as a nullity, and sign judgment as for want of a plea. *Cuming v. Sharland.* 1 E. R. 411
- 14 Where a defendant, when under an order to plead issuable, puts in a plea, though informal, which went to the substance of the action, the Court held that the plaintiff could not sign judgment, as for want of a plea. *Theluston v. Smith.* 5 T. R. 152
- 15 If a declaration in debt demand 2,000*l.* and contain several counts, each of which states a debt of 224*l.* 7*s.* 4½*d.* and the defendant plead thereto, that he does not owe the said sum of 224*l.* 7*s.* 4½*d.*, the plaintiff may sign judgment for want of a plea. *Macdonnell v. Macdonnell.* 3 B. & P. 174
- 16 The plea of *solvit ad diem* should be delivered, and ought not to be entered in the general issue book: But if the defendant, who is entitled to an imparlance, do enter such a plea in the general issue book before the plaintiff is entitled to a plea, it operates as a waiver of the imparlance, and enables the plaintiff to sign judgment as for want of a plea. *Lockhart v. Mackreth.* 5 T. R. 661
- 17 Where a sham plea was pleaded of judgments recovered in the Court of Pie-poudre in *Bartholomew Fair*, in terms palpably fictitious and out of the regular course, the Court reprobated the practice, and suffered the plaintiff to sign interlocutory judgment as for want of a plea, and made the defendant's attorney pay all the costs occasioned by the plea, and the costs of the rule for correcting the proceedings. *Blewitt v. Marsden.* 10 E. R. 237
- 18 A demand of a plea made before the rule to plead is given, will not entitle a plaintiff to sign judgment after the rule expired, as for want of a plea. *Hewit v. Palmer.* 4 Taunt. 51
- 19 If defendant do not rejoin, the plaintiff may strike out the previous plead-

ings, and enter judgment as for want of a plea. *Petrie v. Fitzroy.* 5 T. R. 152

20 To a replication of *nul tiel record* and day given, if the defendant demur, the plaintiff need join in demurrer, but if the record is not produced may sign judgment. *Tipping v. Johnson.*

2 B. & P. 302

21 If the defendant plead a subtle plea to ensnare the plaintiff, the Court of C. P. will permit the plaintiff to sign judgment, unless the defendant will amend. *White v. Howard.* 3 Taunt. 339

22 If a defendant files two pleas at several times on the same day, in order to mislead the plaintiff by the second plea, the plaintiff may sign judgment. *Samuels v. Dunne.* 3 Taunt. 386

23 Not guilty pleaded to an action of debt on a penal statute is not such a nullity as warrants judgment to be signed for want of a plea. *Coppin, q. t. v. Carter.* 1 T. R. 462

(b) *Non Pros.*

1 The stat. 13 Car. 2. st. 2. c. 2. enabling a defendant to sign judgment of *non pros* for want of a declaration in due time, extends to all cases. *Oldham v. Burrell.* 7 T. R. 26

2 The plaint in replevin being removed by the defendant into the Court of C. P. by *re. fa. lo.* which is filed on the appearance day of the return, and a rule to declare being given, he may sign judgment of *non pros* for want of declaring without demanding a declaration. *James v. Moody.* 1 H. B. 281

3 The defendant is bound to search in the office, whether the plaintiff has brought in the issue-roll on the same day that he signs judgment of *non pros*, even though he may have searched on another day on the expiration of the rule to bring in the roll. *Minus v. Barker.* 1 T. R. 16

4 If plaintiff declare against one of two defendants named in his writ, and does not proceed against the other, the latter may sign judgment of *non pros* immediately. *Roe v. Cock.* 2 T. R. 257

5 So if plaintiff serve notice of declaration, or take out a rule for time to declare against one only, without proceeding against the other. 2 T. R. 257

6 Where a plaintiff does not declare, after having obtained time, the defendant may sign judgment of *non pros* without giving a rule to declare. *Towers v. Powell & Ux.* 1 H. B. 87

7 And, wherever it can appear that the action is not joint, judgment of *non pros* may be signed by all or any of the defendants. *Butler v. Upton.*

2 T. R. 259, n.

8 Judgment of *non pros* for not entering the issue, cannot be signed, unless there be a rule to enter the issue of the same Term in which such judgment is signed. *Lancaster v. Fraser.*

1 M. & S. 478

(c) *Nonsuit, and Judgment as in case of.*

1 A plaintiff cannot be nonsuited without his consent after he has appeared. *Watkins v. Towers.* 2 T. R. 275

2 If one of two defendants suffer judgment by default, and the other go to trial, the plaintiff cannot be nonsuited as to him, but such defendant must have a verdict if the plaintiff fail to make out his case. *Hannay v. Smith.* 3 T. R. 662

3 Plaintiff cannot sign judgment for the defendant's refusing to pay 4d. for the warrant of attorney when the copy of the declaration is delivered to him. *Oneale v. Price.* 4 T. R. 370

4 If a record be ever so erroneous, the plaintiff, who has made default by suffering a nonsuit, can never have a judgment afterwards in his favour. *Kempland v. Macauley.* 4 T. R. 436

5 It seems that undertaking by a rule of Court to give material evidence in the county of A. in order to fix the venue there, does not imply a consent to be nonsuited if the party fail. *Jackson v. Williamson.* 2 T. R. 281

6 Judgment as in case of a nonsuit cannot be entered on the plaintiff's neglecting to carry the record down to trial, where the defendant might have carried it down by proviso. *King v. Pippet.* 1 T. R. 492

7 Judgment as in case of a nonsuit may be entered up against the demandant in a writ of right; nor will the Court relieve him if he has conducted himself unfairly towards the tenant in the course of the proceedings. *Almgill & Ur. v. Pierson.* 1 B. & P. 103

8 The Court will not give judgment as in case of a nonsuit, in replevin, under statute 14 G. 2. c. 17. *Jones v. Concannon.* 3 T. R. 661

9 The rule, requiring a Term's notice of proceeding, does not extend to a motion for judgment as in case of a nonsuit. *Doed, Phillips v. Moses.* 5 T. R. 634

- 10 If a rule to shew cause why there should not be judgment, as in case of a nonsuit, be discharged on an affidavit which contains an answer false in itself, the Court will not afterwards open the matter on an affidavit which disproves the contents of the former one; though if they see reason to doubt the truth of the first affidavit at the time, they will suspend their judgment till the matter be examined into. *Davis v. Cottle.* 3 T. R. 405
- 11 To support, in the next Term after that in which issue is joined, a rule for judgment as in case of a nonsuit, for not proceeding to trial, the affidavit must state, that issue was joined early enough in the preceding Term for the plaintiff to have proceeded to trial in that Term. But in the third Term a general affidavit, stating that issue was joined in the former Term, is sufficient. *Woulfe v. Shells.* 1 H. B. 282
- 12 And in a subsequent case under such general affidavit, the Court of C. P. held that judgment, as in case of a nonsuit for not proceeding to trial, could, in no case, be moved for till the third Term after that in which issue is joined. *Da Costa v. Ledstone.* 2 H. B. 558
- 13 If issue in a London cause be joined early enough in a Term to enable the plaintiff to give notice of trial for the sittings after that Term, the defendant is not entitled to judgment, as in case of a nonsuit for not proceeding to trial, unless the plaintiff has in fact given notice of trial. *Munt v. Tremamondo.* 4 T. R. 557
- 14 The defendant in C. P. may rule the plaintiff to enter the issue, and move for judgment as in case of a nonsuit in the same Term. *Peeters v. Throgmorton.* 1 B. & P. 387
- 15 Where plaintiff withdraws his record after entering it for trial, the defendant may have judgment, as in case of a nonsuit. *Burton v. Harrison.* 1 E. R. 346
- 16 After judgment for the defendant on demurrers to certain special pleas, there may be judgment of nonsuit against the plaintiff for not proceeding to trial upon other general pleas on which issues were joined. *Paxton v. Popham.* 10 E. R. 366
- 17 Although notice has been given of a motion for judgment as in case of a nonsuit for not proceeding to trial in due time after issue joined, on which the plaintiff enters into a peremptory undertaking to try, yet notice must also be given (under 14 G. 2. c. 17.) of the like motion for not proceeding to trial in pursuance of the undertaking. *Gooch v. Pearson.* 1 H. B. 527
- 18 The Court of C. P. laid down as a rule, that a peremptory undertaking to try, should of itself be sufficient to induce the Court to refuse a rule for judgment as in case of a nonsuit for not proceeding to trial, on a first default. *Mallet v. Hilton.* 2 H. B. 119
- 19 If the plaintiff shew on his declaration in debt on bond against two, that the bond is executed by three, it is good matter of plea in abatement; or in arrest of judgment; but is no ground of nonsuit on the plea of *non est factum.* *Tanner v. Jones.* 2 Taunt. 254
- 20 If plaintiff give notice of trial for the sittings in the Term in which issue is joined, and do not proceed to trial accordingly, the defendant may move for judgment as in case of a nonsuit in the succeeding Term. *Hay v. Howell.* 2 N. R. 397
- 21 An action of covenant for not levying a fine is a personal action within the meaning of the 13 G. 3. c. 51. s. 1. which empowers the Judge to certify the defendant's residence in Wales, if the verdict be under 10*l.* in order that a nonsuit may be entered. *Davis v. Jones.* 1 N. R. 267
- 22 Costs for not proceeding to trial and judgment, as in case of a nonsuit, may both be moved for in the same Term. *Dorant v. Rouvelet alias Romney.* 2 N. R. 247
- 23 Where the plaintiff withdraws the record after the cause is called on for trial, the Court of C. P. will make it a condition of discharging a rule for judgment as in case of a nonsuit, that he shall pay the defendant the costs of the day occasioned by not countermanding notice of trial: though the practice of that Court is not to grant a rule for costs for not going on to trial, and a rule for judgment as in case of a nonsuit, at the same time. *Jordaine v. Sharpe.* 2 H. B. 280
- 24 The Court of C. P. will make the payment of costs, for not proceeding to trial, one of the terms for discharging a rule for judgment as in case of a nonsuit. *Jolliffe v. Morris.* 1 B. & P. 38
- 25 Where a nonsuit is set aside upon

payment of costs, such payment is made a condition precedent to the setting aside the nonsuit; and without it the plaintiff cannot proceed to another trial. *Nichols v. Bozon*.

13 E. R. 185

26 If a defendant dies pending the argument on a point reserved, on which judgment of nonsuit is afterwards given, his representatives are entitled, upon application to the Court, to enter up the judgment of the Term next after the trial, that they may get the costs of the nonsuit. *Toulmin v. Anderson*.

1 Taunt. 385

27 Where a plaintiff has carried a record down for trial once, the Court refused to give judgment, as in case of a nonsuit, for not carrying it down a second time, even though it were made a *remanet* the first time: The defendant should have carried the record down by proviso. *Mewburn v. Langley*.

3 T. R. 1

28 So, where a plaintiff had once proceeded to trial, the Court of C. P. refused a rule for judgment, as in case of a nonsuit, for not proceeding to a new trial. *Porzelius v. Maddocks*.

1 H. B. 101

29 A defendant who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit for the same default. *Clark v. Simpson*

4 Taunt. 591

30 The plaintiff in a *qui tam* action on stat. 7 G. 2. c. 3 withdrew his record, because the broker who negotiated the illegal contract for stock refused to give evidence for fear of subjecting himself to a penalty on the same Act; this was holden to be a sufficient reason for discharging a rule for judgment as in case of a nonsuit for not proceeding to trial, though the witness's liability to be sued would not be removed until after the three succeeding Terms. *Raynes, q. t. v. Spicer*.

7 T. R. 178

31 An affidavit of excuse, however slight, for not proceeding to trial, is sufficient to discharge a rule for judgment as in case of a nonsuit, in a *qui tam*, as well as any other action. *Stone v. Farey*.

1 E. R. 554.

(d) When and how entered.

1 If a plaintiff, after entering up judgment for himself upon two counts, discover an error in one of them, he may waive his judgment on that count,

and enter it for the defendant. *Spicer v. Teasdale*.

2 B. & P. 49

2 *Qu.* Whether judgment for a sum of money awarded by an award reducing a verdict, can be entered before the day on which the payment of the sum is awarded? But execution ought not to be had for it before the day of payment. *Callard v. Paterson*.

4 Taunt. 319

3 If the plaintiff dies after verdict for the defendant, and the defendant does not enter up judgment within two Terms after the verdict, the Court of C. P. have no authority to permit it to be entered up afterwards, *nunc pro tunc*. *Copley v. Day*

4 Taunt. 702

4 The defendant was allowed to enter satisfaction on the roll upon a judgment obtained against him in the Court of King's Bench on his acknowledging satisfaction for the amount upon a judgment obtained by him in C. P. against the plaintiff for a larger amount, although he had the plaintiff in custody in execution of that judgment. *Simpson v. Hanley*. 1 M. & S. 696
S. P. Peacock v. Jeffery. 1 Taunt. 426

(e) Where arrested.

1 Any material misrecital of a statute in a declaration founded on the statute, is a ground to arrest the judgment.

Rex v. Marsack.

6 T. R. 771

2 *Qu.* Whether a mere literal misrecital, not varying the sense, be also a ground to arrest the judgment? 6 T. R. 776

3 A. having declared on a promissory note against B. made by C. to A. by him indorsed to B., and by him again indorsed to A., and having obtained a verdict, the judgment was arrested on the ground of a circuity of action.

Bishop v. Hayward.

4 T. R. 470

4 If some counts in a declaration are good and some bad, and general damages are given, the Court will arrest the judgment *in toto*, and will not award a *venire de novo*. *Holt v. Scholefield*.

6 T. R. 691

5 Where, in an action of *assumpsit* on a bill of exchange with the usual money counts, the defendant pleads *nil debet* to the count on the bill, but does not plead at all to the other counts, after a verdict for the plaintiff, the defendant shall not take advantage of his own mis-pleading in arrest of judgment. *Harvey v. Richards*.

1 H. B. 644

6 If there be a misjoinder of counts, and a verdict for plaintiff on the counts

well joined, and for the defendant on the others, the misjoinder is not a cause for arresting the judgment. *Rightly v. Birch.* 2 M. & S. 533

7 To a plea of justification in trespass, under a *capias ad satisfaciendum* issued at the suit of the now defendant against the now plaintiff, by virtue of which the latter was arrested and detained till payment of 1267*l.* if the plaintiff reply that the writ was irregularly issued for so much; whereas *it ought only to have been for 300*l.**; and that the Court afterwards on motion ordered it *to be quashed*; which fact was found for the plaintiff; the Court will intend, on the plaintiff's own shewing, that the writ was only *quashed for the excess*, and will arrest the judgment. *King v. Harrison.* 15 E. R. 612

8 *Herefordshire* is the next adjoining English county to *South Wales* for the trial of issues arising there; therefore where in ejectment for lands in *Cardigan* the *venire* was awarded out of *Salop*, and objection was thereupon made at the trial, and a verdict found for the plaintiff; the Court arrested the judgment, and though it appeared that *Salop* was in fact nearer to the lands in question, and more easy of access, that was held not to vary the practice. *Goodright d. Richards v. Williams.* 2 M. & S. 270

(f) In Criminal Cases.

1 Where a defendant is brought up for sentence on any indictment or information, *after verdict*, the defendant's affidavits shall be first read, and then those for the prosecution; after which the defendant's counsel shall be heard, and lastly the counsel for the prosecution. *Rex v. Bunts, Reg. Gen. M.* 29 G. 3. 2 T. R. 683

2 Where a defendant is brought up for sentence *after judgment by default*, the prosecutor's affidavits shall be first read, then the defendant's; after which the counsel for the prosecution shall be heard, and lastly the defendant's counsel. *Rex v. Bunts.* 2 T. R. 684

3 But if no affidavits be produced, the defendant's counsel shall be heard first, and then the counsel for the prosecution. 2 T. R. 684

4 After conviction on a criminal information, to which objections were taken, the defendant must stand committed,

pending the consideration of the judgment, unless the prosecutor expressly consent to his standing out on bail. *Rex v. Waddington.* 1 E. R. 159

5 Besides the common four-day rule on a defendant in misdemeanour to join in demurrer to his plea, there must be a peremptory rule, giving him a certain day in the discretion of the Court, without which judgment cannot be signed against him. *Rex v. The Hon. R. Johnson.* 6 E. R. 583

VIII. OF CONSOLIDATING ACTIONS AND STRIKING OUT COUNTS.

1 If two actions be brought by the same plaintiff at the same time for causes which may be joined in one action, and the defendant is holden to bail in both, the Court will compel the plaintiff to consolidate them, and to pay the costs of the application. *Cecil v. Brigge.* 2 T. R. 639

2 Where several causes are consolidated, if a writ of error be issued in the cause tried and execution taken out for want of bail in error being duly put in, execution in those causes is thereby stayed: for the consolidation rule only relates to the verdict. *Aulwin v. Farine.* 2 N. R. 430

3 If the Court of Common Pleas thinks it reasonable to open a consolidation rule, and try a second cause, they will extend to the second trial all such terms made compulsory on the party successful in the first cause, as are requisite for attaining the merits. *Cohen v. Bulkeley.* 5 Taunt. 165

4 An Inclosure Act, directing feigned issues to try the boundary of a manor, empowered the Court of C. P. to consolidate the actions, if more than one; several plaintiffs, suing in different Courts, having conflicting interests, and issues; the Court of C. P. would not compel them all to concur in the choice of one attorney, entrust to him their conflicting claims and evidence, and agree about the division of costs; and refused to consolidate the actions. *Cramer v. Pennington.* 5 Taunt. 167

5 In an action against forty-six defendants, where the declaration contained two counts for work done by plaintiff as an attorney, and two more for work done by him, without saying in what capacity; the Court of C. P. ordered two counts to be struck out, and the word defendants to be substituted for the names

of the defendants in all the places where they occurred, except the first. *Mecke v. Oxlade.* 1 N. R. 289

IX. OF MAKING UP AND ENTERING THE ISSUE.

1 The issue must be entered as of the Term when the rule of reply was given and the *similiter* joined, and not as of the preceding Term when the plea was pleaded. *Wood v. Miller.* 3 E. R. 204

2 If after issue joined and notice of trial given, the plaintiff enter a suggestion on the roll, and assign breaches under stat. 8 & 9 W. 3. c. 11., he cannot deliver the second issue without a Judge's order. *Ethersey v. Jackson.* 8 T. R. 255

3 The plaintiff having added the *similiter* to the replication, and delivered the issue to the defendant, who accepts it, but does not pay the issue-money, judgment may be signed by the plaintiff *without giving a rule to rejoin.* *Boone v. Eyre.* 1 H. B. 254

4 The plaintiff does not wave his right of signing judgment for not paying the issue-money by giving notice of trial after demanding it. *Jones v. Bryant.* 5 T. R. 400

5 The Court determined that a pauper plaintiff was not entitled to the issue-money; and that if he sign judgment because the defendant does not pay it, the Court will set aside the judgment. *Codron v. Hayman.* 5 T. R. 509

6 But now no judgment shall be signed for non-payment of issue-money; but the issue-money shall remain to be taxed as part of the costs in the cause. *Reg. Gen. K. B. and C. P. H. 35 G. 3.* 6 T. R. 218

2 H. B. 552

7 And this extends to all cases. *Fuller v. Osborne.* 6 T. R. 477

8 The Court of C. P. therefore, refused to allow a plaintiff to sign judgment on the refusal of the defendant to pay for half the paper books delivered to the Judges on a demurrer. *Fulham v. Bagshaw.* 1 B. & P. 292

9 The Court will grant leave to enter the continuances after verdict, in order to arrive at the justice of the case. *Doe d. Meurs v. Dolman.* 7 T. R. 618

X. SPECIAL CASES AND DEMURRERS,—WHEN AND HOW ARGUED.

1 All special cases set down for argument by the clerk of the papers shall be entered within the four first days of the Term next after the trial at which such special cases have been reserved; and none shall ever be set down for argument on any of the four last days of the Term. *Reg. Gen. M. 38 G. 3.* 7 T. R. 454

2 The paper books in causes entered for argument on *Tuesdays* shall be delivered to the Judges on the *Saturday* preceding; and in those entered for *Fridays* on the *Tuesday* preceding; with such marginal notes as are directed by the rule of *Hil. 38 G. 3.* *Reg. Gen. K. B. Trin. 40 G. 3.* 1 E. R. 181

3 All arguments upon demurrers and other arguments in C. P. are to be heard on *Mondays* and *Thursdays* only. *Reg. Gen. C. P. II. 42 G. 3.* 3 B. & P. 110

4 Where issues are taken on some of the pleas and demurrer to others, the plaintiff has a right to argue the demurrers either before or after trial. *Duberley v. Page.* 2 T. R. 394

5 Where the same plaintiff brought three actions of trespass against three several defendants for different parts which they took in the same transaction: one against the Speaker of the House of Commons, who justified under a warrant issued by him under the order of the House for arresting and committing to the *Tower* the plaintiff, a Member of the House, for a breach of privilege, in publishing a libel upon the House; to which justificatory plea the plaintiff demurred: another against the Serjeant at Arms; who pleaded *not guilty*, and also justified under the authority of the Speaker's warrant, to which the plaintiff replied, an excess in the manner of executing it by a military force, and with improper and unnecessary violence; on which issue was joined to the country: and the third against the Constable of the *Tower*, who received and detained the plaintiff as a prisoner, and who also justified under a warrant from the Speaker for that purpose; in which issue was also taken to the country on several facts stated in

the justification; and notice of trial was given in the last two causes (which stood for trial at bar on a day fixed); but the plaintiff, though still within time by the general rules and practice of the Court, had not set down his demurrer in the first cause for argument: The Court on motion of the Attorney-General on behalf of the Serjeant at Arms, and of the Constable of the *Tower*, postponed the trial of issues in those cases until after the argument on the demurrer in the cause against the Speaker; because the right, just, and distinct consideration of the question which arose on the issues of fact, and on the true measure of damages in the causes against the Serjeant at Arms and the Constable of the *Tower*, depended mainly upon the decisions of the issues in law joined in the other action against the Speaker: and though the same question of law might ultimately be raised on motion in the two former actions, yet it could not be considered so conveniently to the Court, to whom the decision of such question belonged, or so advantageously to the party who should prove to be in the right, as upon the demurrer which presented the question of law distinct from the question of fact. *Burdett (Bart.) v. Colman & Moira (Earl.)*

13 E. R. 27

6 If the plaintiff take no step in the cause for three Terms, and in the fourth sign a *concilium*, and obtain judgment in the fifth, the signing the *concilium* is taking a step in the cause, so as to make it unnecessary to give a Term's notice. *Bland v. Darley.*

3 T. R. 530

7 The rule, requiring a Term's notice after a delay of four Terms, is to prevent surprise on the defendant, and therefore does not apply where the proceedings have been delayed at the defendant's request.

3 T. R. 530

XI. TRIAL.

(a) Notice of.

1 Where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission day, one day exclusive, and the other inclusive. *Reg. Gen. E. 30 G. 3.*

3 T. R. 660

2 A notice of trial for the sittings after

Term in *London* must specify whether the cause is intended to be tried at the first day of such sittings, or at the adjournment-day; and in the latter case, it is sufficient to give such notice eight days before the first day of the sittings after Term, if the defendant reside above 40 miles from *London*; and four days if he reside within that distance. *Reg. Gen. E. 51 G. 3.*

13 E. R. 393

3 The plaintiff is not bound by the practice of the Court to give notice of trial till the Term after that in which issue is joined. *Hall v. Buchanan.*

2 T. R. 734

4 If one of several defendants reside within 40 miles of *London*, it is not necessary to give the 10 days' notice of trial required by stat. 4 G. 2. c. 17. s. 3. *Per Ashhurst, J. in Perry v. Jackson.*

4 T. R. 520

5 Where the defendant residing in town at the issuing of the writ changes his residence permanently to the country, at the distance of above 40 miles from town, before the delivery of the issue, he is entitled to 14 days' notice of trial. *Spencer v. Hall.*

1 E. R. 688

6 The venue was in *London*, and verdict for plaintiff without defence, which was set aside because only eight days' notice of trial was given, the defendant residing in *India*. *Douglas v. Ray.*

4 T. R. 552

7 It is not necessary to give a Term's notice of trial after proceedings in the cause have been suspended for a year, if within the year the plaintiff gave notice that he should proceed again; but the common notice of trial is sufficient. *Richards v. Harris.*

3 E. R. 1

8 It was said by the Court of C. P. that where issue is joined early in a Term, (e. g. within the first six days), notice of trial must be given in the same Term. *Frampton v. Payne.*

1 H. B. 65

9 If a cause be made a *remanet*, no new notice of trial need be given: *secus*, where the trial of the cause is put off to the next sittings or assizes by a rule of Court. *Jacks v. Mayer.*

8 T. R. 243

10 And even when a plaintiff gives a peremptory undertaking to try at the next sittings or assizes, there also a new notice of trial must be given. *Dict. p. Cur.*

8 T. R. 246, n.

Monk v. Wade.

ib.

11 Although the plaintiff has undertaken peremptorily to proceed to trial at the next assizes, yet the defendant is not bound to attend and be prepared with witnesses, counsel, &c. without having had notice of trial. *Ifield v. Weeks.* 1 H. B. 222

12 Nor will the prothonotary allow him the costs of such attendance and preparation, though he obtain judgment as in case of a nonsuit, on account of the plaintiff's not proceeding to trial. 1 H. B. 222

13 Where issue is joined in the vacation, the Court of C. P. allows the plaintiff the whole of the next Term to proceed to trial in. *Baker v. Newmun.* 1 H. B. 123

(b) When put off.

1 Motions to put off trials must be made in bank when possible, and not at *nisi prius*. *Reg. Gen. Easter, 49 G.* 3. 1 Taunt. 565

2 Trials can not be put off by consent at *nisi prius*. *Reg. Gen. Mich. 50 G.* 3. 2 Taunt. 221

3 A motion to put off a trial in *London* or *Middlesex*, on account of the absence of a witness, cannot be made when there is not time to shew cause within the Term, if the party applying had it in his power to come earlier. *Anonymous.* 3 Taunt. 315

4 The affidavit of an attorney's clerk to put off a trial must state that he is particularly acquainted with the circumstances of the cause, and has the management of it. *Sullivan v. Magill.* 1 H. B. 637

5 The Court of C. P. will not put off a trial at the instance of the defendant, on account of the absence of a material witness, if he has conducted himself unfairly, or been the cause of any improper delay. *Saunders v. Pitman.* 1 B. & P. 33

6 A defendant indicted in the King's Bench for misdemeanours committed by him in the *West-Indies* in a public capacity under stat. 42 G. 3. c. 85. is not entitled under that statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of *mandamus* to the Courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the

Court of King's Bench; but he must lay before the Court such special grounds by affidavit, as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of *mandamus* for the like purpose. *Rex v. Jones.* 8 E. R. 31

7 The Court of C. P. will not, by putting off a trial, or other indirect means, compel a party to consent to a commission for the examination of witnesses in *Scotland*. Where contradictory verdicts have been found on a policy of insurance, and a third action brought against another underwriter, the Court will not put off the trial to enable him to obtain a commission from a Court of equity for the examination of witnesses in *Scotland*, to the same facts which were given in evidence on the last trial; at least if he has obtained time to plead on the usual terms. *Calland v. Vaughan.* 1 B. & P. 210

8 That Court refused to put off a trial on account of the absence of a material witness, by whose evidence the defence of slavery was to be established. *Robinson v. Smyth.* 1 B. & P. 454

9 If witnesses are absent, and their return is not immediately expected, the Court of C. P. will not require of the plaintiff a peremptory undertaking to proceed to trial, as the condition of discharging an application for judgment as in case of a nonsuit. *Gardner v. Moses.* 1 Taunt. 118

Watson v. Moses.

(c) By Proviso.

1 Where the defendant carries down the record by proviso, it is sufficient if he obtain the usual rule for trial by proviso any time before trial, even though it be obtained after he has given the plaintiff notice of trial. *King v. Pippet.* 1 T. R. 695

2 A defendant in a case where the King is party cannot carry down the *nisi prius* record to trial by proviso. *Rex v. Dyde.* 7 T. R. 661
Rex v. M'Leod. 2 E. R. 202

3 And see a *quære* as to prosecutions by private persons; and a general note on the trial by proviso. 2 E. R. 206, n.

4 A defendant cannot go to trial by pro-

viso, unless there have been a default on the part of the plaintiff, though there have been a former trial, and though the defendant gave notice to the plaintiff of his intention to carry down the record. *Worcestershire Canal Company v. The Trent Navigation Company.* 1 Marsh. 218

(d) *At Bar, or by Record.*

- 1 The granting of a trial at bar is in the discretion of the Court, and must depend upon the particular circumstances of the case. *Rex v. Amery.* 1 T. R. 363
- 2 The Court will permit a defendant to carry a record of an issue, directed by Chancery, down to trial, on a suggestion that the plaintiff intends to delay. *Humpage v. Rowley.* 4 T. R. 767
- 3 A retainer in a cause, without a brief, does not authorize counsel to withdraw a record at *nisi prius*. *Ahitbol v. Beneditto.* 3 Taunt. 225
- 4 A plaintiff in several causes, who by the event of one verdict, perceives that he cannot have a fair trial in the others, may reasonably withdraw his records, without subjecting himself either to judgment, as in case of a nonsuit, or to the defendant's costs of the day of trial, upon the rule for such judgment being discharged. *Mullings v. ————* 5 Taunt. 88

(e) *Jury process and venire.*

See *Goodright d. Richards v. Williams*, ante, page 585.

- 1 Where a fair trial cannot be had in the county where the matter arises, trial will be awarded in the next *English* county where the King's writ of *venire* runs. *Rex v. Amery.* 1 T. R. 363
- 2 Therefore where the action arose in the city of *Chester*, and a fair trial could not be had there, the *venire* was awarded into the county of *Salop*. 1 T. R. 363
- 3 But in a subsequent case, the Court declared that this opinion was founded on a mistake; and, upon a suggestion entered by leave of the Court upon the roll, that a fair and impartial trial could not be had in the county of the city of *Chester*, the Court awarded the trial to be had in the adjoining county *palatine*. *Rex v. St. Mary on the Hill, Chester.* 7 T. R. 735
And see the notes in this case. *ibid.*

4 *Chester* is one of the places excepted out of stat. 38 G. 3. c. 52. for regulating trials in towns corporate, &c. 7 T. R. 735, n.

5 Generally speaking, a Court of Error cannot award a *venire de novo* when the proceedings originate in an inferior Court. *Trevor v. Wall.* 1 T. R. 151

6 But where there was a bill of exceptions to the rejection of evidence in the Court of Great Sessions in *Wales*, and upon error in the King's Bench the evidence was deemed admissible: the Court thought themselves called on to award a *venire de novo* (into the next *English* county); as without the intervention of the jury no final judgment could be given on the record.

Davies v. Pierce. 2 T. R. 125

[And see the note in 2 T. R. 126.; and also the notes in *Johnstone v. Sutton*, 1 T. R. 528, as to the power of a Court of Error to award a *venire de novo*.]

7 That the Court will only award a *venire de novo* where there is a defective finding in the verdict. See *Goodtitle d. Jones v. Jones.* 7 T. R. 52
And see *Holt v. Scholfield.* 6 T. R. 691, ante, page 584.

(f) *Verdict and Damages.*

See PENAL ACTION, ante, page 507.

- 1 If the plaintiff has evidently sustained some damage, and the jury being unable to ascertain the amount, find a verdict for the defendant, the Court of C. P. will permit the plaintiff to enter a verdict for nominal damages. *Feize v. Thompson.* 1 Taunt. 121
- 2 In an action in *tort* against six, the plaintiff may recover a verdict against two. *Cooper v. South.* 4 Taunt. 802
- 3 The Court of C. P. will compel a plaintiff to elect in the Term after the trial, on what count he will enter up a verdict taken generally. *Lee v. Muggeridge.* 5 Taunt. 42
- 4 Where a special verdict concludes generally, the whole case must appear on the record. *Rex v. Calder Navigation.* 2 T. R. 666
- 5 It is the province of a special verdict to find facts, not evidence. *Hubbard v. Johnstone.* 3 Taunt. 209

PREROGATIVE.

See ESCHEAT, *ante*, 306.

EXTENT, 332.

- 1 The King cannot by his prerogative destroy a corporation. *Rex v. Amery.* 2 T. R. 532
- 2 The power of the Crown to pardon a forfeiture, and to grant restitution, can only be exercised where things remain in *statu quo*, but not so as to affect legal rights vested in third persons. *Rex v. Amery.* 2 T. R. 569
- 3 A pardon, if pleaded, must be averred to be under the great seal; (except a statute pardon, or what amounts thereto.) *Bull v. Till.* 1 B. & P. 199
- 4 The King, by virtue of his prerogative, is exempted from the payment of taxes collected *personally* from the subject, and not mingled with the price of the commodity before it is known by whom it is to be made use of; therefore, an express sent upon government service, is not liable to pay the duty on post-horses imposed by 25 G. 3. c. 51. s. 4. *Rex v. Cook.* 3 T. R. 519
- 5 The royal prerogative of presenting to a church vacant by the incumbent being promoted to a bishoprick does

not destroy the effect of a prior grant of the next presentation, by the owner of the advowson. Therefore, if, after a grant of a next presentation to a living, the incumbent be made a bishop, by which the living becomes vacant, and the King is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the King's presentee. *Calland (or Cailland) v. Troward.*

2 H. B. 324 ;

Affirmed in the Court of King's Bench.

6 T. R. 439 :

And the judgments of both Courts affirmed in *Dom. Proc.* 6 T. R. 778

- 6 Kensington Palace being kept in a constant state of preparation to receive the King, with his officers, servants, and guards residing and doing duty there at all times, and some of the royal family having apartments there, is privileged as a royal palace against the intrusion of the sheriff, for the purpose of executing process against the goods of one of the King's sons, having the use of certain apartments therein. *Winter v. Miles.*

10 E. R. 578

PRISONER.

- I. DECLARATION AGAINST—WHEN FILED OR DELIVERED.
- II. APPEARANCE AND PLEAS BY.
- III. WHEN AND HOW CHARGED IN EXECUTION.
- IV. COGNOVIT BY—HOW EXECUTED.
- V. ALLOWANCE TO—HOW MADE.
- VI. SUPERSEDEAS AND DAY RULE.
- VII. WHEN AND ON WHAT GROUNDS DISCHARGED.

- I. DECLARATION AGAINST—WHEN FILED OR DELIVERED.

- 1 A plaintiff need not declare against a prisoner until the end of the Term

next after the return of the writ, even though there was time, in the Term in which the writ was sued out, to have made the writ returnable in that Term. *Richardson v. Richardson.*

6 T. R. 547

- 2 A copy of the declaration must be *delivered*, as well as the declaration entered, before the end of the Term next after the return of the writ. *Blyth v. Harrison.* 1 B. & P. 535
- 3 The defendant having surrendered in discharge of his bail in the King's Bench, removed himself by *habeas corpus* into the *Fleet*, and plaintiff declared against him there after the end of the second Term after the writ was returnable; a judgment of *non pros* signed afterwards was irregular. *Sherison v. Hughes.* 5 T. R. 35
- 4 If a person, having privilege of Parli-

ament, be in the King's Bench Prison, a declaration may be filed against him as being in custody of the marshal, and no summons need be issued against him. *Jackson v. Mackreth*.

5 T. R. 361

- 5 A summons is generally issued to bring the party into Court; but it is unnecessary when the defendant is already in the custody of the marshal.

5 T. R. 362

- 6 If a defendant in custody employ an attorney merely for the purpose of putting in bail, delivery of declaration to that attorney is not sufficient. *Dent v. Halifax*.

1 Taunt. 493

- 7 The declaration need not be delivered to a prisoner personally, or to the gaoler, unless where he is in custody at the suit of the same plaintiff for the same cause of action. *Robertson v. Douglas*.

1 T. R. 191

- 8 A declaration against a prisoner may be delivered in the vacation. *Heron v. Edwards*.

8 T. R. 643

- 9 The rule of *E. 5 W.* and *M. Reg. 2.* requiring the affidavit of the delivery of the declaration to be filed within 20 days of the delivery does not extend to the case of a declaration delivered by way of detainer. *Davis v. Davenport*.

2 B. & P. 72

- 10 The delivery of a declaration against a prisoner, though within two Terms, is a nullity if there were no bill filed before; and he is entitled to his discharge under the above rule of Court. *Nowell v. Bingham*.

4 E. R. 16

- 11 If a declaration be delivered against a prisoner as such, after he has obtained a *supersedeas*, it is irregular; but he cannot take advantage of the irregularity unless he apply to the Court in due time. *Gehegan v. Harper*.

1 H. B. 251

- 12 The stat. 48 G. 3. c. 2. *sched. 149.* requiring an office copy of the declaration to be written in the usual and accustomed manner, on which the duty of fourpence per sheet is imposed; and it not having been the practice to write such copies on *both sides* of the stamped sheet of paper: Held, that an office copy so written and delivered to a prisoner was irregular, and entitled him to be discharged out of custody. *Chumpeys v. Hamlin*.

12 E. R. 294

II. APPEARANCE AND PLEAS BY.

- 1 Persons charged with offences against the excise laws (who by stat. 26 G. 3. c. 77. s. 18., and 35 G. 3. c. 96., are to be committed to gaol in case they cannot find bail, and in whose names an appearance and the plea of not guilty is to be entered within a time to be limited by the Court, to any indictment or information exhibited against them for the same, unless they appear and plead, are allowed by rule of Court six days to enter an appearance and plead in case they are confined within forty miles of London, and eight days if above forty miles. *Reg. Gen. T. 35 G. 3.*

6 T. R. 400

- 2 When a prisoner pleads out of time, he must give the plaintiff notice of his plea. *Thomas v. Prichard*.

4 T. R. 664

- 3 In general a prisoner need not give notice of his having filed a plea, but when he pleads at an earlier time than by the rules of the Court he is compellable to plead, he must give notice. *Rusholm v. Chapman*.

5 T. R. 473

- 4 And if he do not, the plaintiff may sign judgment as for want of a plea. *Parkinson v. Thompson*.

8 T. R. 596

- 5 A prisoner who is supersedeable for want of filing a bill against him in time, waves the irregularity by afterwards pleading. *Pearson v. Rawling*.

1 E. R. 77

- 6 If a prisoner be prevented from justifying bail by the plaintiff desiring further time to inquire into their sufficiency, he is from the time of his notice of justification entitled to a demand of a plea before judgment can be signed against him. *Davies v. Chippendale*.

2 B. & P. 367

- 7 Where a declaration was delivered to a prisoner in gaol, and indorsed with notice to plead in eight days, a plea pleaded before the declaration was filed, is good. *Fraas v. Paravicini*.

4 Taunt. 545

- 8 But judgment having been signed for want of a plea, and the defendant having taken part in the execution of a writ of inquiry, and final judgment being signed: Held, that the defendant came too late to take advantage of it.

4 Taunt. 545

III. WHEN AND HOW CHARGED IN EXECUTION.

See HABEAS CORPUS, *ante*, page 355

- 1 A person in custody under an attachment for non-payment of costs may be charged with an execution in a different action. *Bonafous v. Schoole*. 4 T. R. 316
- 2 A prisoner, after judgment against him, may, notwithstanding the allowance of a writ of error, be charged in execution; as he would otherwise be supersedeable. *Fisher v. McNamara*. 1 B. & P. 292
- 3 When a defendant surrenders in discharge of his bail in the vacation *after verdict* against him, the plaintiff must charge him in execution within the two Terms next following such vacation. *Smith v. Jefferys*. 6 T. R. 776
- 4 But when he surrenders in the vacation *after judgment*, the Term in which the judgment is signed is reckoned as one of the two Terms within which the plaintiff must charge him in execution. 6 T. R. 777
- 5 A creditor may lawfully enter a detainer against his debtor, who is in fact resident within the walls of the *Fleet*, though he be not there by compulsion. *Wilkinson v. Jaques*. 8 T. R. 392
- 6 The plaintiff must give notice of his having abandoned a former *committitur*, which is erroneous, before he enters a second, rectifying the mistake. *Topping v. Ryan*. 1 T. R. 227
- 7 If the plaintiff's attorney sign judgment, and file the *committitur* piece with the clerk of the judgments within the second Term after trial had and verdict obtained against a prisoner, that is a sufficient *charging him in execution within two Terms*, pursuant to the rule of Court of *Hilary* 26 G. 3. though the final judgment and the *committitur* be not entered of record by the officer of the Court till the continuance day after such second Term; provided such entries be then completed. *Pearson v. Rawlings*. 1 E. R. 405
- 8 Every *committitur* of a judgment against a prisoner shall be filed with the clerk of the docquets on or before the last day of the Term, in which the prisoner is charged in execution; and the clerk shall enter the *committi-*

tur on the judgment roll within four days next after the end of such Term, exclusive of the last day of the Term; unless the last of such four days be *Sunday*, and then within five days, &c. and in default thereof the prisoner shall be discharged. *Reg. Gen. East*. 41 G. 3. 1 E. R. 410

And see SUPERSEDEAS, post.

- 9 Defendant discharged out of the custody of the marshal, because there was no acknowledgment by him of the defendant's being in custody in the Term in which he was charged in execution. *Fisher v. Stanhope*. 1 T. R. 464
- 10 In the case of a defendant charged in execution, the *committitur* must be filed of the same Term as the marshal's acknowledgment. *Cunningham v. Cogan*. 10 E. R. 46

IV. COGNOVIT BY—HOW EXECUTED.

For the mode of executing a Warrant of Attorney by a Prisoner, see WARRANT OF ATTORNEY, post.

- 1 Interlocutory judgment having been signed against a prisoner in custody of the marshal; the plaintiff's attorney took a *cognovit* from him for 200*l.* with a *defeasance* on paying 49*l.* (the real debt) and the costs; but no attorney was present on the part of the defendant; though this case was not strictly within the rule of Court, (15 *Car.* 2) which only mentions prisoners in the custody of the *sheriff's officers*, yet the Court interfered for the relief of a prisoner. *Parkinson v. Caines*. 3 T. R. 616
- 2 But at the plaintiff's request they permitted him to alter his judgment to the real debt, on paying the costs. 3 T. R. 616
- 3 If a defendant in custody gives a *cognovit*, it is absolutely necessary that the attorney for the defendant should be present. The clerk to the defendant's attorney is not sufficient. *Paul v. Cleaver*. 2 Taunt. 368

V. ALLOWANCE TO—HOW MADE.

- 1 A prisoner has a right to his discharge if his groats be not paid before 10 o'clock at night of the day on which they are payable; and the right is not waved by the turnkey on the felon's side accepting them after that time. *Fisher v. Bull*. 5 T. R. 36

- 2 But if the turnkey accept a *French* half-crown of the creditor in payment of the groats, although the prisoner afterwards refuse it, that is a sufficient discharge as to the creditor.

5 T. R. 37, n.

- 3 Payment of the weekly allowance to a prisoner under the Lord's Act, to the person who opens the door of the prison, is a sufficient payment to the prisoner within the meaning of the Act. *Parsons v. Salomon*. 1 N. R. 111

- 4 A note for groats must be signed by all the creditors in the suit; and a defendant was discharged, though he had received some payments under a note signed only by one of the parties. *Rex v. Wilkinson*. 7 T. R. 156

- 5 But where a debtor was in execution at the suit of several plaintiffs on a joint debt, and one of them gave a note for the weekly payments signed by him alone "for himself and partners:" this was held to be good. *Meux v. Humphrey*. 8 T. R. 25

- 6 When several executors are plaintiffs, the note must be signed by all of them. *Lepine v. Bayley*. 8 T. R. 325

- 7 If a note for the weekly allowance to a prisoner in execution at the suit of a corporation, be sealed with the corporation seal, it is a sufficient compliance with the words of the Lords' Act; which require it to be signed with the name or mark of the plaintiff. *Doe d. Cutlers' Company v. Hogg*. 1 N. R. 306

- 8 The note cannot be signed by the creditor's attorney if the creditor be dead. *Rex v. Davies*. 1 B. & P. 336

- 9 The Court of C. P. held, that they could not, under the words of 37 G. 3. c. 8. s. 2, moderate the sum to be paid weekly to a prisoner on his being remanded, but that a note must be signed for the full sum directed by that Act. *Rex v. Davies*. 1 B. & P. 336

- 10 If a note for payment of the allowance to a prisoner under the Lords' Act be dated on a *Sunday*, and delivered on a *Monday*, and contain a general promise to pay the allowance weekly, the prisoner is entitled to be discharged. *Constantine v. Pugh*. 3 B. & P. 184

- 11 *Quare*, Whether such a note ought not to contain an express promise to pay the allowance on a *Monday*, although it be dated on that day of the week?

3 B. & P. 184

VI. SUPERSEDEAS AND DAY-RULE.

- 1 The rule that a prisoner who is once supersedeable always continues so, only holds so long as he remains in the same custody and under the same process: Therefore, if a prisoner on mesne process were supersedeable for any irregularity, he cannot take advantage of that after he is charged in execution, if he had an opportunity of applying on that ground before he was charged in execution. *Rose v. Christfield*. 1 T. R. 591

- 2 A *supersedeas* obtained after judgment cannot be pleaded in bar to an action on such judgment. *Topping v. Ryan*. 1 T. R. 273

- 3 A defendant superseded for want of being charged in execution in due time after judgment, cannot be again taken in execution upon the same judgment. *Line v. Lowe*. 7 E. R. 330

- 4 But it seems otherwise if the defendant be super-eded for want of proceedings before judgment. 7 E. R. 330

- 5 The Court of C. P. held, that if a defendant be supersedeable for want of judgment being entered up in time, but not actually discharged, he cannot be detained in an action on the judgment. *Pierson v. Goodwin*. 1 B. & P. 361

- 6 By the rule of Court, *Hil. 26 G. 3.*, if there be a *trial* against a prisoner, he is supersedeable, unless charged in execution within two Terms afterwards: If there be *final judgment* against him, *without trial*, (which is what is there meant by *final judgment*,) then he is supersedeable, unless charged in execution within two Terms after such final judgment; inclusive of the Term of trial or final judgment respectively. *Heaton v. Whittaker*. 4 E. R. 349

- 7 The rule of Court of *Hilary, 26 G. 3.*, superseding a prisoner, against whom plaintiff shall not proceed to trial or final judgment within three Terms after declaration delivered, does not attach in a case where there are two defendants, one of whom suffered judgment by default, and the other pleaded to issue, the trial of such issue being had within the third Term; though the costs were not taxed nor final judgment in fact signed till after

that Term; but then entered according to the course of the Court as of that Term. *Wriglesworth v. Wright.*

13 E. R. 167

- 8 A day-rule, when made, covers, by relation back, the liberation of a prisoner who had signed the petition, but had gone out of the prison before the sitting of the Court on the same day; though the Marshal were sued for an escape. *Field v. Jones.*

9 E. R. 151

VII. WHEN AND ON WHAT GROUNDS DISCHARGED.

N.B. See INSOLVENT DEBTORS, *ante*, page 381.

- 1 If a plaintiff do not proceed to trial or judgment within three Terms against the defendant (a prisoner), the latter is not entitled to be discharged until the expiration of the third Term. *Thomas v. Prichard.*
4 T. R. 664
- 2 Where a defendant was arrested on a contract, the legality of which was doubtful under 7 G. 1. stat. 1. c. 21. and which might eventually subject the plaintiff to a penalty; the Court of C. P. discharged the defendant on entering a common appearance. *Sumner v. Green.*
1 H. B. 301
- 3 The Court of C. P. refused to discharge out of custody a defendant holden to bail for a debt contracted in *England*, on a common appearance, and an affidavit of his having become a bankrupt in *Ireland*, and there obtained his certificate; but put him to plead. *Quinn v. Keefe.*
2 H. B. 553
- 4 If a defendant be holden to bail under a Judge's order, a material fact being concealed from the Judge which would probably have induced him to refuse the order; the Court will on application discharge the defendant, even though there was a sufficient affidavit of debt, independent of the order. *Davis v. Chippendale.*
2 B. & P. 282
- 5 But they will not discharge him from a detainer lodged against him by a third person while in custody under the Judge's order. 2 B. & P. 282
- 6 The Court refused a rule to discharge a defendant out of custody on filing common bail, on the ground that the plaintiffs, at whose suit he was arrested, were assignees under a commission of bankrupt sued out above three years ago against the defendant, under which they had received dividends. *Oliver v. Ames.*
8 T. R. 364
- 7 But the Court suspended the execution of the rule on the sheriff to bring in the body; in order to give the defendant time to make an application to the Lord Chancellor for relief.
8 T. R. 364
- 8 The plaintiff, having charged the defendant in execution, died; the defendant's wife took out administration to the plaintiff; then the Court ordered the defendant to be discharged out of custody, saying, that the plaintiff's attorney had no lien on the judgment for his costs. *Pyne v. Erle.*
8 T. R. 407
- 9 The Court of C. P. discharged a defendant out of custody, who was in execution at the suit of a plaintiff some time since deceased, on whose part no will had been proved, nor any administration granted; and whose family, on notice of a motion for the above purpose, declined interfering. *Broughton v. Martin.* 1 B. & P. 176
- 10 So that Court discharged an attorney in custody by virtue of an attachment for not paying money, under the Lord's Act, whose creditor was dead. *Rex v. Davis.*
1 B. & P. 336
- 11 A defendant cannot be discharged out of execution on the ground of a commission of bankruptcy having been sued out against him by the plaintiff. *M. Master v. Kell.* 1 B. & P. 302
- 12 The Court of C. P. will discharge a defendant out of custody in execution after the plaintiff's death, if it appear that the next of kin do not intend to take out administration, on service of the rule *Nisi* on the next of kin. *Parkinson v. Horlock.* 2 N. R. 240
- 13 The Court of C. P. will not discharge a prisoner out of execution, because the judgment against him is not docketed and entered upon the rolls of the Court. *Pariente v. Castle.*
2 B. & P. 163

PRIZE AND PRIZE-MONEY.

DISTRIBUTION OF.

(a) To Flag-Officers.

(b) — other Officers.

DISTRIBUTION OF.

(a) To Flag-Officers.

1 A flag-officer, who, after giving orders to one of the ships under his command to sail on a cruise, received an appointment to another command, is not entitled to share in a prize taken (after his accepting the new appointment) by the ship so sent out by him to cruise, the ship not being actually under his command at the time of the capture. *Johnstone v. Margeson*.

1 H. B. 261

2 Where a ship belonging to a squadron under the command of an admiral, sails, by his orders on a cruise, but before any prize is taken he is superseded in his command by another admiral, and afterwards a prize is taken by the ship which so sailed; though it should be doubtful to which of the admirals the share of admiral would belong; clearly the captain of the ship taking the prize is not entitled to it. *Taylor v. Lord Pawlett*.

1 H. B. 264, n.

3 But under such circumstances, the admiral who succeeds to the command, (*i. e.* who is *actually in command at the time when the prize is taken*), is entitled. *Pigot v. White*.

1 H. B. 265, n.

4 If an admiral, commander in chief upon a station, come home by leave of the Admiralty for the re-establishment of his health, leaving the squadron under the command of the flag officer next in seniority, but retain his commission as commander in chief:—*Qu.* Whether he be entitled to share in prizes taken by the cruisers of the squadron during his absence? *Lord Nelson v. Tucker*.

3 B. & P. 257

See the next Case.

5 By the 4th article of the King's proclamation of 1797, respecting the distribution of prize, as to flag officers, it is directed, that a chief flag-officer, returning home from a foreign station, shall have no share of the prizes taken

by the ships left behind to act under another command: this applies as well to another command devolving by seniority, as to another chief flag-officer appointed by express commission to succeed the officer returning home: and such returning home, &c. means the commencement in fact of a commander in-chief's departure from the local station of his command for the purpose of returning home, leaving his fleet behind, *i. e.* leaving it for all effective purposes under the controul of another commander competent, under the terms of the proclamation, to command in his stead: Therefore, where a flag-officer, commander in chief in the *Mediterranean*, returned to *England* by leave of the Admiralty for the recovery of his health, leaving the fleet under the command of the next flag-officer in seniority, but having before his departure dispatched one of the fleet on a cruise, who made captures within the limits of the station after the departure homewards of such commander in chief out of those limits, but before any new orders given by the next flag-officer on whom the command of the station had devolved: Held, that the right to the 1-8th, or commanding flag-officer's share of prize, belonged to the *present acting* flag-officer in command on the station, and not to the chief flag-officer returning home; although the latter still retained the title, pay and table money of commander in chief after his return home, and did not resign his commission as such till after the prize taken, and had official correspondence with the Admiralty in that character till his resignation, and made appointments in the fleet as such: the governing principle of his Majesty's proclamation being, that the reward of prize should be to the present effective commander on the station, and not to the nominal one who returns home, leaving ships behind to act under another command. *Lord Nelson v. Tucker* (*in error*).

4 E. R. 238

6 An inferior flag-officer succeeding by devolution to the principal command, upon the returning home of his super-

rior flag-officer, commander-in-chief on a foreign station, is entitled under the King's proclamation of 1797, to the chief flag-officer's 1-8th share of prize taken within the limits of the station, by a squadron which had been detached from the main body, (with which such inferior flag-officer remained), by the superior flag-officer before his return home; but the prize not taken till after he had passed the limits of his station on such return home: and this, though the superior flag-officer, before his departure, directed the inferior flag-officer to take under his command those ships only, *by name*, which continued with him at the principal station, and the detached squadron *when they returned to the same place* after the particular service performed, for the performance of which he had before limited a time: and though such superior flag-officer's commission was stated to be to command in chief a squadron *upon a particular service*, and not merely *upon a particular station*: and though such superior flag-officer did not resign his commission of commander-in-chief till after his return home, and after the prize taken. At least, the superior is not entitled to recover such share of prize from the inferior flag-officer who had received it. *Lord Keith v. Pringle.* 4 E. R. 262

- 7 One of the ships of a squadron is detached by the commanding flag-officer to lie off a certain place within the limits of the station, from whence the captain, *without any further orders* for that purpose, though he had written for such to his superior officer, and waited for them some time, takes upon him *on his own responsibility*, (though from laudable motives which were afterwards approved of by the Admiralty) to depart and to proceed as convoy with the homeward-bound trade, and in the course of the voyage home, out of the limits of his station, (but nothing turned on the question of limits) he takes a prize: Held, that the superior flag-officer who had before the capture succeeded the one by whom the order for being detached had been originally issued, (admitting him to stand in the same situation in point of right) was not entitled to share the flag-officer's share of 1-8th given by the King's

proclamation to a flag-officer *directing or assisting* in a capture by a ship under his command. *Harvey, Knt. v. Cooke.* 6 E. R. 220

- 8 A flag-officer at the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag-officer's command in the *Asiatic* seas, for the special purpose of getting her repaired: and after the ship's going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station, while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag-officer's command in the *Asiatic* seas, but in the course of rejoining her original flag-officer at the *Cape*: Held, that the latter was not entitled to the flag-officer's 1-8th share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command. *Holmes v. Rainier.* 8 E. R. 502

- 9 The commander of the *Cork* naval station, on the 3d of *May* ordered the *Loire* frigate, under his command, to cruise for a month within certain limits mentioned, (whether within the *Cork* station or not did not appear,) but in case of obtaining intelligence of the enemy being at sea, to return immediately and report the same to him, unless the captain should deem it more serviceable first to apprise the commander-in-chief of the *Channel* fleet off *Brest* of it, and then to return to *Cork* without loss of time. The *Loire* having sailed and obtained such intelligence on her cruise, went off *Brest*, and communicated it to the commander of the *Channel* fleet on the 25th of *May*, who on the 28th ordered the *Loire* to go off *Ferrol* with dispatches, &c.; and afterwards, and whilst in the execution of her former orders from the commander of the *Cork* station, to look out for the *Jamaica* homeward bound convoy within certain limits, (which were partly within and partly beyond his original cruising orders;) and if met with, to protect them up *St. George's* and the *Bristol Channel*: The *Loire* having delivered the dispatches, &c.

to the naval commander off *Ferrol*, on her return took three prizes, beyond, as was admitted, the limits of the *Channel* station, and asserted to be within the *Cork* station; (but whether or not within the *Cork* station was deemed to be immaterial in this case.) Held, that the commander-in-chief of the *Channel* fleet did not, within the true meaning of his orders to the *Loire*, intend to retain her under his command after the execution of his orders off *Ferrol*, but only that she should attend to his further instructions while executing her original orders, and as a modification of, or addition to, such orders, rather than as a supercession or abrogation of them: But that, if he had so intended, he had no right so to retain her out of the limits of his command by partial modifications of her original orders, for the purpose of entitling himself to prizes taken by her out of such limits, in derogation of the rights of another flag-officer. *Lady Gardner v. Lyne*.

13 E. R. 574

10 *Qu.*—How the case would be, where a cruiser in chase pursues an enemy out of the limits of one station into another?

13 E. R. 574

11 Where the admiral commanding on the *Cork* station issued orders to the captain of a frigate on that station to go on a particular service, and afterwards to cruise within certain limits for six weeks, and the frigate after performing the service, began her cruise, and returned with a prize to *Cork*; and afterwards the admiral being directed by the Admiralty to take one of the frigates and proceed to *Plymouth* for further orders, and to direct another admiral to take the command, did accordingly direct another admiral to take under his command the frigate among others, and afterwards took himself the said frigate, and sailed in her to *Plymouth*, and was appointed commander of the *Channel* fleet, and issued an order to the captain of the frigate to cruise for a particular purpose for a week, and at the expiration of that time to proceed in execution of the former orders which he had received from him; and the frigate sailed from *Plymouth*, and afterwards arrived within the limits prescribed by the former

orders (which were taken to be within the limits of the *Cork* station), and made two captures, one within and another without those limits: Held, that the admiral so appointed and commanding on the *Cork* station at the time of the captures was entitled to the flag 8th of that which was captured within the limits, not as being privy to the former orders (which orders were not suspended by the last order, and again subsisting at the time of the capture, but were expired by efflux of time), but as admiral of the station within the limits of which the said frigate had made the capture. *Drury v. Lady Gardner*.

2 M. & S. 150

12 A commodore who appoints a captain under him, without having authority for that purpose, is not entitled to share as a flag-officer in the distribution of prizes under his Majesty's proclamation: Nor will the subsequent ratification of such appointment by the Lords of the Admiralty, or the King in Council, entitle him to share as a flag-officer in any prizes taken before the date of such ratification. *Donnelly v. Sir Home Popham*.

1 Taunt. 1

13 If the fleet of an ally and a *British* fleet serve together under a *British* commander-in-chief who detaches the squadron of the ally, the admiral of the auxiliary power is not entitled as a flag-officer to share prizes made by *British* ships detached in another direction, to which he lent no actual co-operation in effecting the capture. *Duckworth, Bart. v. Tucker*.

2 Taunt. 7

(b) To other Officers.

1 *Quare*, Whether an officer under arrest and suspension on board the fleet for an offence of which he is afterwards acquitted, is entitled to prize-money taken during such arrest and suspension? *Johnson v. Sutton (in error)*.
In Cam. Scac.

1 T. R. 493

[This question came incidentally before the Court in an action by the officer suspended, against his superior officer for a malicious prosecution.]

2 In consequence of a trial, directed by the Court of Chancery, the Court of King's Bench declared their positive

opinion that the captain of a ship, actually on board at the time of a capture, was entitled to prize-money, though under arrest at the time, and though another officer had been sent on board to command the ship. *Lumley v. Sutton*. 8 T. R. 224

- 3 A second captain is entitled to a captain's share of prize under the King's proclamation. *Waterhouse v. King, Bart.* 2 E. R. 507

- 4 One, who at the time of a prize taken by a custom-house cutter bore the commission of mate, but was acting commander on board, under an order from the commissioners, communicated by letter to the collector of the port to which the cutter belonged, and by him communicated by letter to such mate, is entitled to the commander's share of the prize under the King's warrant of the 26th of November, 1803, referring to his former warrant of the 4th of July, 1803; which speaks generally of the share to be given to the commander, officers,

and crew, as a reward for their service: and this, though the former commander, whose commission, as such, had before been withdrawn and cancelled by order of the commissioners, on some supposed misconduct, was afterwards restored, and a new commission granted to him bearing the same date as his former commission, which was before the prize taken. And such acting commander was held to be entitled to the full share of commander, without deducting a share of a deputed mariner, who at the time of such capture made was on board acting as mate by like authority. *Pill v. Taylor*.

11 E. R. 414

- 5 Every instrument by which a seaman or marine conveys his prize-money or wages in the hands of the public officers, must be in the form prescribed by the stat. 26 G. 3. c. 63., and the other statutes to which it refers. *Turtle v. Heartwell*. 6 T. R. 426

And see 1 B. & P. 161

PROCEDENDO.

- 1 If, after a *procedendo* to carry back a cause to an inferior Court, the plaintiff recover, and then sue out a *scire facias* against the bail below, and they remove the proceedings against them into the Court of King's Bench, by *habeas corpus*, the latter Court will award a *procedendo* in the suit against the bail. *Dixon v. Heslop*.

6 T. R. 365

- 2 A cause was removed from an inferior Court by an *habeas corpus cum causa*, to which a return was made, stating a custom under which the defendant was sued and arrested: the defendant who removed the cause not having proceeded in it here, the Court awarded a *procedendo*, though error was suggested on the face of the proceedings below; saying they would leave the defendant to his writ of error. *Horton v. Beckman*. 6 T. R. 760

- 3 Bail may render without justifying, and where the rule expires in vacation, a

render on the first day of the ensuing Term, *sedente curia*, is good, though notice were not given till afterwards on the same day, and after a writ of *procedendo* had issued to an inferior Court where the cause originated. *Wiggins v. Stephens*. 5 E. R. 533

- 4 Plaintiff in an inferior Court from which a cause is removed by *habeas corpus*, and a rule for better bail given, is not entitled to a *procedendo*, after render of the defendant and notice of such render, although such render be made after the day on which the rule for better bail expires. *Farquharson v. Fouchecour*. 16 E. R. 387

- 5 If an indictment for felony has been removed here from an inferior Court, in order to issue process of outlawry upon it, and the party accused come in, the Court of King's Bench will award a *procedendo* to carry the record back. *Rex v. Perry*.

5 T. R. 478

PROHIBITION.

I. TO SPIRITUAL AND ECCLESIASTICAL COURTS.

II. — COURTS OF INFERIOR JURISDICTION.

I. TO SPIRITUAL AND ECCLESIASTICAL COURTS.

For the Costs recoverable in PROHIBITION. See Trask v. French.

15 E. R. 574, *ante*, page 225

- 1 A prohibition issued to the Bishop of Chichester, who claimed a right to present by lapse, under pretence of his visitatorial authority, to the office of a canon residentiary of his church: it being a freehold office, and the right of election thereto in the dean and chapter. *The Bishop of Chichester v. Howard.* 1 T. R. 650
- 2 Prohibition was granted to stay a suit in the Spiritual Court for breaking open a chest in the church, and taking away the title-deeds to the advowson. *Gardner v. Parker.* 4 T. R. 351
- 3 Prohibition lies to the Spiritual Court if a suit be instituted to obtain a general probate of the will of a woman made during her coverture, though with her husband's consent, and though she survived him. *Scammell v. Wilkinson.* 2 E. R. 552
- 4 If a *modus* be not proved as laid by the plaintiff in a suit in prohibition, there must be a verdict for the defendant, who is entitled to costs: but if any *modus* be found, though different from that laid, that is a ground for the Court to refuse a consultation. *Brock v. Richardson.* 1 T. R. 421
- 5 Prohibition granted on an affidavit that the defendant (to a libel for tithes in kind in the Spiritual Court) answered on oath, or pleaded a *modus*; without its appearing that the *modus* was regularly pleaded below, so as to be put in issue there. *French, Clerk, v. Trask.* 10 E. R. 348
- 6 Where a *modus* is pleaded in an Ecclesiastical Court, a prohibition may be granted any time before final sentence. *Darby v. Cozens.* 1 T. R. 552
- 7 Prohibition to a Spiritual Court will be granted after sentence, if it appear

on their proceedings that they have exceeded their jurisdiction. *Leman v. Goulty.* 3 T. R. 3

- 8 Therefore, though they may compel churchwardens to deliver in their accounts, yet as they cannot decide on the propriety of the charges, a prohibition will be granted if they do. 3 T. R. 3

- 9 Where a Spiritual Court incidentally determines any matter of common law cognizance, such as the construction of an Act of Parliament, otherwise than as the common law requires, prohibition lies after sentence; although the objection do not appear upon the face of the libel, but is collected from the whole of the proceedings below. *Gould v. Gapper, Clerk.* 5 E. R. 345

- 10 After sentence in the Ecclesiastical Court in a matter of tithe, where the question turned upon the construction of an Act of Parliament, upon a doubt raised whether that Court had not misconstrued the Act, the Court of King's Bench directed the plaintiff to declare in prohibition, for the more solemn adjudication of the question, whether, supposing the Court below to have misconstrued the Act, a prohibition should go after sentence in a matter in which the Court below had original jurisdiction, or whether it was only a ground of appeal. *Gare v. Gapper, Clerk.* 3 E. R. 472

- 11 No prohibition will be granted to a Spiritual Court after sentence upon a libel for particular words spoken of a woman. *Carlsake v. Mapledoram.* 2 T. R. 473

- 12 If the Spiritual Court hath cognizance of part of the charge only, and not the rest, the Court, after sentence below, would not grant a prohibition. *Carlsake v. Mapledoram.* 2 T. R. 473
- 13 Prohibition denied after sentence, where the party applying had permitted the question of fact, whether the land for which tithe was claimed were natural meadow or not, to be tried below. *Stainbank v. Bradshaw.* 10 E. R. 349

- 14 The Court of C. P. has no power to issue an original writ of prohibition

to restrain a bishop from committing waste in the possessions of his see; at least at the suit of an uninterested person. *Semb.* That no Court of common law has that power. *Qu.* If the Court of Chancery has not? *Jefferson v. The Bishop of Durham.*

1 B. & P. 105

N. B. *All the authorities relating to Prohibition to a Bishop are collected in this case.*

- 15 Where a rector was cited in the Episcopal Consistorial Court to shew cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in a church, against which it was proposed to erect a monument, to the granting of which the rector dissented; notwithstanding which the Court below were proceeding to grant the faculty with the consent of the ordinary: Held, to be no ground for a prohibition, but mere matter of appeal, if the rector's reasons for dissenting were improperly overruled. *Bulwer, Clerk, v. Hase.*

3 E. R. 217

- 16 Prohibition denied to the Spiritual Court upon its rejection of a *modus* set up there of 1*d.* for every turkey laying eggs, or of every tenth egg, &c. in lieu of tithe of turkeys, at the option of the vicar; such *modus* not ascertaining any certain time when the money payment in lieu of the eggs, was to be made, in case the option was made to take it in money. *Roberts v. Williams, Clerk.*

12 E. R. 33

II. COURTS OF INFERIOR JURISDICTION.

See ADMIRALTY, I. *ante*, page 19.

- 1 A prohibition will be granted to a Court of Appeal, where it appears that they have no jurisdiction over the subject-matter, even after they have remitted the suit to the Court below, and awarded costs against the appellant,

and though the party applying for a prohibition appealed to that Court.

Darby v. Cosens.

1 T. R. 555

- 2 Where the subject of a suit in an inferior Court is within the jurisdiction of that Court; though in the proceedings a matter be stated which is out of its jurisdiction, yet unless it is going on to try such matter, a prohibition will not lie. *Dutens, Clerk, v. Robson.*

1 H. B. 100

- 3 Courts-Martial, Courts of Admiralty, and Courts of Prize, are all liable to the controuling authority of the Courts at Westminster: the general ground of prohibition being an excess of jurisdiction, when they assume a power in matters not within their cognizance, or act contrary to the rules of an Act of Parliament made to limit their authority. That they have decided wrong, or that there is error in the proceedings, may be a ground of appeal on review, but not of prohibition, there being no ground for the interference of the Courts at Westminster where the matter is clearly within the jurisdiction of such inferior Courts. *Grant v. Sir Charles Gould.*

2 H. B. 100, 101, 107

- 4 The Court of C. P. refused to grant a prohibition to prevent the execution of the sentence of a court-martial, passed against A., who had received pay as a soldier, (but assumed the military character merely for the purpose of recruiting in the usual course of that service), though the proceedings of the court-martial appeared to be in some instances irregular. *Grant v. Gould.*

2 H. B. 69

- 5 The Court refused a prohibition to magistrates to restrain them from pulling down an old bridge before a new one was passable. *Rex v. Justices of Dorset.*

15 E. R. 594, *ante*, page 171

QUARE IMPEDIT.

- 1 If the right of nomination be in one, and of presentation in another, and either impede the other in his right, a *quare impedit* lies. *Cross v. Salter.*

3 T. R. 640

- 2 Where the right of nominating is in A. and of presenting in B., B. is to judge of the qualification of the person nominated, in the same manner as a bishop does; but if the person pre-

- senting object to the nominee on the ground of immorality, that must be tried by a jury. 3 T. R. 646
- 3 Where the grant of a *rectory* by the Crown contained an exception of all churches and vicarages thereto belonging, a perpetual curacy belonging to the rectory passed by the grant, not being included in the exception. *Arlington v. Chester, Bishop.* 1 H. B. 418
- 4 In *quare impedit*, the plaintiff having stated his title in the declaration, the defendant pleads his own title in bar in deducing which several incidental points are also stated; the plaintiff in the replication sets forth essential matter, which would fully avoid the defendant's title, but does it by way of inducement to a traverse of one of those incidental points, with which traverse the replication concludes; the defendant in the rejoinder takes no notice of the traverse in the replication, but traverses the matter of inducement which precedes it. This rejoinder is good, and may well pass by the traverse in the replication; that traverse being an immaterial one. *Thrale v. London, Bishop.* 1 H. B. 376
- 5 In pleading a right in coparceners to present an advowson by turns, it is good to state that the right arose because they did not agree to present, which is synonymous to saying they could not agree. 1 H. B. 376
- 6 A. B. and C., three sisters, are coparceners of an advowson. A. marries D., on whom A.'s third is settled; B. marries E.; and C. dies, having devised her third to F., the son of B. and E.—D. E. and F. being thus entitled, under or in right of the several original coparceners, a *quare impedit* is brought by G., a stranger, against D. and E.—E. dies pending the writ, and the share of B. (previously deceased) thereupon descends to F., in addition to the share devised to him by C.—D. suffers judgment by default. This judgment against D. is a bar to a *quare impedit* brought by D. and F. (in which D. is summoned and severed) to recover the same presentation; but is not a bar to F.'s right to recover on the next avoidance in his turn. *Barker v. London, Bishop.* 1 H. B. 412 (And see *Willes's Rep.* 659.)
- 7 In *quare impedit*, the defendant pleaded that one M. O. under whom he claimed, being seised in fee of one moiety of the advowson to present to one turn in every two turns, presented one J. O. in her proper turn; that the church being afterwards vacant, one J. W., under whom the plaintiff claimed, presented in his proper turn; that the church being again vacant, the plaintiff presented; and that the church being a fourth time vacant, it belonged to the defendant to present. On demurrer to this plea, the Court held that the defendant had not shewn a title to present, since he had not shewn whether the third presentation was by usurpation or by agreement, and that it could not be presumed that the defendant was entitled to present in the first and fourth turn, and the plaintiff in the second and third, since the plea averred that M. O. had presented to the first turn in her proper turn, and J. W. in his proper turn. *Birch v. Lichfield and Coventry, Bishop.* 3 B. & P. 444
- 8 *Semb.* that if it had appeared by the plea that the plaintiff had presented to the third turn by usurpation, he would still have been entitled to the fourth turn by right. 3 B. & P. 444

QUO WARRANTO.

INFORMATIONS.

(a) *How, for what Purposes, and on whose Application granted.*

(b) *On what Grounds refused.*

(c) *Limitation of Time for granting.*

(d) *Proceedings in, relative to Pleadings, Evidence and Judgment.*

(e) *Costs, Proceedings for—where staid.*

(a) *How, for what Purposes, and on whose Application granted.*

See CORPORATION, *ante*, *passim*.

1 Informations in nature of a *quo warranto* have been considered of late years merely as civil proceedings. *Rex v. Frances.* 2 T. R. 484

2 When a proper case has been laid before the Court to induce them to grant an information, they have never exercised any controul over it afterwards, as to the manner in which it is to be conducted. *Rex v. Brown.* 4 T. R. 276

3 If the affidavit in support of the rule for such an information omit a material fact, which is stated in the affidavit filed on the other side, the latter affidavit may be read by the prosecutor in support of his rule. *Rex v. Mein.* 3 T. R. 596

4 The Court will make the rule for a *quo warranto* information absolute, although the party has, since the rule obtained, resigned his office, and his resignation has been accepted. The Court will not consolidate several informations against several persons for distinct offices, for there must be an information against each, to enable each to disclaim. *Rex v. Warlow.* 2 M. & S. 75

5 In considering whether they should give leave to file a *quo warranto* information, the Court will judge from all the circumstances who are the real prosecutors. *Rex v. Cudlipp.* 6 T. R. 503

6 *2u.*—Whether the Court will grant an information to impeach a derivative title, where the person from whom it was derived died in the undisturbed possession of it? *Rex v. Stacey.* 1 T. R. 4

7 Such title shall not be impeached by those who have acquiesced and acted under it. 1 T. R. 4

8 An information in nature of a *quo warranto* granted against a port-reeve of a borough and manor, who as such, was the returning officer of the borough. *Rex v. Mein.* 3 T. R. 596

9 Information in nature of a *quo warranto* lies against a person claiming to have a right of voting by virtue of a burgage tenement. *Horsham case.* 3 T. R. 599, n.

10 Information in nature of *quo warranto* lies for the office of bailiff of a court-leet, being a prescriptive officer, having a power to summon, and select the jury. *Rex v. Bingham, Clerk.* 2 E. R. 308

11 An information in nature of a *quo warranto* granted in order to try whether a residence in a borough, previous to an election, one of the qualifications for which, was residence; were *bona fide* or not. *Rex v. Richmond, Duke.* 6 T. R. 560

12 An information in nature of *quo warranto* was granted against several for exercising the office of commissioners for paving the town of *Taunton*, under an Act of the 9 G. 3. to whom a power was given to impose rates and taxes on the inhabitants. *Rex v. Badcock.* 6 E. R. 359

13 There must be an *user* as well as a *claim* of a franchise in order to found an application for an information in nature of a *quo warranto*; stating that the defendant, who was elected to an office, had tendered himself to be sworn in, is not sufficient. *Rex v. Whitwell.* 5 T. R. 85

14 But a swearing in, though defective in law, yet being such whereby the party claimed at the time to be a free burgess of a corporation: Held a sufficient *user* of the office to warrant an information in nature of a *quo war-*

ranto against him, and not like a mere claim of the office. *Rex v. Tate.*

4 E. R. 337

15 It is no objection to an application for an information in nature of a *quo warranto* against a mayor for not having taken the sacrament within the proper time before his election, according to stat 13 Car. 2. st. 2. c. 1.; that the relators concurred in his election; because that defect is a latent one, arising from the omission of an act positively required by the Legislature. *Rex v. Smith.*

3 T. R. 573

16 And the Court for such an omission will grant an information at the prayer of a mere stranger to the corporation, because it concerns the interest of the whole kingdom. *Rex v. Brown.*

3 T. R. 574, n.

17 An application for a *quo warranto* information made on the affidavits of several persons, of whom all but one have consented to the election proposed to be impeached, may be granted on the affidavit of that one, if he avow himself to be the relator. *Rex v. Symmons.*

4 T. R. 223

18 It is no objection to relators applying for a *quo warranto* information against the defendant for exercising the office of an alderman (his election to which they had opposed), that they afterwards made no opposition to his election to the principal office of magistracy (to which the other was a necessary qualification); or that they afterwards attended at and concurred in corporate meetings whereat he presided or whereat he attended in his official character: such application being made within the time limited by law, viz. in four years after the defendant's election as an alderman. *Rex v. Clarke.*

1 E. R. 36

19 It seems that though such an information may be granted on the relation of a stranger to the corporation; yet he ought to make out a very strong case for the interference of the Court. *Rex v. Kemp.*

1 E. R. 46, n.

20 It is no objection to the person applying for an information in nature of a *quo warranto*, which would operate in its effect to dissolve the corporation, that they attended the meeting at which the mayor was elected, whose election they impeached on the ground that the corporation was then dis-

solved by the loss of an integral part, and that they voted for another candidate, and afterwards attended other corporate meetings at which such mayor presided. *Rex v. Morris and Stewart.*

3 E. R. 213

(b) On what Grounds refused.

1 The Court will not grant a *quo warranto* information to try the validity of an election to the office of church-warden, because it is no usurpation on the Crown. *Rex v. Shepherd.*

4 T. R. 381

2 The Court refused to grant an information against one who had served the office of mayor twelve years before, when the rule to shew cause was obtained upon an affidavit that the relator did not believe he had been duly sworn in, and the rule was opposed by an affidavit, which did not expressly allege that he had been duly sworn, but stated that he appeared by the corporation books to have been sworn in. *Rex v. Newling.*

3 T. R. 310

3 The Court refused to grant a *quo warranto* information, because the party applying for it had agreed not to enforce a bye-law, upon which he now grounded his attempt to impeach the defendant's title. *Rex v. Mortlock.*

3 T. R. 300

4 Information refused after eight years, though applied for on affidavit of the town-clerk that defendant had not taken the oaths of allegiance, &c.; it appearing by the corporation books that he had, and it not being a recent complaint. *Rex v. Helleston, Mayor.*

3 T. R. 311, n.

5 In general, the title of the electors is not to be brought in question by attacking the title of the person elected by them: but this rule does not apply where there is no method of prosecution by which the title of the electors may be questioned in the first instance. *Rex v. Mein.*

3 T. R. 596

6 Upon a question concerning the validity of an election to a vacant fellowship made by the fellows of *Trinity Hall, Cambridge*, which was disputed by the master: The Court held that an information in nature of *quo warranto* would not lie; but thought the proper remedy in such case was by *mandamus*, or by an action brought by

the fellow appointed by the master; to try his right. *Rex v. Gregory.*

4 T. R. 240, n.

- 7 The Court will not permit one corporation to file an information in nature of a *quo warranto* against another for a defect of title which equally applies to his own, or to the title of those under whom he claims. *Rex v. Cudlipp.*

6 T. R. 503

- 8 Where sufficient appears by the affidavits, to draw the merits of an election to a corporate office into question, the Court will not grant an information in nature of a *quo warranto*; though the fact of the defendant's usurpation no otherwise appeared than by the deponent's swearing to their information and belief, that the defendant was admitted freeman, and sworn and enrolled accordingly, the defendant not denying the fact when called upon by a rule to shew cause. *Rex v. Harwood.*

2 E. R. 177

- 9 Where a corporation was dissolved, and no corporate body existed in fact at the time, the Court refused to grant an information in nature of *quo warranto* against an individual for an impertinent claim to be returning officer at an election of members to serve in parliament, by virtue of his having been elected an alderman while the corporation existed in fact; there being no civil right in controversy, but it being rather the ground of a proceeding in *panam* by the Attorney-General. *Rex v. Saunders.*

3 E. R. 119

- 10 Where an information in nature of *quo warranto* was moved for on the ground of a disputed mode of election, which alone was in controversy at the time of the defendant's election, and which ground was afterwards answered on shewing cause, the Court would not, in their discretion, make the rule absolute to try another incidental and secondary question, as to whether there were a sufficient interval of time allowed between the nomination and election of the defendant; no person's right having been set aside by means of such acceleration of the election, if it were accelerated. *Rex v. Osbourne.*

4 E. R. 327

- 11 The stat. 15 Car. 2. c. 17. creating the corporation of the *Bedford Level*, directs that they shall appoint a regi-

strar, &c. and other officers at their pleasure; the duty of which registrar is to register titles to land within the Level; and he takes an oath of office: Held, that an information in nature of *quo warranto* does not lie against such an officer; he being a mere servant of the corporation, and his office not affecting any franchise, or other authority holden under the Crown. *Rex v. Bedford Level Corporation.*

6 E. R. 356

(c) Limitation of time for granting.

- 1 N. B. By the statute 32 G. 3. c. 58. "for the amendment of the law in the proceedings upon information in nature of *quo warranto*;" it is enacted by sec. 1. that a defendant may plead that he has held or executed his office for six years or more; and on a verdict on such issue should be entitled to judgment in his favour with costs; and this extends to informations by the attorney-general; by sec. 2. derivative titles are also protected. Under the above Act, a defendant may plead several pleas, even though he do not plead (in one of them) the limitation imposed by the statute. *Rex v. Autridge.*

8 T. R. 467

For the construction of the 3d section, see *Rex v. Stokes*, next page.

N. B. The following cases were determined previous to the stat. 32 G. 3. c. 58.

- 2 The Court determined that they would not grant an information in the nature of a *quo warranto* after twenty years' quiet possession. *Rex v. Stacey.*

1 T. R. 1

- 3 And it was held that length of time, though less than twenty years, might induce the Court to refuse such an information under certain circumstances.

1 T. R. 3

- 4 Fourteen years' quiet possession held a sufficient length of time for refusing an information. *Rex v. Pike Braddock.*

1 T. R. 3, n.

- 5 A *quo warranto* information against a freeman of the borough of *Winchelsea*, was refused after sixteen years' acquiescence under the election of a mayor (under which the defendant claimed), where a mere blunder was committed, as to the person who ought to have presided thereat in the absence of the old

mayor, whose duty it was. The corporation consisted of a mayor, jurats, and freemen; and the election of mayor was made annually by the body of freemen out of the jurats, which latter have no right to vote: and on that occasion the election appeared to have been held before the new mayor himself, instead of the oldest freeman: but all parties had concurred at the time. *Rex v. Stacey.* 1 T. R. 1

6 The Court said they would in no case grant a *quo warranto* information after twenty years' quiet possession. *Rex v. Newling.* 3 T. R. 310

7 And that applications made within that time might be refused on particular circumstances. 3 T. R. 310

8 Such an application refused after fourteen years' quiet possession. *Rex v. Pike and Prideaux.* 3 T. R. 311

9 At length the Court resolved to limit their own discretion, and that they would not, under any circumstances, grant an information in nature of *quo warranto* against a person who has been in the peaceable possession of his franchise six years. *Rex v. Dickinson.* 4 T. R. 282

10 And soon afterwards the Court determined that they would not grant a *quo warranto* information to impeach a derivative title, if the person claiming the original title has been in the undisturbed possession of his office six years. *Rex v. Peacock.* 4 T. R. 684

11 It was held that possession of a corporate franchise for less than twenty years, was not of itself a sufficient objection to an information in nature of a *quo warranto* to try the validity of the title to such franchise. *Rex v. Bond.* 2 T. R. 767

12 But that the circumstance of the relator's standing in the same situation with the defendant, or its appearing that the corporation must necessarily be dissolved by impeaching the defendant's title, and the title of those who claim under him, would govern the discretion of the Court in refusing such an application. 2 T. R. 767

13 The fact of the defendant's title having been before attacked by a similar information, which was afterwards abandoned, was not allowed to have any weight. 2 T. R. 767

(d) *Proceedings in, relative to Pleadings, Evidence and Judgment.*

See *Rex v. Amery.* 1 T. R. 575.

1 Where leave had been granted by the Court to file an information in nature of a *quo warranto* against a party for claiming to be common council-man of York, and the relator by his replication attacked also the defendant's title as freeman, which had been stated in the introductory part of his plea, the Court refused to strike it out, or direct their officer to enter a *nolle prosequi*. *Rex v. Brown.* 4 T. R. 276

2 The stat. 32 G. 3. c. 58. which enables a person to plead that he held or executed an office six years before exhibiting a *quo warranto* information, means six years before making the rule absolute for the information, and not six years before obtaining the rule *nisi*; and therefore the Court refused to make the rule absolute where the six years had then elapsed, though they had not elapsed before the rule *nisi*. But a title to one office, which is a qualification to hold another office, is not within s. 3. of the statute respecting derivative titles; and therefore although the party had exercised the first for six years, the Court made the rule absolute for an information for exercising the second office upon a defect of title to the first. *Rex v. Stokes.* 2 M. & S. 71

3 After a defendant in *quo warranto* has appeared, the prosecutor must give two four day-rules to plead, and after the expiration of the last must also move in Term-time for a peremptory rule to plead, otherwise the defendant has until the next Term to plead. *Rex v. Ginever.* 6 T. R. 594

4 *Quare*, Whether a prosecutor of an information in a nature of a *quo warranto* can demur to part of the defendant's plea, and reply to the rest? *Rex v. Ginever.* 6 T. R. 733

5 The defendant in a *quo warranto* information derived title under a custom for "the mayor and burgesses of N. in common council assembled, under their various names of incorporation, from time immemorial till the granting of letters patent by Queen Elizabeth, and for the mayor, bailiffs, and capital burgesses, in common council assembled

since that time," to admit every person of the age of twenty-one whom they chose; after verdict for the defendant establishing this custom, the Court held it well pleaded; it appearing to them to have been always exercised by the same body, (to wit) the *common council*, though constituted of different persons at different times. *Rex v. Knight.* 4 T. R. 425

- 6 A charter of *W. 3.* granted to the town of *Liverpool*, directs that the common councilmen shall be elected in such manner as was used before a former charter of *Car. 2.*; the defendant, to a *quo warranto* information for exercising the office of common-council-man, pleaded, that before the charter of *Car. 2.* the mayor, bailiffs, and burgesses used to elect (except at those times when there was any bye-law to regulate the mode of election): it was held that the plea was bad, because it did not shew what was the usage in fact before the charter of *Car. 2.* *Rex v. Birch.* 4 T. R. 608

- 7 To a *quo warranto* information the defendant derived a title in his plea to the office of a burgess under a custom for the common council to admit *ad libitum* any person of the age of 21, whom they chose: the prosecutor, after denying that custom, replied that no person was entitled to be admitted but in right of servitude, and that the defendant had not served a seven years' apprenticeship; rejoinder stating the special circumstances under which he had served: on a demurrer to this rejoinder, because it was a departure from the plea, the Court held the replication itself to be bad, as *immaterial* to the title in the plea; and gave judgment for the defendant. *Rex v. Knight.* 4 T. R. 419

- 8 After the death of a mayor, *Black-*

stone, J. would not suffer his eligibility to be disputed, but merely the fact whether he was mayor or not, which the corporation book shewed; and if he was in fact mayor, it was to be taken that he had been regularly so. *Rex v. Spearing.* 1 T. R. 4, n.

- 9 Upon an information in nature of *quo warranto* against one for claiming the office of alderman, if he disclaim, and judgment of ouster be given against him, he is concluded from shewing to a second information, for exercising the same office, that he was duly elected before such first information and judgment of ouster, and that he was afterwards sworn in by virtue of a peremptory *mandamus* from the Court of King's Bench. But, *semble*, if the election to the office were good, and only the first swearing in irregular, the first judgment should not have been an absolute judgment of ouster; but either a judgment of *capiatur pro fine* only, for the temporary usurpation, or a judgment of ouster *quousque*, &c. *Rex v. Clarke.* 2 E. R. 75

- 10 In a *quo warranto* information the defendant relied on an election to the office of Port-Reeve, by a homage consisting of twenty-three free tenants; the jury found, on a special verdict, that twenty-one of those persons were not free tenants; and the Court held the election to be void. *Rex v. Mein.* 4 T. R. 480

(c) *Costs, Proceedings for, where staid.*

- 1 The Court will not stay proceedings in a *quo warranto* information until the prosecutor give security for costs, on the ground that the relator is in insolvent circumstances, where it appears that he is a corporator, and no fraud is suggested. *Rex v. Wynne, Bart.* 2 M. & S. 346

And see *COSTS*, XII. *ante*, page 226.

RANSOM.

- 1 A sentence of condemnation of a *British* ship (which had been captured by a *French* privateer, and carried into *Bergen* in *Norway*) by the *French* consul at *Bergen*, is an illegal sentence; and if after such a sentence the owner repurchase his ship at a public auction

at *Bergen*, he cannot recover the money so paid from the underwriter. For such a contract is a ransom and illegal under the Acts 22 G. 3. c. 25.; 35 G. 3. c. 66. s. 37, 8, 9. *Havelock v. Rockwood.* 8 T. R. 263

- 2 The statutes prohibiting ransoms, be-

- ing remedial Acts, are to be construed liberally. 8 T. R. 277
- 3 A ransom may take place on shore in a neutral country as well as on the high sea. 8 T. R. 277
- 4 It is not necessary that an hostage should be given to constitute a ransom. 8 T. R. 277
- 5 In the case of a ransom bill, the owners are not liable beyond the value of the ship and cargo. *Helly v. Grant*. 1 T. R. 76
- 6 But a promise by a captain of a ship,

on behalf of his owners, when the ship was taken, to pay monthly wages to one of the sailors, in order to induce him to become a hostage, is binding on the owners, although they abandon the ship and cargo. *Yates v. Hall*. 1 T. R. 73

7 *Qu.*—Whether, after a capture and ransom, the owner is liable to pay wages for the time which elapsed previous to the capture? 1 T. R. 79 (See stat. 22 G. 3. c. 25.)

RECOVERY.

- I. BY WHOM AND HOW SUFFERED—AND WHO ARE BARRED THEREBY.
- II. WHEN AND HOW PASSED.
- III. AMENDMENT OF.

- I. BY WHOM AND HOW SUFFERED—AND WHO ARE BARRED THEREBY.

N. B. *The nature and operation of common recoveries is stated and explained at large in the case of Martin d. Tregonwell v. Strachan*. 5 T. R. 107, n.

- 1 *A.*, tenant for years, remainder to *B.* for life, remainder to the first and other sons of *B.* in tail, remainder to *B.* in tail; *A.* and *B.* join in a lease and release to make a tenant to the *præcipe*, and suffer a recovery; the estate tail limited to the sons of *B.* is not divested by the recovery, nor is there any forfeiture of the respective estates of *A.* and *B.* *Smith d. Richards v. Clifford*. 1 T. R. 738
- 2 By such recovery *B.* only barred his remainder in tail, subsequent to the remainder in tail to his first and other sons. 1 T. R. 738
- 3 The tenant to the *præcipe* must have a freehold in possession, otherwise a recovery suffered by him is invalid. *Roe d. Hale v. Wegg*. 6 T. R. 708
- 4 *A.* being seised in remainder during the life of *B.* and *C.*, and the survivors, in trust to preserve contingent remainders, takes an estate in possession to him and his heirs during the life of *C.*, to make him tenant to the *præcipe*, and a recovery is suffered against *A.*, the contingent remainders are saved

by the statute 14 Eliz. c. 8. *Boughton v. Sandilands*.

3 Taunt. 373, *in notâ*. See this Case ante, DEED II. 10. page 245,

5 If a tenant in tail by purchase under a settlement, made by his ancestor *ex parte materna*, suffer a recovery, and declares the uses to himself in fee, he takes the fee as a purchaser descendible to his paternal heirs. *Roe d. Crow v. Baldwere*. 5 T. R. 104

6 If tenant in tail by descent from the maternal ancestor suffer a recovery, and declare the uses to himself in fee, the estate will descend to the heirs *ex parte materna*, whether it be copyhold or freehold. 5 T. R. 164

7 Under a devise of land to a trustee and his heirs, out of the rents and profits to pay an annuity to the testator's wife, and the overplus to his nephews; and after his wife's death, to the use of his nephews and the survivor for their lives; remainder to the use of the trustee to preserve contingent uses and estates, &c. during their lives; and after their deceases *in trust* for the heirs male of the body and bodies of the nephews; and in default of such issue, then to the use of another in fee: Held, that the limitation *in trust* for the heirs male of the body and bodies of the nephews was executed by the statute, and therefore united with the prior use executed in them for life; and that a recovery suffered of the whole estate by the survivor of the nephews after the death of the other nephew without issue, and after the death of his own issue, bound

the entail, and defeated the subsequent limitation in fee. *Doe d. Terry v. Collier.* 11 E. R. 377

8 Under a devise of a mansion and family estate to several successively for life and in tail; with a proviso that whatsoever person should, by virtue of the will, become possessed of, or entitled to, the estate, should, from the time he became so possessed, take upon himself the surname of *Thetwall*, and make the mansion his usual and common place of abode and residence: Held, that a tenant in tail in remainder succeeding to the possession, who had also become *heir at law* to the testator, since his death, not being found to have had notice of the will of her ancestor containing such condition, her title could not be impeached by the remainder-man over, who brought ejectment after her death against her husband, by whom she had issue which died before her: she having also in fact suffered a recovery about four months after she came of age, within which period it was contended that she ought to have complied with the condition of residence to enable her to make a good tenant to the *præcipe*. *Doe d. Kenrick v. Beauclerk.*

11 E. R. 657

9 A recovery cannot be suffered of premises in one of two counties in the alternative. *Wainwright, Demandant; Seagrave, Tenant; Smith, Vouchee.*

1 Taunt. 538

10 It is no objection to a recovery with double voucher that the tenant jointly vouchers the tenant for life and remainder-man in tail, who vouch over the common vouchee. *Doe d. Greasley v. Nelson.* 2 Taunt. 59

II. WHEN AND HOW PASSED.

1 In every common recovery where the vouchee shall personally appear, the writ of entry shall be sued out, and produced at the time of the recording of the vouchee's appearance at the foot of the *præcipe* in such recovery. *Reg. Gen. C. P. T. 30 G. 3. 1 H. B. 526, 7*

2 In every common recovery wherein the tenants' or vouchees' warrants of attorney shall be taken under a *dedimus potestatem*, there shall be written on every copy of the *præcipe* and of such warrant of attorney (having the affidavit required by the rule of H. 14 G. 3. thereto annexed) the *allocatur* of the Lord Chief Justice, or some other

Justice, in the same manner as on fines taken by *dedimus potestatem*: and the copy of the *præcipe* and warrants of attorney, with the *allocatur* thereon, shall be filed as directed by the said rule: and at the time of signing such *allocatur*, the writ of entry for such common recovery shall be produced before the Judge signing such *allocatur*, who may mark such writ with his title, name, or initials; and such writ shall also be produced at the time of the arraignment of such recovery. *Reg. Gen. C. P. T. 30 G. 3. 1 H. B. 527*

3 No common recovery (or fine) shall pass unless the taking of the warrants of attorneys be before one of the justices or barons at *Westminster*, or a serjeant, without an affidavit being filed that the commissioners taking the same are either barristers of five years standing, or solicitors or attorneys of some of the Courts at *Westminster*; the Judges of the Court of Session and Exchequer, or advocates and clerks to the signet, or five years standing in Scotland. *Reg. Gen. C. P. M. 39 G. 3. 1 B. & P. 362*

4 Though the deeds to make a tenant to the *præcipe* be not executed till after the execution of the writ of *seisin*, still the recovery will be good by stat. 14 G. 2. c. 20., if the deeds be executed in the Term in which the recovery is suffered. *Goodright d. Burton v. Rigby.* 2 H. B. 46;

N. B. *This judgment was affirmed in the Court of King's Bench.* 5 T. R. 177

5 The affidavit of the acknowledgment of a warrant of attorney to suffer a recovery, taken before an ordinary magistrate in a foreign country, must be attested by a notary public. *Ex-parte Worsley.* 2 H. B. 275

6 It is no objection to the passing a common recovery, that the order of the names of the vouchees in the *præcipe* at bar and the *dedimus* varies, nor that the warrants of attorney of the several vouchees, are on separate pieces of parchment. *Lang v. Woodhouse.*

1 B. & P. 31

7 If the different vouchees in a recovery execute and acknowledge several warrants of attorney, though upon the same piece of parchment, the Court of C. P. will not suffer the recovery to pass. *Jennings v. Vernon.* 3 B. & P. 361

8 And if under a *dedimus potestatem* to take the acknowledgment of nine persons to a fine; the commissioners

- take the acknowledgment of six on one piece of parchment, and of three on another, the Court of C. P. will not allow the fine to pass. *Baich v. Phelps*. 3 B. & P. 366
- 9 In a recovery, if the acknowledgment of the vouches is taken abroad, a notarial certificate, made to authenticate the affidavit of the commissioners, must distinctly state that the affidavit was sworn. *Laidlaw, Demandant; Cox, Tenant; Brown, Vouches*. 2 Taunt. 205
- 10 If a recovery do not pass within the Term in which the *dedimus* recites the writ of summons to be returnable, it will not suffice to indorse on the renewed *dedimus*, a return purporting to be made by the commissioners who returned the former writ, without having their actual signature. *Bevir, Demandant; Robbins, Tenant; Beech, Vouches*. 1 Taunt. 418
- 11 If a warrant of attorney for suffering a recovery be acknowledged in a part of the *East-Indies*, far distant from the residence of any notary public or British magistrate, an affidavit of the acknowledgment, made before a British consul or agent there, will suffice. *Domville, Demandant; Kinderley, Tenant; Collier, Vouches*. 3 Taunt. 275
- 12 The warrant of attorney to suffer a recovery of lands in a county palatine, cannot be taken before an attorney who is an attorney only of the Court palatinate of great sessions. *Blagrove, Demandant; Owen, Tenant; Blagrove, Vouches*. 3 Taunt. 302
- 13 The acknowledgment of a warrant of attorney for suffering a recovery must be before the return of the summons; and if not, it would be error. *Anonymous*. 4 Taunt. 452
- 14 Notarial seal dispensed with in taking the acknowledgment of a vouches in a country where the notaries do not use a seal. *Pricc, Demandant; Williams, Tenant; Lord Somers, Vouches*. 4 Taunt. 573
- 15 The day upon which an acknowledgment was taken, being left blank, was permitted to be supplied by affidavit. *Lane, Demandant; Peutriss, Tenant; Bennett, Vouches*. 4 Taunt. 589
- 16 Where the tenant should have appeared in *Hilary* Term, and he did not appear till *Easter* Term, the Court of C. P. would not permit the appearance to be entered as of *Hilary* Term. *Buzzard, Demandant; Ware, Tenant; Baxter, Vouches*. 4 Taunt. 589
- 17 Under the rule of Court, *Hilary* 14 G. 3., attorneys of the Court of great sessions in *Wales* are not competent to take the acknowledgment of a warrant of attorney for suffering a recovery. *Mullins, Demandant*. 4 Taunt. 584
- 18 In a recovery, the attorney upon the record cannot be a commissioner for taking the acknowledgment of the warrant constituting himself the attorney. *Shaw, Demandant; Wure, Tenant; Clulow, Vouches*. 4 Taunt. 590
- 19 Where a recovery had failed to be completed in the Term in which it was intended, through the refusal of one of the vouches to accede to it, the Court of C. P. in a subsequent Term, for the benefit of the other parties, permitted it to be completed. *Wardale, Demandant; Bell, Tenant; Robinson, Vouches*. 4 Taunt. 618
- 20 If an estate, of which a recovery is suffered, lies in two counties, there must be a separate affidavit of the caption in each county. *Lee, Demandant; Rashleigh, Tenant; Rashleigh, Vouches*. 4 Taunt. 736
- 21 The affidavit of the taking the acknowledgment for a recovery must state that the party knew it was for the purpose of suffering a recovery. *Bleasdale, Demandant; Alexander, Tenant; Eyres, Vouches*. 4 Taunt. 737
- 22 Where the vouches in a recovery abroad, and notary public certified that the commissioner by whom the affidavit of taking the acknowledgment was in fact sworn before S., a magistrate authorized to administer an oath, made it before C., (the other commissioner,) which said S. was duly authorized to administer an oath, the Court of C. P. considered it as a clerical error, and allowed the recovery to pass. *Le Blanc, Demandant; Pocock, Tenant; Nicholas, Vouches*. 5 Taunt. 184
- 23 Recovery permitted to pass, though the notary public did not certify that the signature of the magistrate before whom the affidavit of taking the acknowledgment was sworn in *Paris* was his; it being apparent that it was his. *Hubert, Demandant; Humphreys, Tenant; Greenwood, Vouches*. 5 Taunt. 197
- 24 An affidavit of the taking of the acknowledgment in a recovery must be

engrossed on parchment. *Mander, Demandant; Hookney, Tenant; Green, Vouchee.* 5 Taunt. 263

25 An affidavit, stating the commissioner named in a *dedimus potestatem* to be an attorney of the Court of King's Bench, was suffered to pass without the words "*at Westminster.*" *Mander, Demandant; Hookney, Tenant; Green, Vouchee.* 5 Taunt. 263

26 If the tenant to the *præcipe* in a recovery is confined to his house in London by illness, he may appear at bar by attorney, upon motion: And it seems that he may constitute an attorney for that purpose, who is not an attorney of any Court of *Westminster-Hall*, notwithstanding the statute 2 G. 2. c. 23. *Cotton, Demandant; Murphy, Tenant; Lord Charles Spencer, Vouchee.* 5 Taunt. 355

III. AMENDMENT OF.

1 The Court of C. P. will not grant leave to amend a recovery on affidavit only; it must appear on the face of the deed to lead the uses, that there is sufficient ground for an amendment. *Pearson, Demandant; Pearson, Tenant; Brougham, Vouchee.* 1 H. B. 73

2 That Court will give leave to amend (by the deed to lead the uses) a mistake in the writ of entry in a recovery. *Cross, Demandant; Grey, Tenant; Pead, Vouchee.* 1 B. & P. 137

3 The Court of C. P. amended a recovery by inserting a new parish in the writ of entry, upon an affidavit of the original intent of the parties to include all their property within the county, and of the assent of all persons interested at the time of the amendment. *Wheeler, Demandant; Hill, Tenant; Heseltine, Vouchee.* 2 B. & P. 560

4 A writ, and the subsequent proceedings in a recovery, were amended by inserting the words, "*all and all manner of tithes whatsoever yearly arising, &c. from and out of the said premises,*" on an affidavit, setting out the vouchee's title to the tithes, and stating his intention to have passed all his interest in the premises, the word "*hereditaments*" being contained in the deed to lead the uses. *Dowse, Demandant; Lloyd, Tenant; Reeve, Vouchee.* 2 B. & P. 578

5 On the 23d June, 12 G. 3. a recovery suffered on the 2d October, 11 G. 1. of the manor or deanery of *Chester-le-*

Street, with its members and appurtenances, 30 messuages, &c. and 400 acres of moor, was amended by inserting, in the writ of entry and subsequent proceedings, after the words "*quadraginta acrus mora,*" the words "*ac etiam advocacionem, presentationem, donationem, nominationem, liberam dispositionem, et jus patronatus ecclesiæ de Chester-le-Street, ac etiam advocacionem, &c. de curatione de Chester-le-Street,*" the word "*hereditaments*" being contained in the deed to lead the uses, and the intention to pass the advowson with the rest of the premises appearing, although the amendment was contested. *Milbank v. Joliffe.* 2 B. & P. 580, n.

6 A recovery of *Hil.* 17 G. 3. was allowed to be amended by inserting the word "*Tithes,*" it being sworn to have been only recently discovered that the devisor at the time of the execution of the deed to lead the uses was entitled to the tithes. *Corden, Demandant; Hall, Tenant; Colclough, Vouchee.* 2 N. R. 431

7 Upon affidavit of the facts, the Court of C. P. allowed a recovery to be amended by inserting certain messuages, &c. which were omitted by mistake: and also permitted the indenture to lead the uses to be amended by inserting the entireties of certain premises named in the indenture as moieties only; all the conveying parties being alive and consenting, and all the premises lying within the same county. *Kinderley, Demandant; Donville, Tenant; Bampfylde, Vouchee.* 1 Taunt. 257

8 The Court of C. P. permitted a recovery suffered of manors to be amended by the insertion of messuages originally parcel of the manor, but severed by a settlement and omitted to be named in the recovery: the vouchee being tenant in tail still alive, and the messuages being originally intended to pass. *Carew, Vouchee.* 1 Taunt. 355

9 The Court of C. P. will not amend a recovery by inserting the name of the husband of a vouchee who is a feme covert. *Parsons, Demandant; Abbot, Tenant; Knight, Vouchee.* 1 Taunt. 478

10 The Court of C. P. allowed a recovery to be amended by inserting a rent-charge which had long been treated as merged in the land by unity of possession. *Brett, Demandant; Smith, Tenant; Honeywood, Vouchee.* 1 Taunt. 484

- 11 The Court of C. P. would not permit a recovery of lands, &c. lying in two different parishes, to be amended by inserting one of the parishes not named in the deed to make a tenant to the *præcipe*, although it appeared that the parish was named in the instructions for the deed, and had been inadvertently omitted, and that the lands in that parish were part of the estate of an ancestor whose estate was intended to pass. *Clutterbuck, Demandant; Debary, Tenant; Langton, Vouchee.* 2 Taunt. 96
- 12 Recovery amended by transposing the names of the demandant and tenant. *Roberts, Demandant; Robinson, Tenant.* 2 Taunt. 222
- 13 A recovery may be amended by striking out the voucher of a vouchee, whose acknowledgment was taken without a *dedimus*. *Rawlings, Demandant; Price, Tenant; Tom, Vouchee.* 3 Taunt. 59
- 14 Recovery amended by inserting a messuage recently built upon part of the premises. *Shaw, Tenant; Hawkins, Vouchee.* 3 Taunt. 74
- 15 Recovery amended by substituting a certain part of a parish which lay within a liberty, for the other part of the parish which lay within a borough. *Payne, Demandant; Nathaniel, Tenant; Hodges, Vouchee.* 3 Taunt. 396
- 16 A recovery 98 years old, amended by inserting a manor and tithes without affidavit of intention that they should pass, the intention being manifest from the deeds, and the possession having gone accordingly: though there was no other evidence of the existence of a manor, than the mention of it in an old deed, and the appointment of a gamekeeper. *Tennyson, Demandant; Goulton, Tenant; Raisby, Vouchee.* 3 Taunt. 408
- 17 The Court of C. P. refused to amend a recovery by changing the county, the premises lying in a parish which ran into two counties, and lying wholly in the county omitted, and no part in the county mentioned. *Anonymous.* 3 Taunt. 418
- 18 The Court of C. P. permitted a recovery to be amended by inserting an advowson which had passed by the general word hereditaments, but refused to insert a curacy, because the right of nominating a perpetual curate was incident to, and parcel of the rectory. *Horne, Demandant; Lodge, Tenant; Preston, Vouchee.* 3 Taunt. 462
- 19 Recovery amended by substituting the name of the attorney for the name of the vouchee, which had by mistake been inserted in the place of the attorney's name. *Shaw, Demandant; Leblanc, Tenant; Ramsay, Vouchee.* 4 Taunt. 98
- 20 The Court of C. P. refused to alter a recovery by substituting one joint-tenant to the *præcipe* for his companion. *Busswell, Tenant.* 4 Taunt. 101
- 21 Recovery amended by inserting more acres of land, there being an excess of acres of wood and meadow, and too few of land. *Strong, Demandant; Still, Tenant; Drake, Vouchee.* 4 Taunt. 155
- 22 In applying to amend a recovery, it is not necessary to shew the title to the Court, further back than a seisin in tail of the vouchee. *Sumcox, Demandant; Wakeford, Tenant; Marshall, Vouchee.* 4 Taunt. 155
- 23 A warrant of attorney in a recovery amended by inserting an additional christian name of the vouchee. — *O'Brien, Vouchee.* 4 Taunt. 196
- 24 Recovery amended by transposing the christian name of the demandant. *Shepherd, Demandant; James, Tenant; Boughton, Vouchee.* 4 Taunt. 226
- 25 Recovery amended by inserting the tithes of Wroxham, where possession had followed the deed ever since, and the tithes appeared to be intended to pass recovery. *Collyer, Demandant; Lord Chesterfield, Vouchee.* 4 Taunt. 226
- 26 The belief of a person not born when the recovery was suffered, that certain estates were intended to pass, suffices for amending a recovery, if the deed countenances the belief, and the possession has gone accordingly. 4 Taunt. 226
- 27 Recovery amended by insertion of a parish in which a certain close lay, the close being named in the deed declaring the uses, but the parish being no otherwise named in the deed than by reference to a map in the margin, on which the name of the close and parish were marked together. *Baxter, Demandant; Baxter, Tenant; Newman, Vouchee.* 4 Taunt. 249
- 28 Recovery amended by increasing the number of messuages, which had originally been 17 to 43, into which

- latter number they had been subdivided. *Horne, Demandant; Rossiter, Vouchee.* 4 Taunt. 366
- 29 Recovery amended by increasing the quantities of specific closes, described in the deed as being of a less number than the true quantities. *Alexander, Demandant.* 4 Taunt. 734
- 30 Where lands in two parishes were conveyed as lying in the parish of *G.*, which was the true name of neither of them, nor of any parish, but was an addition equally applicable to both, the Court of C. P. permitted both parishes to be added to an old recovery. *Jacob, Demandant; Duke of Devonshire, Vouchee.* 4 Taunt. 737
- 31 The Court of C. P. will not amend a recovery by inserting more parishes, unless it be irresistibly clear that the land in those parishes passed by the deed: although the intention to pass them be sworn to, and the construction of the deed, at the worst, is only doubtful. *Kinderly, Demandant; Donville, Tenant; Bampfylde, Vouchee.* 4 Taunt. 738
- 32 But where the deed clearly passes them, omitted parishes may be added. 4 Taunt. 738
- 33 Conveyance to make a tenant to the *præcipe* of the vouchee's manor of *J.* in the parish of *B.*, and of all his manors and lands in *B.*, or in any town or towns next or near adjoining thereto. Recovery of the manor of *J.*, in the parish of *B.*, amended by inserting six other parishes, upon affidavit that the manor of *J.*, extended into those six parishes, that they were adjoining to *B.*, and that the vouchee had exercised ownership over those parts before the sale and not since, and that they were intended to pass. *Colville, Demandant; Denison, Tenant; Acton, Vouchee.* 4 Taunt. 749
- 34 Where the deed to make the tenant to the *præcipe* is lost, a recovery is not to be amended by an attested copy of that deed, nor by an office copy of the enrolment of that deed: but it may be amended by the enrolment itself being brought into Court. *Dawney, Demandant; Newsome, Tenant; Lord Downe, Vouchee.* 4 Taunt. 798
- 35 An original writ and other proceedings in a recovery amended by inserting the county of the town of *S.* for the county of *S.* *Rashley, Demandant; Lee, Tenant; Smith, Vouchee.* 4 Taunt. 855
- 36 Recovery amended by inserting a parish after seventy-five years. *Rolfe, Demandant; Lacon, Tenant; Anguish, Vouchee.* 5 Taunt. 2
- 37 Recovery amended by striking out the name of one of two defendants, who dies pending the recovery. *Norris, Demandant.* 5 Taunt. 73
- 38 A return of writ of entry amended by adapting it to the time of taking the acknowledgment. *Hind, Demandant; Milne, Tenant.* 5 Taunt. 259
- 39 Recovery amended by altering the name of a parish misnamed in the deed making the tenant to the *præcipe*, as well as in the recovery, upon affidavit of the intention. *Flower v. Bainwright.* 5 Taunt. 303

REMAINDER.

I. CONTINGENT.

II. VESTED.

III. CROSS.

I. CONTINGENT.

See DEVISE. X. *ante*, page 271, &c.

- 1 Where *R. Frank*, on the marriage of his son, levied a fine to the use of himself, during the joint lives of himself and his son, and after the decease of

either, to the use of *Susan Cotele* for life, and after her decease to the use of the issue male of her and his son, and the heirs of their bodies, and in default thereof to the use of the heirs to be begotten on the body of *Susan* by his son, remainder to his own right heirs, and *S. C.* died, leaving only five daughters; on the death of *R. F.* a question arising as to what estate his son took, it was resolved, 1st, That if he had been joint-tenant with the wife for life, this had been an estate tail in both, as

the word "heirs" is not applied to any body particularly; 2dly, That neither husband nor wife had an estate tail; not the husband, because he had no prior estate for life; nor the wife, because, though she took an estate for life, yet the heirs are not applied to her body alone; and 3dly, That it was a contingent remainder to the heirs of both their bodies. *Denn d. Trickett v. Gillot.*

2 T. R. 435
And see *Williams v. Williams.*

12 E. R. 209

II. VESTED.

See DEVISE. X. ante, page 276, &c.

- 1 By a marriage settlement, lands were conveyed to trustees to the use of the wife for life, remainder to the use of the husband for life, remainder to the use of all and every the children of the marriage, or such of them, and for such estates, &c. as the husband and wife should appoint, and for want of such appointment to the use of all and every the child or children equally, if more than one, as tenants in common, and if but one, then to such only child, his or her heirs or assigns for ever; remainder over: in the deed was contained a power, enabling the settlers to revoke the uses of the settlement, and the trustees to sell the estate, and convey it to a purchaser, so as the purchase-money should be paid to the trustees (and not the settlers), and invested in the purchase of other lands to the same uses: it was held, that *the remainder to the children was a vested remainder in fee*, liable however to be divested by an appointment by the parents. *Doe d. Willis v. Martin.*
4 T. R. 39
- 2 In such a case where no appointment was made, the remainder to the children was not defeated by a deed of revocation by the parents, and a conveyance by them and the trustees to a purchaser, who paid the consideration money to the settlers (not to the trustees), which was never laid out in the purchase of any other lands. The above power of revocation was conditional; and as the conditions (*viz.* the payment of the money to the trustees, and the settling of other estates to the same uses) were not performed,

the deed of revocation was a nullity. *Doe d. Willis v. Martin.*

4 T. R. 39

N. B. A writ of error was afterwards brought on this judgment in the House of Lords, which was non-prossed. See 5 T. R. 521.

III. CROSS.

See DEVISE. XI. ante, pages 277, 8.

- 1 Cross-remainders in a deed cannot be raised by implication. *Doe d. Watts v. Wainewright.* 5 T. R. 427
Doe d. Tanner v. Dowell. 5 T. R. 521
- 2 They can only be raised by proper words of limitation; however plainly expressed the intention of the parties may be. Under a limitation in a marriage settlement to the use of all and every the daughter and daughters of, &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters; and for default of such issue to the right heirs, &c.: Held, that there were no cross-remainders between the daughters or their issue. *Doe d. Foquett v. Worsley.*
1 E. R. 416
- 3 But they may, by the general words that there shall be cross-remainders. *Doe d. Watts v. Wainewright.* 5 T. R. 431
- 4 For no technical precise form of words is necessary to create them.
5 T. R. 431
- 5 The limitations in a deed were to trustees to the use of A. and B. for their lives, remainder to the use of the child or children of B. in tail as tenants in common, "and in case any such child or children should die without issue of his, her, or their bodies, then the part of such child should be and remain to the use of the surviving child or children of B. and the heirs of his, her, or their bodies issuing; and in case all the said children should die without issue, &c. then to A. in fee: Held, that the deed created cross-remainders between the children of B.; and that on the death of one without issue, his share vested in a surviving child, and the heir of one deceased, as tenants in common. *Doe d. Watts v. Wainewright.*
5 T. R. 427

REPLEVIN.

I. LIABILITY OF SHERIFF IN TAKING INSUFFICIENT PLEDGES.

II. BOND AND SURETIES.

III. PLEADINGS.

IV. PROCEEDINGS—WHERE STAID OR SET ASIDE.

V. JUDGMENT AND DAMAGES.

I. LIABILITY OF SHERIFF IN TAKING INSUFFICIENT PLEDGES.

1 If insufficient pledges *de retorno habendo* be taken by the officer of the Court below in replevin, the remedy against him is by action, and the Court of C. P. will not order him to pay the costs recovered by the defendant in replevin. *Tesseyman v. Gildart*.

1 N. R. 292

2 The Court refused to grant an attachment against the sheriff for neglecting to take a replevin bond; the party injured may have his action. *Rex v. Lewis*.

2 T. R. 617

3 An action on the case against the sheriff for taking insufficient pledges in replevin, ought to be brought by the person making cognizance, where there is no avowant on the record. *Page v. Eamer, (Knt.)*

1 B. & P. 378

4 In such an action the Court held that the plaintiff could not recover damages beyond the value of the distress taken, which was not equal to the rent in arrear. *Yea v. Lethbridge*.

4 T. R. 433

5 But in a similar action it was ruled by the Court of C. P. on great consideration, that the plaintiff might recover damages to the extent of the injury which he had actually sustained, though they exceeded *double the value* of the things distrained. *Concanen v. Lethbridge*.

2 II. B. 36

6 In a subsequent case however, (*Eyre C. J., Buller J., and Rooke J.*, having succeeded Lord Loughborough C. J., Gould J. and Wilson J. at the time of the former determination) the Court of C. P. declared that the good sense and justice of the case was, that the sheriff should be liable no farther than the sureties would have been if he had done his duty under stat. 11 G. 2. c. 19. viz. to the amount of *double the value* of the goods distrained. *Evans v. Brander*.

2 H. B. 547

7 The sheriff is not bound to warrant the sufficiency of the pledges in a re-

plevin bond; if they are apparently responsible it is sufficient. *Hindle v. Blades*.

5 Taunt. 225

S. C. 1 Marsh. 27

II. BOND AND SURETIES.

1 The condition of a replevin bond is not satisfied by a prosecution of the suit in the County Court; but the plaintiff removed by *re. fa. lo.* into a superior Court, must be prosecuted *there* with effect, and a return made, if adjudged *there*. *Gwillim v. Holbrook*.

1 B. & P. 410

2 A replevin bond may, under stat. 11 G. 2. c. 19. be assigned to the avowant only, and he may bring his action upon it without joining the party making cognizance. *Archer v. Dudley*.

1 B. & P. 381, n.

3 A defendant in replevin is entitled to an assignment of the replevin-bond, if the plaintiff in replevin do not appear in the County Court and prosecute according to the condition. *Dias v. Freeman*.

5 T. R. 195

4 And he may sue on the bond as assignee of the sheriff in the superior Courts, though the replevin be not removed out of the County Court.

5 T. R. 195

And see *Brackenbury v. Pell*, 12 E. R. 585, *post*, page 616.

5 The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of the suit on the bond. *Hefford v. Alger*.

1 Taunt. 218

III. PLEADINGS.

1 If the writ by which a replevin is removed be returnable on the first return of the Term, and the plaintiff do not declare within four days before the end of that Term, the defendant is entitled to an imparlance; though he has not appeared within the Term. *Thompson v. Jordan*.

2 B. & P. 137

2 The rule to declare in replevin may be served at any day before the time in the rule is expired, and the plaintiff must declare within four days after such service. *Edwards v. Drench*.

11 E. R. 183

And see *Craven v. Vavasour*, 5 Taunt. 35, *post*, page 616.

3 A declaration in replevin by J. S. and

his wife, without shewing any cause for joining the wife, is bad on demurrer. *Serres & Ux. v. Dodd.*

2 N. R. 405

- 4 One tenant in common cannot avow alone for taking cattle damage feasant, but he ought also to make cognizance as bailiff of his companion. *Culley v. Spearman.*

1 H. B. 386

- 5 To an avowry for rent, the tenant may plead payment of a ground-rent to the original landlord. *Sapsford v. Fletcher.*

4 T. R. 511

- 6 The stat. 11 G. 2. c. 19. respecting avowries in replevin does not extend to an avowry for a rent-charge. *Bulpit v. Clarke.*

1 N. R. 56

- 7 The defendant in replevin having made cognizance for rent service as bailiff of A., B., and C., who were lawfully possessed of a certain manor of which the *locus in quo* was parcel, and holden at a certain rent; the plaintiff replied, that A. B. and C. were not seised in their demesne as of fee of the manor: Held, bad on demurrer.

1 N. R. 56

- 8 Replevin for taking the plaintiff's goods and chattels; to wit, a lime-kiln; avowry for rent; plea in bar that the lime-kiln was affixed to the freehold: the Court held the plea in bar bad, because it was a departure from the declaration, which had treated the lime-kiln as a chattel. *Niblet v. Smith.*

4 T. R. 504

- 9 The plea *de injuriâ suâ propriâ absque tali causâ* to cognizance for rent in arrear, is bad upon special demurrer. *Jones v. Kitchen.*

1 B. & P. 76

- 10 A plea in bar of an avowry for taking damage feasant, that the cattle escaped from a public highway into the *locus in quo*, through the defects of fences, must shew that they were passing on the highway when they escaped: it is not sufficient to state, that being in the highway they escaped. *Dovaston v. Payne.*

2 H. B. 527

- 11 The plaintiff in replevin pleaded in bar to an avowry for damage feasant that the *locus in quo*, from time whereof, &c. ought to be opened and common, "on or before the 15th of October, when the corn was cut and carried, and from thence for a long time, to wit, for three weeks and upwards," that the plaintiff when, &c. put in his cattle "the same time being when the said field was and ought to be open and common as aforesaid." Held, that

the plea was bad for uncertainty, even after verdict, the right of common being too generally described both in its commencement and conclusion. *Da Costa v. Clarke.*

1 B. & P. 257

- 12 In an avowry, defendant averred that all those whose estate he now has, &c. from time whereof, &c. have been accustomed to have, and of right during all the time aforesaid ought to have had, and still of right ought to have common of pasture in the *locus in quo*: Held bad, and that it did not amount to an averment of right of common at all times of the year. *Hawkins v. Eccles.*

2 B. & P. 359

- 13 If a defendant in replevin plead by way of justification of the taking, that he was possessed of a messuage with common appurtenant, and that the plaintiff's cattle were damage feasant on the common, and conclude in bar without praying a return, it seems that such a plea is bad.

2 B. & P. 359

- 14 Replevin of cattle taken in A. The defendant avowed the taking in A., under a demise of certain premises of which B. was parcel, and because the cattle were damage feasant in B., he took them and drove them through A. in his way to the pound; and upon general demurrer the avowry was held to be well pleaded. *Abercrombie v. Parkhurst.*

2 B. & P. 480

- 15 If to an avowry for 120*l.* rent in arrear, the plaintiff plead "that the said 120*l.* is not due," and the defendant join issue thereon, and at the trial it appear that 24*l.* only is due, upon which the plaintiff objects that the evidence does not support the issue joined by the defendant; yet if a verdict be taken for 24*l.* subject to the opinion of the Court, such finding will cure the defect in the formality of the issue. *Cobb v. Bryan.*

3 B. & P. 348

- 16 A. having the exclusive right to dig stone in a certain close, avowed distraining the cattle of B., who had the exclusive right of pasture there, as damage feasant, for having broken the stones: B. pleaded that there was no fence to keep them off, nor did A. otherwise guard or protect the stones. A. replied that he was not bound to fence: and on demurrer the replication was held bad. *Churchill v. Evans.*

1 Taunt. 529

- 17 When the defendant in replevin made cognizance for two years and a

- quarter's rent in arrear; and alleged that for a long time, viz. for two years and a quarter, ending at Christmas 1803, the plaintiff held and enjoyed the premises as tenant thereof to A. B. by virtue of a certain demise, &c.; to which the plaintiff pleaded in bar, that he did not hold and enjoy the premises as tenant thereof to A. B. by virtue of the supposed demise *modo & forma*; it is sufficient to entitle the defendant to a verdict on such issue if he prove that the plaintiff held of A. B. from the 23d of December, 1801; and to recover for two years' rent. *Forty v. Imber.* 6 E. R. 434
- 18 To an action on a replevin bond, conditioned for the defendant to prosecute his suit below with effect, and alleging a breach in his not prosecuting it according to the tenor and effect of the condition, but therein failing and making default, it is a good defence to plead that the defendant did appear at the next County Court, and there prosecuted his suit, which he had there commenced against the now plaintiff, and which suit was still depending and undetermined: and such plea is not avoided by replying that the defendant did not prosecute his suit as in the plea mentioned, but wholly abandoned the same, and that the said suit is not still depending; without shewing how it was determined and ceased to depend. *Brackenbury v. Pell.* 12 E. R. 585

IV. SETTING ASIDE AND STAYING PROCEEDINGS.

- 1 After a rule for time to declare in replevin, the Court of C. P. will not set that rule aside, and compel the plaintiff to declare sooner in that form of action, any more than in any other. *Craven v. Lady Vavasour.* 5 Taunt. 35
- 2 The plaintiff having brought replevin for goods levied under a warrant of distress for an assessment made by a special sessions under the Highway Act, 13 G. 3. c. 78. s. 47. on the ground of the premises for which he was assessed, being situated without the township which was liable to repair the road; the Court of C. P. refused to set aside the proceedings. *Fenton v. Boyle.* 2 N. R. 399
- 3 It is doubtful whether goods taken under a warrant of distress granted by commissioners of sewers may be replevied while in the hands of the officer, or by the sheriff or his deputy: but if they be actually replevied, and the proceedings in replevin be removed here, the Court will not quash the proceedings on a summary application, but will leave it to the defendant in replevin to put his objection on the record. *Pritchard v. Stevens.* 6 T. R. 522
- 4 The Court of C. P. will stay proceedings in replevin on payment into Court of the rent avowed for, and payment also of the costs of the action. *Vernon v. Wynne (Bart.)* 1 H. B. 24
- 5 So before avowry, on payment of the rent due and costs up to the time, including those of the application. *Hopkins v. Shrole.* 1 B. & P. 382
- 6 But not upon payment of the rent, and of the costs to the time of a tender which had been made of such rent and costs, after the distress and before the replevin. 1 B. & P. 382
- 7 Nor upon payment of costs, on the application of the defendant; though no special damage were assigned in the declaration. *Hodgkinson v. Snibson.* 3 B. & P. 603

V. JUDGMENT AND DAMAGES.

N. B. When a Judgment may be amended. See *Rees v. Morgan.*

3 T. R. 349, ante, page 43

- 1 A defendant in replevin is not entitled to move for judgment as in case of nonsuit under stat. 14 G. 2. c. 17. s. 1. *Shortridge v. Hiern.* 5 T. R. 400

And see *Jones v. Concannon.*

3 T. R. 661, ante, page 582

- 2 A judgment in replevin "that the defendants have a return of the cattle, and recover their damages and costs assessed by the jury," &c. is good either as a judgment at common law, though the return be not judged irrepleviable, or as a judgment under stat. 21 H. 8. c. 19. which entitles the defendants to damages and costs. *Gammon v. Jones (in error.)* 4 T. R. 509
- 3 If the plaintiff in replevin is nonsuited, the defendant is not bound to have his damages assessed by the jury under stat. 17 Car. 2. c. 7. or to take the earliest moment to prosecute his writ *de retorno habendo*. And he may again distrain the same goods for rent subsequently accrued, previously to his executing his *retorno habendo*,

without waving his action against the sureties in the bond. *Hefford v. Alger.*

1 Taunt. 218

- 4 Where judgment is given on demurrer for the avowant in replevin, 15 days'

notice of executing the writ of inquiry should be given to the plaintiff, as in the case of nonsuit on stat. 17 Car. 2. c. 7. *Burton v. Hickey.*

1 Marsh. 444

RIGHT, WRIT OF.

N. B. See AMENDMENT. 1. 18, 19.

11. 10, 11, *ante*, pages 41, 2.

- 1 A writ of right cannot be maintained without shewing an *actual seisin* by taking the *esplees*, either in the demandant himself, or the ancestor from whom he claims. *Dally v. King.*

1 H. B. 1

- 2 The demandant in a writ of right must allege in his count that his ancestor was seised *of right*, as well as that he was seised *in his demesne as of fee*. *Dowland v. Slade.*

2 B. & P. 570.—5 E. R. 272

- 3 *2u.*—Whether if one through whom title is derived be improperly stated to be *heir* to her brother, who, it appears by the record, had a son who survived him, and through whom title is properly derived, such erroneous appellation of the sister as *heir* to her brother, be fatal? 2 B. & P. 570.—5 E. R. 272

- 4 In the count of a writ of right, it is not sufficient to state that the lands descended to four women as nieces and co-heirs of J. S. without shewing how they were nieces. *Dumaday v. Hughes.*

3 B. & P. 453

S. C. not S. P., *ante*, page 41.

And see *Charlwood v. Morgan.*

1 N. R. 66

- 5 Upon an application to the Court of C. P. by the demandant in a writ of right

to be allowed to discontinue on account of the omission of one step in a descent, they would not assist the demandant. *Maidment v. Jukes.*

2 N. R. 429

- 6 In a writ of right, proof of possession of land and permanency of the rents is *prima facie* evidence of a seisin in fee of the person. But proof of 40 years' subsequent possession by a daughter, while a son and heir lived near and knew the fact, is much stronger evidence that the first possessor had only a particular estate. *Jayne v. Price.*

5 Taunt. 326

S. C.

1 Marsh. 68

- 7 The Court of C. P. will not permit the mise joined in a writ of right, to be tried by a jury instead of the grand assize, though both parties desire it. *Galton v. Harvey.*

1 B. & P. 192

- 8 In a writ of right, if the *nisi prius* clause be omitted in the writ of summons, and the knights come from a distant county, and appear at bar, the Court of C. P. will not compel them to be sworn unless the demandant will undertake to pay their expenses. *Pearson v. Maynard.*

1 Taunt. 415

- 9 It is settled that the *nisi prius* clause is properly inserted in the writ of summons. *Pearson v. Maynard.*

1 Taunt. 415

RIOT.

- 1 The hundred are not liable in an action for damages brought by the person injured by a mob beginning to pull down his house, &c. unless the riot be of such a kind as to amount to felony within stat. 1 G. 1. st. 2. c. 5. *Reid v. Clarke.*

7 T. R. 496

- 2 In that case the breaking of the plaintiff's windows by a mob, because he would not illuminate his house on a particular occasion, was held not to be within the Act.

7 T. R. 496

- 3 Where a mob, after beginning to demolish and pull down a house, steal flour therein, or force the owner to sell it at an under price, the value thereof cannot be recovered in an action against the hundred of the 6th section of the Riot Act, 1 G. 1. stat. 2. c. 5. such stealing and robbery being substantive felonies, and not within the offence created by the 4th section of the Act. But flour which was spoiled or destroyed at the time

- of such beginning to demolish, &c. may be so recovered. *Greasley v. Higginbotham.* 1 E. R. 686
- 4 Where a mob attacked a baker's house and broke the glass and shutters of the windows, and compelled him to sell flour at a price named by themselves, below the marketable value: Held, this was evidence for the jury of a felonious beginning to demolish the house, &c. within the 4th section of the Riot Act; and that the plaintiff might recover for the damage done to the house, in an action against the hundred on the 6th section, but not for the value of the flour so sold; that not being consequential to the act of demolition: nor could he recover for the value of other flour taken and wasted in another warehouse distinct from his dwelling-house, on the opposite side of the street, of which the lock only was burst; that not being a beginning to demolish, &c. within the Act, with the view with which it appeared to have been done. *Burrows v. Wright.* 1 E. R. 615
- 5 To support an action against the hundred for damages on stat. 1 G. 1. stat. 2. c. 5. for the riotous demolition of a house, it is not necessary to prove that twelve rioters were assembled at the time. *Prichet v. Waldron.* 5 T. R. 14
- 6 Such an action is maintainable by a trustee, in whom the legal estate is vested for existing purposes, and (as it seems) even by a bare trustee of a satisfied term. 5 T. R. 14
- 7 An order of justices for the levying of money upon the inhabitants of an hundred under the Riot Act, directing that the money, when levied, shall be paid into the hands of a banker, subject to their further order, is bad. *Rex v. Halfshire (Inhab.)* 5 T. R. 341
- 8 The money should be directed to be paid to the party entitled. 5 T. R. 341
- 9 *Semble*, That a writ of execution sued out by the party who has recovered damages against the hundred, and delivered by the sheriff to the justices, is a good foundation for an order to levy the amount. 5 T. R. 341
- 10 The order for levying the damages ought to be upon the inhabitants of the "towns, parishes, villages, and hamlets," pursuant to stat. 27 Eliz. c. 13., and not upon the inhabitants of the "districts and parishes" within the hundred. 5 T. R. 341
- 11 If a mob riotously and by force demolish a gaol, by which the debtors escape, the sheriff or gaoler is answerable in an action on the case to the creditors for their escape. *Elliot v. The Duke of Norfolk.* 4 T. R. 789

RIVERS.

- 1 The public are not entitled at common law to tow on the banks of ancient navigable rivers. *Ball v. Herbert.* 3 T. R. 253
- 2 The right must be founded either on statute or on usage. 3 T. R. 253
- 3 If an Act of Parliament for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empower commissioners to set out such public and private roads and ways as they shall think necessary, and direct that all roads and ways not set out shall be deemed part of the lands to be allotted, an ancient towing path on the bank of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. *Simpson v. Scales.* 2 B. & P. 496

SCIRE FACIAS.

I. WHAT—AND HOW SUED OUT.

II. ON RECOGNIZANCES AGAINST BAIL.

III. AMENDMENTS IN—WHERE ALLOWED.

I. WHAT, AND HOW SUED OUT.

- 1 A *scire facias* is an action. *Winter v. Kretzman*. 2 T. R. 46
- 2 A *scire facias* to revive a judgment, entered on a bond securing an annuity, granted before statute 17 G. 3. c. 26. s. 2., commanding that no action shall be brought on any judgment already entered (unless certain requisites were complied with), is an action within that clause. *Fenner v. Evans*. 1 T. R. 267
- 3 A *scire facias* to revive a former judgment is so far a continuation of the same action, that if the plaintiff's testator had agreed not to bring a writ of error in that former action, such agreement shall bind his executors, upon the *scire facias* being brought against them. *Wright v. Nutt (in error)*. 1 T. R. 388
- 4 Judgment being entered on a bond to secure the quarterly payment of an annuity, and a *fi. fa.* having issued for the arrears of the last half year, a second *fi. fa.* may be taken out for the next quarter, without reviving the judgment by *scire facias*. *Scott v. Whalley*. 1 H. B. 297
- 5 A *scire facias* on a judgment must pursue the terms of the judgment: Therefore, where an executor pleads *plene administravit*, and the plaintiff does not take issue on it, but takes a judgment of assets *quando acciderint*, the *scire facias* on that judgment must only pray execution of such assets as have come to the executor's hands since the former judgment; and if it pray execution of assets generally, without confining it to that time, it cannot be supported. *Mara v. Quin*. 6 T. R. 1
- 6 A *scire facias* must lie in the sheriff's office the last four days before the return. *Forty v. Hermer*. 4 T. R. 583
- 7 Where plaintiff brought an action against two defendants, and proceeded

to outlawry against one, and went on with the action against the other, who died after interlocutory and before final judgment; Held, that he could not have a *scire facias* against his administrator; for notwithstanding the outlawry, the action remained joint, and therefore survived against the other defendant. *Fort v. Oliver*. 1 M. & S. 242

II. ON RECOGNIZANCES AGAINST BAIL.

See *Wuthen v. Beaumont*.

11 E. R. 271, ante, page 574

- 1 Where the defendant was sued by original in *London*, the *scire facias* against the bail must be sued there also; and it does not help the plaintiff who sued out the *scire facias* in *Mid-dleser*, that bail had by mistake been put in there. *Harris v. Calvert*. 1 E. R. 603
- 2 The plaintiff may sue out a writ against the bail on their recognizance, on the return-day of the *ca. sa.* against the principal. *Shivers v. Brooke*. 8 T. R. 623
- 3 Where there is only one *scire facias* against bail, and the proceedings are by bill, there need be only four days exclusive, between the teste and return of it. *Bell v. Jackson*. 4 T. R. 663
- 4 The *scire facias* against bail must lie four days in the office, as well where *scire feci* is returned as *nihil*. *Williams v. Mason*. 1 E. R. 89, n.
- 5 For the purpose of fixing the bail on *scire facias*, the *capias ad satisfaciendum* against the principal must lie the four last days in the office before the return; and the bail having once been prepared to render their principal in time, which they then omitted to do, in consequence of a rule *nisi* taken out by them on the suggestion of the Court with a view to an arrangement out of Court between the parties (the principal being a lunatic), which rule was afterwards discharged without providing for the bail to be placed in the same situation that they were in before; the Court in a subsequent Term, permitted the bail to

take the above objection to their regularity of the proceedings, though they had before, in the same Term, before they were aware of this objection, brought forward another objection, which was over-ruled. *Cock v. Brockhurst.*

13 E. R. 588

- 6 If the second writ of *scire facias* be in proper time on the file in the sheriff's office, that is sufficient to warrant proceedings against the bail, though it were not entered in the *scire facias* book in the sheriff's office, which is merely a private book for his own convenience. *Heywood v. Rennard.*

3 E. R. 570

- 7 The Court set aside the proceedings in *scire facias* against bail, because they were summoned only an hour before the Court rose on the return-day. And the sheriff's return of *scire feci* does not estop the bail from shewing that they were summoned so late on the return-day, that they could not bring in their principal before the rising of the Court. *Webb v. Harvey.*

2 T. R. 757

Pool v. Wills.

2 T. R. 758, n.

- 8 N.B. *There is a mistake in the report of the case of Webb v. Harvey, in stating the notice to the bail to have been before, as in fact it was not served till after the rising of the Court.*

1 E. R. 88, 9

- 9 It is now sufficient if the bail be summoned *any time* before the rising of the Court on the return day. *Clark v. Bradshaw.*

1 E. R. 86

- 10 The Court of C. P. set aside proceedings against bail, because the *ca. sa.* was tested of a Term prior to that in which judgment was signed against the principal. *Gawler v. Jolly.*

1 H. B. 74

- 11 But it is immaterial whether the *capias ad respondendum* against the bail be tested of a day prior to the return of the *ca. sa.* against the principal, if in fact it be not sued out till after. *Pinero v. Wright.*

2 B. & P. 235

- 12 In the Court of C. P. no *ca. sa.* lies on a judgment on a *sci. fa.* against bail; for in that Court the bail only undertake that the condemnation-money may be levied of their goods, &c. and the execution is always *elegit*, or *fi. fa.* The practice is otherwise in the Court of King's Bench, where a

ca. sa. is permitted. *Troughton v. Clarke.*

2 Taunt. 113

And see *Bayly v. Titmass.*

2 Taunt. 114, n.

- 13 In declaring in *scire facias* on a recognizance of bail, taken in an action by original, there is no incongruity in stating that the recognizance was taken in an action "then lately commenced and depending in the Court of King's Bench," for the action may be said to *commence* in that Court when its jurisdiction attaches upon the original writ sued out of Chancery. *Mayo v. Rogers.*

14 E. R. 539

- 14 To *scire facias* against bail upon their recognizance, it is competent to the defendant to plead in bar against the issuing of execution, that before the issuing of the *alias* writ of *scire facias* the plaintiff became bankrupt, and a commission issued against him, on which he was declared a bankrupt before the return of the writ, and his effects, debts, &c., assigned to the provisional assignee, who before plea pleaded assigned to the assignee under the commission, who was entitled to sue the defendants, &c. *Kinnear v. Tarrant.*

15 E. R. 622

- 15 To a plea to *scire facias* against bail, that the principal died before the return of any *ca. sa.* a replication stating the particular *ca. sa.* and that the principal was alive at the return of that *ca. sa.* must conclude with an averment: for the *ca. sa.* in the replication is new matter; and, by the rules of pleading, whenever new matter is introduced, the other party must have an opportunity of answering it. *Henderson v. Wither.*

2 T. R. 575

III. AMENDMENTS IN—WHERE ALLOWED.

- 1 A *scire facias* against bail in error may be amended by the record of the recognizance. *Perkins v. Petit.*

2 B. & P. 275

- 2 But the Court of C. P. do not think proper to cure any irregularities of which the bail are entitled to take advantage; and therefore refused to amend a *scire facias* against bail. *Fulwood v. Annis.*

3 B. & P. 321

- 3 The Court on a motion, ordered two writs of *scire facias* against the principal on a judgment and the declaration thereon to be amended conformably to the judgment-roll. *Braswell v. Jeco.*

9 E. R. 316

- 4 And in *scire facias* against the bail, when there was a failure of the record through misprision of the officer of the Court, the Court of C. P. permitted the recognizance to be amended. *Mann v. Calow.* 1 Taunt. 221
- 5 The Court of C. P. refused to allow the amendment of a declaration in *scire facias*, against bail who had failed to surrender their principal (then in custody) before the *quarto die post* of the second writ. *Stevenson v. Grant.* 2 N. R. 103

SEISIN.

- 1 A. died seised, leaving two infant daughters by different *venters*: Held, that an entry generally, by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter to carry the descent of her moiety, on her death, to her heirs. *Doe d. Barnett v. Keen.* 7 T. R. 386
- 2 The distinction taken is, that if a father die, his estate being out on a *freehold* lease, that is not such a possession as to induce the *possessio fratris*, unless the elder son live to receive rent after the expiration of such lease: but if the father's estate were out at his death on a lease for *years* only, the possession of the tenant is a sufficient possession of the elder son to constitute the *possessio fratris*. 7 T. R. 386
- 3 The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it; for he hath the whole seisin. *Phillips v. Bury.* 2 T. R. 355

SESSIONS.

- I. JURISDICTION OF—OVER PARTICULAR OFFENCES.
- II. ORDERS OF—WHEN QUASHED.
- III. SPECIAL CASES—HOW STATED.
- IV. JUDGMENTS—WHERE CONCLUSIVE.
- V. APPEAL TO—WHEN AND HOW MADE.

I. JURISDICTION OF—OVER PARTICULAR OFFENCES.

- 1 The sessions have no jurisdiction over the offence of forgery at common law, nor can they take cognizance of it as a cheat. *Rex v. Gibbs.* 1 E. R. 173
- 2 Therefore they cannot hold cognizance of an indictment, charging that the defendant being a person assessed to certain duties granted upon income, by certain commissioners, and under pretence of being aggrieved, having appealed to certain other commissioners, and contriving and intending to deceive the said last-mentioned commissioners, and to induce them to believe that the particulars of his income delivered in, and the deductions claimed by him to be allowed, had been inquired into, examined, and approved by one *Richard Else*, then being clerk to the first-mentioned commissioners, and with fraudulent intent to give effect to his appeal, and to evade the duty at the bottom of a paper purporting to be a schedule of the defendant's income, did forge, &c. the letters *R. E.* purporting to be the initials of the said clerk, and did exhibit to the Commissioners of Appeal the said paper, &c. against the peace, &c. 1 E. R. 173
- 3 But it was not denied that they had jurisdiction over cheats in general, and the Court gave judgment as for a cheat, on indictments respectively removed from the sessions by *certiorari*. *Rex v. Brayne.*
- Rex v. Beale.* 1 E. R. 183, *notis.*
- 4 To solicit a servant to steal his master's goods is a misdemeanour, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting: and such offence is indictable at the Sessions, having a tendency to a breach of the peace. *Rex v. Higgins.* 2 E. R. 5
- 5 The sessions have cognizance of all

offences which tend to a breach of the peace; except forgery and perjury.
Per Lord Kenyon. 2 E. R. 18

II. ORDERS OF—WHEN QUASHED.

See JUSTICES OF THE PEACE, II. III.
ante, 444, 5., &c.

- 1 If a Court of *General Quarter Sessions*, next after an order of bastardy, quash the order, the Court of King's Bench will not intend that a Court of *General Sessions* intervened; and, unless that appear, the order of sessions will be confirmed. *Rex v. Guardians of the Chichester Poor.* 3 T. R. 496
- 2 Justices at sessions appointed a committee of twelve magistrates to inspect the state of a county bridge, and to make any new contract for repairing or rebuilding, to be executed by the clerk of the peace, on behalf of the county: afterwards they made an order, adopting a contract for rebuilding, proposed by the committee, and directed to be prepared by the clerk of the peace, which contract having been afterwards executed by the clerk, the justices at a subsequent sessions confirmed all the resolutions of the committee, and ordered the clerk to perform their directions in respect to the contract; the acts of the committee so confirmed are the acts of the sessions, and the authority given to the committee, and exercised by them, is not such a delegation of power by the sessions as will invalidate their orders. *Rex v. Glamorganshire Justices.* 5 T. R. 279
- 3 The Court will take cognizance of a case reserved by the sessions, accompanying proceedings upon a conviction removed by *certiorari*; and where the sessions, upon proof that the appellant had received from the clerk of the convicting magistrates a copy of his conviction, signed and sealed by such justices, purporting, on the face of it, to have been made upon the information of B. and C.; (though such copy was drawn up on the back of the paper which contained the information of A. the true informer; B. and C. being only the witnesses who had been examined in support of the charge; and though the same justices had returned to the sessions to be filed of record, a regular conviction of the

same date, signed and sealed by them, on parchment; stating it to have been made on the information of A., and supported by the evidence of B. and C., according to the truth of the case;) had quashed the latter conviction so returned by the justices, as being at variance with the minutes of the conviction delivered to the appellant, without entering into the merits of the case, upon a preliminary objection taken by the appellant; quashed the order of sessions generally; thereby setting up again the regular conviction; considering that the variance arose from the mere mistake and irregularity of the justice's clerk; and that the appellant was not really surprised by it, but had waived his appeal on the merits. *Rex v. Allen.*

15 E. R. 333

III. SPECIAL CASES—HOW STATED.

- 1 The Court ordered the sessions to inquire into a fact, which appeared doubtful on the original order of removal, even though the sessions stated no case for the opinion of the Court. *Rex v. Margam.* 1 T. R. 775
- 2 The Court will not send a case down to the sessions to be restated, on a mere formal objection, if enough appear to enable them to decide according to the merits of the case. *Rex v. Middlezoy (Inhab.)* 2 T. R. 41
- 3 The sessions should state as a fact (in a settlement case), whether the master dispensed with the service before the end of the year, or whether there were a dissolution of the contract by mutual consent. *Rex v. St. Peter, Norwich (Inhab.)* 8 T. R. 477
- 4 It is a great irregularity to reserve a case for the opinion of the Court upon the trial of an indictment at the Quarter Sessions: and the Court of Quarter Sessions have no power so to do. *Rex v. Salop (Inhab.)*

13 E. R. 95

IV. JUDGMENTS—WHERE CONCLUSIVE.

- 1 *Qu.*—Whether, when the sessions state facts fully and particularly, from which they infer fraud, the Court of King's Bench can draw their own conclusion from those facts, without regard to the adjudication of the sessions? *Rex v. Woodland (Inhab.)*

1 T. R. 261

N. B. [*That the Court will in no*

case presume fraud. See 2 T. R. 711; per Kenyon, C. J.]

- 2 If the sessions draw a conclusion of fact that the taking of a tenement is fraudulent, or that it does not amount to 10*l. per annum*, it is decisive in the Court of King's Bench, though they state all the facts: and refer the consideration of those questions to the Court. *Rex v. Llanwinio (Inhab.)*

4 T. R. 473

- 3 When the sessions adjudge a place to be a vill by reputation, as a substantive fact, the Court is precluded from going into the question, notwithstanding the sessions state all the evidence particularly, on which they formed their opinion. *Rex v. Ranton Abbey (Inhab.)*

2 T. R. 207

- 4 Though the sessions find that certain persons in the township were possessed of visible stocks in trade there, and were personally liable to be rated in respect thereof, if by law such property were liable to be rated: yet if they also state that they were not satisfied, from the evidence offered before them, that there was any surplus profit on such stocks, by which they could amend a rate which omitted them; that concludes the question. *Rex v. Sir A. McDonald.*

12 E. R. 324

- 5 The justices at sessions may alter their judgment during the continuance of the sessions. *Rex v. Leicestershire (Justices.)*

1 M. & S. 442

V. APPEAL TO—WHEN AND HOW MADE.

N. B. See POOR I. (c) *ante*, 517

II. (f) — 525

V. (c) — 557

- 1 Upon an appeal to the sessions against an order of filiation, the respondents are to begin by supporting their orders as in all other cases. *Rex v. Knill.*

12 E. R. 50

And see *Rex v. Newbury (Inhab.)*

4 T. R. 475

- 2 A party appealing to the sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lowther v. The Earl of Radnor.*

8 E. R. 113

- 3 *Semble*, though a statute, giving an appeal to the sessions within a certain time, direct the justices at the *said* sessions, to determine the appeal, yet they have a power of adjourning it,

on sufficient cause, of which they are to judge. *Rex v. Wilts (Justices.)*

13 E. R. 332

- 4 A person aggrieved by a distress for paving rates under 8 G. 3. c. 33. may appeal either to the sessions for the city of London, or to the sessions for Middlesex. *Rex v. Shoreditch (Commissioners.)*

4 T. R. 701

- 5 The 14 G. 3. c. 78. s. 96. (Building Act) does not enable the district surveyor, who lodges a complaint before two justices on account of a projection made in front of a house, contrary to the provisions of that Act, to appeal to the quarter sessions against the dismissal of such complaint by the two justices. *Rex v. Middlesex (Justices.)*

16 E. R. 310

- 6 No appeal lies to the sessions against a conviction and commitment in execution for three months of a collier under stat. 6 G. 3. c. 25., for absenting himself from his master's service; the clause of appeal in that statute excepting an order of commitment; and the order of commitment in question containing a conviction of the collier for an offence within the Act. *Rex v. Staffordshire (Justices.)*

12 E. R. 572

- 7 By 17 G. 3. c. 56. s. 20. an appeal is given to the sessions against certain convictions, the party giving notice in writing to the justices convicting, and entering into a recognizance to try the appeal, &c. and those justices are required to give notice to the party of his right to appeal; if those justices do inform him of such right, without saying any thing about the notice, and he enter into the recognizance, the sessions are bound to receive the appeal, though he did not give the notice in writing. *Rex v. Leeds (Justices.)*

4 T. R. 583

- 8 By stat. 17 G. 3. c. 106. an appeal is given on certain conditions from a conviction by a justice of the peace to any quarter sessions to be holden within six months from such conviction: if the appellant lodge his appeal, and the Court dismiss it without entering into the merits, because the previous conditions have not been regularly complied with, and confirm the conviction, such judgment is conclusive, and the party cannot lodge a second appeal from the same conviction, though within the six months. *Rex v. West Riding, Yorkshire (Justices.)*

3 T. R. 776

9 An appeal against a conviction on stat. 24 G. 3. stat. 2. c. 31. for not entering horses, &c. must be to the quarter sessions next after the conviction, and not after the execution. *Prosser v. Hyde.* 1 T. R. 414

10 An appeal against a surcharge for the duties on servants, &c. must be preferred on the day appointed by the commissioners under stat. 25 G. 3. c. 43. and cannot be made after the expiration of the year within and for which the tax is to be collected. *Rex v. Walker.* 6 T. R. 433

11 No appeal lies to the sessions from a conviction of two justices for an offence under stat. 25 G. 3. c. 72. s. 9. against printing cotton before it is measured, &c. notwithstanding it contains a general clause of reference to all former excise laws, and incorporates all the powers, &c. provided by 12 Car. 2. c. 24. or by any other law, relating to the excise, or inland duties under the management of the commissioners of excise, for managing, mitigating, or adjudging the duties or penalties granted by this Act. *Rex v. Surrey (Justices).* 2 T. R. 540

12 There lies no appeal to the sessions from a conviction by two justices upon the statute 42 G. 3. c. 38. s. 30. for wetting corn in a certain stage of the process of malting; for the clauses of appeal in former excise laws, to which there is a general reference in this Act, do not extend to convictions for penalties by two justices. *Rex v. Shone.* 6 E. R. 514

13 No appeal lies to the quarter sessions against the allowance of the accounts of the surveyor of the highways, under stat. 13 G. 3. c. 78. *Rex v. West Riding of Yorkshire (Justices).* 5 T. R. 628

Rex v. Mitchell. 5 T. R. 701

14 A person aggrieved, cannot appeal to the quarter sessions under the stat. 13 G. 3. c. 78. s. 19. against an order of justices for turning a road, without giving ten days' previous notice of the appeal, though he were not himself apprized of the order so long before the sessions: but in that case he may give notice, and appeal to the following sessions. *Rex v. Staffordshire (Justices).* 7 T. R. 81

15 By that statute the appeal is given to the party grieved by any "such order or proceeding, &c. at the next quarter sessions after such order made or pro-

ceeding had, &c.:" Held, that at all events an appeal to the sessions next after the actual obstruction of the road was too late, the party having had sufficient notice of the order in time to have appealed to a preceding sessions. *Rex v. Penbrokeshire (Justices).*

2 E. R. 213

16 And it is now decided, that by the necessary construction of the statute, the appeal must be made to the quarter sessions next after the order made, without reference to any notice received by the appellant of such order. *Rex v. Staffordshire (Justices).*

3 E. R. 151

17 The notice of appeal required by 13 G. 3. c. 78. s. 80. against a distress for non-payment of a highway rate, may be within six days after the levy, and need not be within six days after the granting the warrant of distress. The notice of appeal need not disclose the ground upon which the appellant objects to the regularity of the distress. *Rex v. Devon (Justices).* 1 M. & S. 411

18 By an Inclosure Act an appeal was given to the next sessions within six months after the cause of complaint; an appellant moved the court of sessions in due time to receive and respite his appeal to the next sessions, which was refused: and the Court of King's Bench would not grant a mandamus to the sessions to receive it. *Rex v. Derbyshire (Justices).* 4 T. R. 488

19 Where an Inclosure Act gave the commissioners power to set out and make roads, &c. and directed that the expenses of making and repairing those roads, and all other expenses should be borne by the proprietors in certain proportions, to be ascertained by the commissioners in one general rate, and then gave an appeal to the sessions in all cases where the parties should think themselves aggrieved: it was held, that an objection to the rate on account of the commissioners having expended money on an improper object, could not be tried in an action of trespass, but that the party aggrieved must appeal to the sessions. *Bonnell v. Beighton.* 5 T. R. 182

20 A private Inclosure Act, which gives an appeal to the quarter sessions within four months after the cause of complaint shall have arisen, to the party grieved by any thing done in pursuance of that or of the General In-

closure Act (other than and except such determinations as are by that or by the General Inclosure Act declared to be binding, final, and conclusive, does not give any appeal to a party complaining that the commissioners have omitted to set out a particular road as a public road, against their determination: and supposing it did, yet he must appeal within four months, and cannot after that time, when the commissioners set out the road as a private road, appeal against that determination; his cause of complaint being that it is not set out as a

public road, and not that it is set out as a private road. *Rex v. Dean Inclosure (Commissioners)*. 2 M. & S. 80
 21 An appeal to the next sessions after an inclosure made by virtue of an inquisition taken on a writ of *ad quod damnum* is too late, if those sessions be not the next after the inquisition taken and entered and recorded at the sessions; therefore, where the sessions dismissed such appeal as being out of time: the Court of King's Bench refused a *mandamus* to them to enter continuances, &c. *Rex v. Bucks (Justices)*.
 2 M. & S. 230

SET-OFF.

I. IN WHAT ACTIONS ALLOWED.

II. BY AND AGAINST PARTICULAR PERSONS.

- (a) *Partners or Trustees.*
- (b) *Factors, Insurance Brokers, and Underwriters.*
- (c) *Assignees of Bankrupts.*

III. COSTS—AND JUDGMENTS WHERE SET OFF.

IV. PLEADINGS AND EVIDENCE.

I. IN WHAT ACTIONS ALLOWED.

- 1 If two persons agree to perform certain work in a limited time, or to pay a stipulated weekly sum for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with condition for the due performance of the work, or the payment of the weekly sum, and the work is not finished at the time: such weekly payments are not by way of penalty, but in the nature of liquidated damages, and may be set off by an obligee in an action of *assumpsit* brought against him by the obligor who executed. *Fletcher v. Dyche*.
 2 T. R. 32
- 2 *A.* being entrusted with goods belonging to *B.* undertook to get them insured; he afterwards effected an insurance in his own name, upon property on his premises, but without making any mention of goods held in

trust, the premises were destroyed by fire, and *A.* received the amount of his insurance, but which fell considerably short of his own loss: the Court of C. P. held that no part of this money could be considered as received on account of *B.*, and that it could not therefore be set off in an action for work and labour brought by *A.* against *B.* *Gillett v. Maxman*. 1 Taunt. 137
 3 Where the grantee of an annuity set aside for a defective registry, brings an action for money had and received, to recover back the consideration-money paid for it, the grantor may set off the payments made in respect of such annuity, though for more than six years, unless the plaintiff reply the statute of limitations. *Hicks v. Hicks*.
 3 E. R. 16

- 4 In *assumpsit* for goods sold and delivered, defendant may set-off money due upon plaintiff's acceptance, of which defendant has become holder since the sale and before delivery of the goods, though he has agreed to give plaintiff ready money for them. *Cornforth v. Rivett*. 2 M. & S. 510
- 5 If a landlord direct a tenant, who is overseer of the poor, to pay on the landlord's account rates irregularly assessed on him, and promises that the levies shall eat out the rents, the tenant may set them off, or prove them as payment, in an action for use and occupation. *Roper v. Bunford*.
 3 Taunt. 76

- 6 There can be no set-off to an avowry for rent. *Sapsford v. Fletcher*.
 4 T. R. 512

- 7 To an action of covenant for rent by a landlord, the defendant cannot set off any uncertain damages that he may be entitled to recover against the landlord on any of the covenants in the lease. *Weigal v. Waters*. 6 T. R. 488

II. BY AND AGAINST PARTICULAR PERSONS.

(a) Partners or Trustees.

See *Staniforth v. Fellowes*.

1 Marsh. 184, post, page 628

- 1 A debt due to a defendant, as a surviving partner, may be set off against a demand on him in his own right. *Slipper v. Stidstone*. 5 T. R. 493
S. P. French v. Andrade. 6 T. R. 582
 N. B. The same point was stated *arguendo* by Buller J. in *Smith v. Barrow*. 2 T. R. 478

- 2 It seems that money due for advances made by a banker to his customer upon a bond given by the customer to one of the partners, in trust for the rest, may be set off in an account current between them. *Crosse v. Smith*. 1 M. & S. 545

(b) Factors, Insurance Brokers, and Underwriters.

- 1 If a factor, who sells under a *del credere* commission, sell goods as his own, and the buyer know nothing of the principal, the buyer may set off any demand he may have on the factor, against the demand for the goods made by the principal. *George v. Clagett*. 7 T. R. 359

- 2 Where a broker effected policies of insurance in the name of his principal under a *del credere* commission: Held, that he could not set off losses which happened on those policies in an action by the under-writer to recover premiums, although the losses claimed were total, and the broker had accounted for them with his principal. *Cumming v. Forrester*. 1 M. & S. 494

- 3 Where a bankrupt has underwritten a policy to a broker acting under a commission *del credere*, and a loss upon the policy happens before, but is not adjusted till after the bankruptcy, the broker may deduct the amount of the loss from the debt which he owes to the estate of the bankrupt. *Bize v. Dickason*. 1 T. R. 285

- 4 A broker with a commission *del credere* cannot prove under a notice of

set-off a loss upon a policy, happening before a bankruptcy, in an action by the assignee of the bankrupt for premiums upon policies underwritten by him, and for which he had debited the broker; but such a loss may be set off under the general issue. *Grove v. Dubois*. 1 T. R. 112

- 5 Commissions *del credere* for guaranteeing sums insured upon policies are due upon entering into the contract of guarantee, and may be recovered in an action of *indebitatus assumpsit*; and after judgment by default, the defendant cannot set off in reduction of damages the amount of losses not indemnified. *Carruthers v. Graham*. 14 E. R. 578

- 6 A broker, who pays to A. the price of goods sold by him for A. under a *del credere* commission, is entitled to set off the amount against the assignees of B., for whom he bought the goods; and where the jury found a verdict disallowing such set-off; and it was doubtful on the evidence, whether the payment was made before disclosure of the name of A. to B. the Court granted a new trial. *Morris v. Cleasby*. 1 M. & S. 576

- 7 Where defendants, insurance brokers, effected several policies of insurance, some in the name and on account of their own firm, others in the name of their own firm, but on account of their principals, and others in the name and on account of their principals, for which principals they acted under a *del credere* commission, without the knowledge of the underwriters: Held, that in an action brought against them for premiums by the assignees, and four of the underwriters upon those policies, who had become bankrupt, the defendants might set off losses and returns due on all such of those policies as were effected in the name of their own firm, but not on such as were effected in the names of their principals, such losses and returns having become due on those policies before the time when the bankrupt stopped payment, though they had been adjusted by the bankrupt, but only by the other underwriters between the time of his stopping payment and committing the act of bankruptcy, on which adjustment the defendants had given their principals credit for the amount. *Koster v. Eason*. 2 M. & S. 112

8 Where brokers effected policies of insurance on goods on account of their principals, but in their own names and accepted bills drawn on them on account of the goods which were consigned to them and lost before arrival: Held, that they might set off such losses in an action brought by the assignees of the underwriter (since a bankrupt) for premiums, although they had not any commission *del credere*, and the losses were not adjusted. *Parker v. Beasley*. 2 M. & S. 423

9 A broker who is indebted to the assignees of a bankrupt for premiums due to them upon policies subscribed by the bankrupt before his bankruptcy, is not entitled to set off returns of premiums due upon the arrival of ships which have arrived since the bankruptcy. *Goldsmidt v. Lyon*.

4 Taunt. 534

10 An insurance broker who is indebted to the effects of a bankrupt underwriter for premiums, cannot, without an especial authority, set off against that debt, sums due from the underwriter for return of premium: whether the returns became due before or after the bankruptcy. *Minnett v. Forrester*.

4 Taunt. 541

11 If a person entrusted with value, trusts his creditor with that which may become productive of value, the first becoming bankrupt; the second may retain his debt out of the proceeds of the thing entrusted to him, and only pay the balance: therefore, where *A.*, a merchant, employed *B.*, a broker, to effect policies and sell goods, and trusted him with the possession of the policies; *A.* being indebted to *B.* for premiums of insurance, and having obtained an advance of money upon a pledge of goods placed in *B.*'s hands for sale, but not on those goods to the exclusion of *A.*'s general credit, became bankrupt: afterwards a loss happened, and *B.* received it from the underwriters: Held, that this was a *mutual credit*, within the stat. 30 Geo 2. c. 5. and that *B.* might retain the sum received for the loss, in liquidation of his advances, as well as of the balance due for premiums. *Olive v. Smith*.

5 Taunt. 56

12 Upon an action against an underwriter for a loss, the underwriter cannot set off the premiums, although they have never been paid, unless he

can make it appear that the state of the relative accounts between the assured, broker, and underwriter, is such as to take the case out of the ordinary rule, which is, that the receipt of the underwriter for the premium is conclusive evidence for the assured that he has paid the premium to the underwriter. *De Gaminde v. Pigou*.

4 Taunt. 246

13 An underwriter cannot set off, as a mutual credit, a loss accruing after the bankruptcy of the assured, against premiums of the same and other policies due before the bankruptcy from the assured, who was himself his own insurance broker in effecting those policies. *Glennie v. Edmunds*.

4 Taunt. 775

14 Neither can he set off returns of premium upon voyages not complete before the bankruptcy: although the underwriter must, upon the conclusion of the adventure, necessarily become debtor to the assured, either for a loss, or a return of premium.

4 Taunt. 775

(c) Assignees of Bankrupts.

N. B. See *Set-off by Factors &c.* last page.

1 Mutual credit may be constituted, though the parties do not mean particularly to trust each other: as if a bill of exchange accepted by *A.* get into the hands of *B.*, and *B.* buy goods of *A.*, there is mutual credit between *A.* and *B.* which may be set off by *B.*; though *A.* did not know when he let *B.* have the goods that such bill was in his hands. *Hankey v. Smith*.

3 T. R. 507, n.

2 Where an agreement was made between one, who afterwards became a bankrupt, and the defendant, that a loss upon cotton, which the latter had sustained by means of the former, should be fixed at 1900*l.*; and that in satisfaction of that sum the bankrupt should for four years recommend certain parcels of cotton to the defendant, which he should purchase by notes at three months' date, the clear produce on the sale of which the bankrupt undertook should amount to that sum, in default of which he was to make good the deficiency, if living; it was held such sum could not be set off by the defendant against a demand made

* by the assignees of the bankrupt. *Hancock v. Entwistle.* 3 T. R. 435

3 If a bankrupt, on the eve of his bankruptcy, fraudulently deliver goods to one of his creditors, the assignees may disaffirm the contract, and recover the value of the goods *in trover*; but if they bring *assumpsit*, they affirm the contract, and then the creditor may set off his debt. *Smith v. Hodson.*

4 T. R. 211

4 Where the defendant lent his acceptance to a bankrupt on a bill which did not become due till after the act of bankruptcy, and was then outstanding in the hands of third persons, yet the defendant having paid the amount after the commission issued, and before the action brought by the assignees, is entitled to set off the same under the words "*mutual credit*" in *stat. 5 G. 2. c. 30. s. 28.* *Smith v. Hodson.*

4 T. R. 211

5 To an action brought by the assignees of a bankrupt for a debt due to the bankrupt's estate, the defendant cannot set off cash notes issued by the bankrupt payable to bearer, bearing date before his bankruptcy, unless he shew further that such notes came to his hands before the bankruptcy. *Dickson v. Evans.*

6 T. R. 57

6 But if the notes had been made payable to the defendant himself, that would have been reasonable evidence of their having come to his hands at the time they bore date. 6 T. R. 57

7 To enable the holder of a bankrupt's acceptances to avail himself of them in an action by the assignees against himself on his own acceptance, by way either of set-off, or of mutual credit, he must most distinctly prove, either that the obligation on himself to pay the bill so set off subsisted before the bankruptcy, or that there was a mutual credit created in the origin of the bills. *Ouchterlony v. Easterby.* 4 Taunt. 888

8 A. first purchased one and afterwards another parcel of goods of B., each at six months' credit; when the first sum became due, A. lodged in B.'s hands a bill of exchange for a larger amount than the value of the goods in order to pay for them, B. engaging to return to A. the overplus when the bill should be paid; B. received the amount of the bill, and then A. became a bankrupt, not having paid for the second parcel of goods: Held, in

an action brought by A.'s assignees for the surplus of the bill, that B. might retain it to satisfy his demand on A. for the second parcel of goods. *Atkinson v. Elliott.* 7 T. R. 378

9 Third persons holding the acceptance of a trader who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of a bill, that it should be indorsed to them, and that they should purchase goods of the trader, which were to be paid for by a bill at three months' date, or made equal to cash in three months, (before which time the trader's acceptance would be due,) but without communicating to the trader that they were the holders of his acceptance: Held, that the trader having become bankrupt, and his assignees having brought *assumpsit* to recover the value of the goods sold and delivered to the defendants, the latter could not set off the bankrupt's acceptance, which they did not hold in their own right, but in effect for such other persons. *Fair v. M' Iver.*

16 E. R. 130

10 Three partners, A. B. and C., deliver bills to D. for a special purpose; A. and B. become bankrupts; in an action by their assignees against D. for the proceeds of the bills: Held, that C. not having been made bankrupt, this was not a case of mutual credit within 5 G. 2. c. 30. s. 28. so as to entitle the defendant to set off the bills against a debt due to him from A. B. and C. *Staniforth v. Fellowes.*

1 Marsh 184

III. COSTS AND JUDGMENTS—WHERE SET OFF.

1 Where there were three defendants, one went to trial and obtained a verdict, but the two others suffered judgment by default: the Court of C. P. permitted the costs and damages, on the judgment by default, to be deducted from the costs taxed on the *postea* to the defendant who had a verdict; and in answer to the objection that this tended to deprive the attorney of his legal lien, they said that the attorney could only have such a lien on the costs as was subject to the equitable claims of the parties in the cause. *Schoole v. Noble.*

1 H. B. 23

2 And that Court affirmed this doctrine,

- in a case where several actions brought on two policies of assurance, underwritten by the same parties (among whom were *A.* and *B.*) were respectively consolidated. In one of the causes, which went to trial, *A.* was defendant, in the other *B.*; the plaintiff became entitled to costs in one action, and the defendant in the other.—The costs taxed and allowed to the defendant were set off against those taxed and allowed to the plaintiff. *Nunez v. Modigliani.* 1 H. B. 217
- 3 *A.* brings an action against *B.*, the expenses of defending which are borne by *C.* and *D.*, but *A.* is nonsuited. Afterwards *C.* brings an action against *A.*, in which *D.* is interested as well as *C.*, and *C.* is nonsuited.—The costs of the one nonsuit were allowed by the Court of C. P. to be set off against the other. *O'Connor v. Murphy.* 1 H. B. 657
- 4 *A.* having obtained a verdict against *B.* for a small sum, and *B.* having previously recovered judgment against *A.* for a larger sum and taken him in execution, the Court of C. P. permitted the sum recovered by *A.* by the verdict and the costs, to be deducted from the amount of the judgment of *B.*, and satisfaction to be entered for so much, notwithstanding *A.* was insolvent, and had no means of paying his attorney's bill, but by the sum for which he obtained the verdict. *Vaughan v. Davies.* 2 H. B. 440
- 5 That Court also allowed the costs recovered by *A.* against *B.* in one action, to be set off and deducted from the damages and costs recovered by *B.* against *A.*, *C.*, and *E.*, in another action; notwithstanding the attorney of *B.* swore that he believed *B.* to be insolvent, and that there was no fund out of which the attorney's costs could be paid, but the damages and costs so recovered by *B.* *Dennie v. Elliot.* 2 H. B. 587
- 6 That Court also allowed the costs of two actions between the same parties, though in two different Courts, to be set off against each other, notwithstanding the attorney's lien; but Lord Eldon, C. J. strongly expressed his opinion of the propriety of reconsidering the practice of the Court in this particular. *Hall v. Ody.* 2 B. & P. :
- 7 The Court of C. P. allowed the costs upon a nonsuit to be set off against costs due from the defendant upon the removal of an indictment against him from the Sessions to the Court, notwithstanding the attorney's lien; and declared that if an attorney acts upon the credit of his client, his lien cannot be allowed to interfere with the equitable arrangement of costs between the parties to the suit. *Embden v. Darley.* 1 N. R. 22
- 8 If an execution be set aside with costs, as having been sued out after the allowance of a writ of error, the Court of C. P. will not permit the costs of the application to be set off against the costs of the action, but will compel the plaintiff to pay them forthwith. *Hill v. Tebb.* 1 N. R. 311
- 9 The plaintiff is entitled to set off interlocutory costs in the same cause payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause, notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. *Howell v. Harding.* 8 E. R. 362
- 10 No action will lie in the Courts at Westminster to recover costs ordered to be paid by a rule of an inferior Court, in the course of a suit there, notwithstanding the defendant should not be liable to an attachment of the inferior Court, by being resident out of its jurisdiction; but such an action having been brought, the Court of C. P. ordered the costs awarded to the plaintiff in the inferior Court to be deducted from those allowed to the defendant in the action. *Emerson v. Lashley.* 2 H. B. 248
- 11 Where *A.* recovered against *C.*, and *C.* recovered against *A.* and *B.*, the Court permitted *C.* on motion, to set off the damages which he had recovered against those obtained by *A.* on his undertaking that the bill of *A.*'s attorney in the first action should be satisfied, holding that he had a general lien on the judgment for his costs. *Mitchell v. Oldfield.* 4 T. R. 123
- And see *Randall v. Fuller.* 6 T. R. 456
- 12 In a cross action, the defendant may on motion set off the debt against a judgment for a greater sum, and the Court

- of C. P. will stay proceedings thereon. *Peacock v. Jeffery.* 1 Taunt. 426
- 13 The Court permitted the defendants to set off a judgment recovered by them against the plaintiff, against a judgment obtained by the plaintiff against them jointly; (subject to the attorney's lien), though the plaintiff had also a separate demand on one of the defendants. *Glaister v. Hewer.* 8 T. R. 69
- 14 Where a prisoner in execution is discharged by the consent of his creditor, upon giving a fresh security to satisfy the judgment, and that security is afterwards set aside on account of a mere informality, the judgment is satisfied, and cannot be set off against a demand of the prisoner. *Jaques v. Wutky.* 1 T. R. 557
- 15 A judgment recovered by A. against B. and C., will not be set off on application to the general jurisdiction of the Court, against another judgment recovered against A. by the assignees of B. under an insolvent debtors' Act; the interest of third persons intervening, who have peculiar trusts by the statute. *Doe v. Dartton.* 3 E. R. 149
- IV. PLEADINGS AND EVIDENCE.
- N. B. See *Grove v. Dubois.* 1 T. R. 112, *ante*, page 626.
- 1 In an action on a bond, the defendant must set forth in the plea what is really due on the bond, before he is entitled to set off any cross demand under stat. 8 G. 2. c. 24. s. 5: and such averment is traversable. *Symmonds v. Knox.* 3 T. R. 65
- And see *Grimwood v. Barrit.* 6 T. R. 460,
- 2 The defendant cannot plead by way of set-off, a bond-debt of the plaintiff, assigned to the defendant by another, to whom and for whose use it was originally given. *Wake v. Tinkler.* 16 E. R. 36
- 3 A plea of set-off for money due on a recognizance, and also for money due upon promises, pleaded to an action of debt on bond, as if to an action of *assumpsit*, was holden to be a nullity, and that the plaintiff might sign judgment. *Penfold v. Hawkins.* 2 M. & S. 606
- 4 A plea of set-off that the plaintiff was indebted to the defendant at the time of the plea pleaded, is bad; it should state that he was indebted at the commencement of the action. *Evans v. Prosser.* 3 T. R. 186
- 5 It is no objection to a plea of set-off, that the defendant has brought an action against the plaintiff for the same sum, in which the plaintiff has paid the amount of the demand into Court. 3 T. R. 186
- 6 To a plea of set-off of a sum due under a recognizance, and also of another sum upon a simple contract, it seems that a replication, protesting that the plaintiff did not acknowledge, &c. and then pleading that he was not indebted in manner and form as the defendant had in pleading alleged, and concluding to the country, is bad; inasmuch as it refers matter of record to the cognizance of a jury: but, as it was a sham plea, the plaintiff had leave to amend without payment of costs. *Solomons v. Lyon.* 1 E. R. 369
- 7 In *assumpsit* for goods sold and delivered, defendant pleaded a set-off of more money due to him from the plaintiff. A replication, that the goods were agreed to be paid for in ready money, was holden bad on demurrer, being no answer to the plea. *Eland v. Karr.* 1 E. R. 375
- 8 But in estimating the plaintiff's damages in such case, the jury should take into their consideration, the loss he had sustained by non-payment of ready money. 1 E. R. 377
- 9 An allegation of an agreement to set off a specific joint debt, against specific separate debts previously accrued, is in substance proved by evidence of an agreement prior to the debts accruing to set off all joint debts that should thereafter arise against all separate debts that should thereafter arise. *Kinnerley v. Hossack.* 2 Taunt. 170
- 10 The plaintiff cannot use one plea of the defendant as evidence of the fact, which the defendant denies in another plea: nor can he use a notice of set-off for evidence of the debt on the issue of *non assumpsit*, because the statute gives the notice of set-off in the nature and place of a plea: nor can he use a particular of set-off for that purpose, because it is incorporated with the notice of set-off. *Harrington v. Macmorris.* 5 Taunt. 228
- S. C. 1 Marsh 33

SEWERS.

N.B. *Callis's Readings are good authority on the subject of Sewers. See Dore v. Gray*
2 T. R. 365

- 1 The stat. 23 H. 8. c. 5. s. 17. having directed that "*laws, acts, decrees and ordinances*" made by commissioners of sewers shall stand good and be put in execution *so long time as their commission endureth, and no longer, except "the said laws and ordinances"* be engrossed in parchment, and certified under the seals of the commissioners into Chancery, and have the royal assent: and the stat. 13 Elizabeth, c. 9. having directed all commissions of sewers to continue in force for ten years, unless sooner determined by *supersedeas* or any new commission; and that all "*laws, ordinances, and constitutions,*" made by force of such commission, *being written in parchment, indented and under seals, &c.* shall, without such certificate or royal assent, continue in force notwithstanding the determination of the commission by *supersedeas*, until repealed or altered by new commissioners; and that all such *laws, ordinances, and constitutions, written in parchment, indented, and sealed, &c.* shall, without certificate or royal assent, continue in force *for one year* after the expiration of such commission by lapse of ten years from its *teste*; held,

1st. That the *laws, acts, decrees, and ordinances*, mentioned in the stat. of Hen. 8. mean the same as the *laws, ordinances, and constitutions*, mentioned in that of Elizabeth. And,

2dly. That a *decree* made by commissioners under a former commission which had expired by lapse of ten years, directing a sea-wall to be re-founded, which had been destroyed by a violent tempest and inundation, and the sums necessary for its construction to be advanced by those who were before bound to sustain it *ratione tenuræ* (and who did advance the money accordingly), and that a rate should be made on the level for their reimbursement; (although such decree had been written in *parchment, indented, and sealed*, which this was not,) could not be enforced,

by commissioners under a new commission, issued more than a year after the expiration of the former commission; as to so much of it as remained unexecuted: though good to the extent to which it had been executed; and therefore the Court refused a *mandamus* to the new commissioners to direct a rate to be levied on the level for the reimbursement directed by the decree. *Rex v. Commissioners of Sewers, Somerset.* 9 E. R. 109

- 2 The commissioners of sewers have jurisdiction over a sewer communicating with a navigable stream, or with the sea above the point where the tide ebbs and flows, if it be useful for navigation, and if the place over which the jurisdiction is exercised is or is likely to be benefited by it. *Dore v. Gray.* 2 T. R. 358

- 3 If a sea-bank or wall, which the owners of particular lands are bound to repair, be destroyed by tempest, without any default in such owners, the commissioners of sewers may order a new one (even in a different form, if necessary) to be erected, at the expense of the whole level. *Rex v. Somersetshire Commissioners of Sewers.*

8 T. R. 312

- 4 A presentment made by a standing jury constituted according to ancient usage originally returned by the sheriff at the commencement of every new commission of sewers from certain parishes or districts, composed of landowners then interested in disclaiming the general charge on the level, which jurymen generally acted for life, and only the foreman of which was summoned by the sheriff, which foreman convened the said jurymen, is illegal and void. *Rex v. Commissioners of Sewers, Somersetshire.* 7 E. R. 70

- 5 Such juries, by 23 H. 8. c. 5. ought to be summoned by the sheriff from the body of the county. 7 E. R. 70

- 6 And the presenting jury after being sworn and charged, must also prosecute their inquiry upon hearing evidence on oath before the commissioners in Court, and make their presentment thereon, and not on information collected in the country without oath

7 E. R. 70

SHERIFF.

I. POWER AND AUTHORITY.

II. DUTY AND LIABILITY.

(a) *On Arrests.*(b) — *Return of Writs.*(c) *In bringing in the Body.*

III. FEES.

I. POWER AND AUTHORITY.

- 1 If, at a County Court held for the election of knights of the shire, a freeholder interrupt the proceedings by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace. *Spilbury v. Micklethwaite.* 1 Taunt. 146
- 2 If the assignees of a bankrupt claim goods taken in execution, and the assignees and the plaintiff in the execution both refuse to indemnify the sheriff, the Court of C. P. will interfere to protect him. *Mac George v. Birch.* 4 Taunt. 585

II. DUTY AND LIABILITY.

(a) *On Arrests.*

N.B. For the several duties and liabilities of Sheriffs in particular actions see the Table of Titles prefixed to this Digest.

- 1 Though a sheriff appoint special bailiffs to arrest the defendant at the plaintiff's request, the sheriff is responsible for the defendant after the arrest made. *Taylor v. Richardson.* 8 T. R. 505
- 2 If a sheriff's officer take an undertaking, and bail above is not put in in due time, the sheriff is liable to an action, and afterwards he cannot justify bail. *Fuller v. Prest.* 7 T. R. 109
- 3 A sheriff, having arrested a party, permitted him to go at large without taking a bail-bond, returned *cepi corpus*, and before the expiration of the rule to bring in the body put in bail: Held, that he was not liable either to an action of escape, or false return. *Pariente v. Plumbtree.* 2 B. & P. 35
- 4 If the sheriff permit the defendant to go at large without taking a bail-bond, he may retake him before the return of the writ. *Atkinson v. Matteson.* 2 T. R. 172
And vide 7 T. R. 109
- 5 Where bail are put in after attaching the sheriff, and a trial has not been lost, the Court will set aside the attachment; for in this case the plaintiff is not entitled to the benefit of it as a security in case he should recover. *Secnis*, if a trial has been lost. *Hill v. Bolt.* 4 T. R. 352
Gravett v. Williams. 4 T. R. 352, n.
Callan v. Tye. 2 H. B. 235
- 6 If the sheriff discharge the defendant without taking a bail-bond, the Court will not permit the defendant to file common bail on paying the sum sworn to, if the plaintiff have any claim on him beyond that sum. *Stevenson v. Cameron.* 8 T. R. 28
- 7 If, after the commencement of an action of escape against the sheriff for not taking a bail-bond, good bail be put in and justified in the room of bail before put in, who by the practice of the Court of C. P. were a mere nullity, the plaintiff cannot recover. *Allingham v. Flower.* 2 B. & P. 246
- 8 But where the sheriff omitted to take a bail-bond upon the arrest, and afterwards, upon an action being commenced against him for an escape, caused bail to be perfected, the Court of C. P. ordered the allowance of bail to be set aside, that the action might proceed. *How v. Lacy.* 1 Taunt. 119
- 9 The Court of C. P. held that a *cognovit*, conditioned for payment of the debt and costs by instalments, given without the knowledge of the sheriff, discharged him. *Rex v. Surrey (Sheriff.)* 1 Taunt. 159
- 10 The Court of C. P. held that where the plaintiff, at the desire of the sheriff's officer, forbore to enforce an attachment in the first instance, and ten days afterwards applied to the sheriff for the debt and costs, that the sheriff was not discharged by the indulgence given to the officer. *Rex v. London (Sheriff.)* 1 Taunt. 489
- 11 If bail be put in with the filazer of the county in which the defendant is arrested on a *testatum capias*, the bail may be treated as a nullity and an attachment issue. *Clemson v. Knox.* 2 B. & P. 516
- 12 The Court of C. P. permitted to permit the defendant to justify bail, after

an action for an escape commenced, where no bail-bond had been taken. *Webb v. Matthew.* 1 B. & P. 225

- 13 A sheriff who takes a bail-bond, and on inquiry denies that he has taken one, cannot be therefore sued for an escape: but he would be liable in an action for not assigning on request. *Mendez v. Bridges.*

5 Taunt. 325

- 14 If a defendant sued by a wrong name, appears and perfects bail by his right name, without identifying himself as the person sued by the other name, the plaintiff may treat the bail as a nullity, and attach the sheriff. *Rex v. Suffolk (Sheriff.)*

4 Taunt. 818

- 15 Or he may waive the variation of the defendant's name, at his own option. 4 Taunt. 818

- 16 Debt lies upon the stat. 44 G. 3. c. 13. s. 4. by a common informer, suing for himself and the King, to recover a penalty against the sheriff for the misconduct of his bailiff in wilfully suffering a seaman to go at large who had been taken out of the King's service by arrest on civil process, on which he was afterwards bailed, instead of delivering him over to the charge of a proper naval officer: the statute which speaks of *sheriffs, gaolers, or other officers* arresting, apprehending, or taking in execution such seamen, or in whose custody they may be, and who are made liable for their escape, meaning by "other officers," such as may be charged with the execution of criminal warrants against such seamen, or to whom any process may properly be directed for their arrest, detention, or discharge; and not the inferior officers of the sheriff. And the sheriff may be charged in such action for *wrongfully and wilfully* permitting the escape. *Sturany, q. t. v. Middlesex (Sheriff.)* 11 E. R. 25

- 17 If, by abuse of the process of one of the Courts at *Westminster*, a sheriff's officer extort a promissory note from a suitor, and declare upon it in another of the Courts of *Westminster*, the latter Court cannot interfere summarily to punish the officer under 32 G. 2. c. 28. s. 11. *Ex parte Evans.*

2 B. & P. 88

(b) Return of Writs.

- 1 All writs must be returned by the

sheriff on the day on which the rule for returning the same expires, and in default thereof the plaintiff is at liberty to move for an attachment on the next day. *Reg. Gen. M.* 32 G. 3.

4 T. R. 496

- 2 A return made by the sheriff that the person arrested was rescued out of the custody of the bailiff, is bad; it should be out of his custody. *Woodgate v. Knatchbull.* 2 T. R. 155

- 3 If the sheriff appoint a special bailiff at the plaintiff's request, the latter cannot rule the sheriff to return the writ. *De Moranda v. Dunkin.* 4 T. R. 119

- 4 A rule issued in the vacation though tested in Term time, requiring a sheriff to return a writ, is irregular; and an attachment against him for disobeying it will be set aside by the Court on motion. *Rex v. Cornwall (Sheriff.)*

1 T. R. 552

- 5 A sheriff is not liable to an attachment for not returning a writ, if not called upon *by a rule of Court* within six months after the expiration of his office; a request by the party is not sufficient. *Rex v. Jones.* 2 T. R. 1

- 6 An attachment may be granted for making an insufficient return to the first writ of *habeas corpus*, without issuing an *alias* and a *pluries* writ. *Rex v. Winton.* 5 T. R. 89

- 7 The Court of C. P. will not discharge an attachment against a sheriff for not returning a writ of execution, except upon payment of the *whole debt and costs*, and the costs of the application, where there are circumstances attending the transaction which induce a suspicion of fraud in the party obtaining a priority in execution, or in the sheriff's bailiff. *Rex v. Middlesex (Sheriff.)* 1 H. B. 543

- 8 The Court, upon the application of the sheriff enlarged the time for his making a return to the writ of *fi. fa.* upon a suggestion of a reasonable doubt whether the goods seized under the writ were not covered by an extent afterwards issued at the suit of the Crown for malt duties under the stat. 28 G. 3. c. 37. s. 21. for the purpose of inducing the plaintiff to go into the Court of Exchequer, and there contest the question of right with the Crown. *Wells v. Pickman.*

7 T. R. 174

- 9 The Court of C. P. refused to grant an attachment against the sheriff for

returning to a writ of *venditioni exponas*, that part of the goods levied, remained in his hands for want of purchasers. *Leander v. Davis*.

1 B. & P. 359

- 10 The same sheriff, by whom any writ directed to him is executed while in office, ought to make his return to the same, and hand over such writ and return to the new sheriff who comes into office before the return-day; and such new sheriff will return the writ with the old sheriff's return thereon: and if the old sheriff, after arresting the defendant, suffer him to escape and go out of office before the return day, he alone is answerable for the escape. *Rex v. Middlesex (Sheriff.)*

4 E. R. 604

- 11 Yet, if the new sheriff by mistake return *cepi corpus* to a writ directed to the old sheriff, after the latter, who arrested the defendant upon it, had permitted an escape, and an attachment afterwards issue against the old sheriff who was ruled to bring in the body, the irregularity may be waived by not moving in reasonable time to set aside the attachment. 4 E. R. 604

- 12 The sheriff having been served in proper time with a rule to return the writ of *est. fi. fa.* which expired on the last day of Term, is attachable at the rising of the Court on that day if no return be made before: and the rule for the attachment is regular, though he make his return on a subsequent day in vacation, before he was actually served with the rule; and though immediately after such service he tendered the sum levied, deducting his poundage. *Rex v. Surrey (Sheriff.)*

11 E. R. 591

- 13 Where a writ of *fi. fa.* expires in the vacation: the sheriff need not return it till the first day of the ensuing Term, and he has the whole of that day to file it. *Rex v. Berks (Sheriff.)*

5 E. R. 386

- 14 Where a rule to return a writ, issued out of the Court of C. P. expires in vacation, the sheriff must file it at the return, and cannot wait till the ensuing Term; the Common Pleas Office being open during the vacation. *Rex v. Middlesex (Sheriff.)*

1 Marsh. 270

- 15 Where the sheriff, on being ruled to return a writ, gave notice to the plaintiff that the writ was lost, and that the defendant was in custody:

the plaintiff should have proceeded as if the sheriff had returned *cepi corpus*: and the Court of C. P. set aside an attachment issued against the sheriff for not returning the writ. *Rex v. Kent (Sheriff.)*

1 Marsh. 289

(c) When to bring in the Body.

- 1 Where any sheriff before his going out of office, shall arrest any defendant, and a *cepi corpus* be returned, he may, within the legal time allowed, be called upon to bring in the body, though he may be out of office before such rule be granted. *Reg. Gen. K. B. T. 31 G. 3.*

4 T. R. 379

- 2 Where a rule to bring in the body expires on the last day of Term, plaintiff may, at the rising of the Court on that day, move for an attachment, which may be accordingly issued on the following day, provided bail shall not then be perfected, or the defendant surrendered. *Reg. Gen. C. P. T. 38 G. 3.*

1 B. & P. 312

- 3 Where a sheriff has been guilty of a contempt for not bringing in the body, and the defendant afterwards dies, an attachment may still issue against the sheriff for the contempt. *Rex v. Middlesex (Sheriff.)*

3 T. R. 133

- 4 The sheriff is liable to an attachment for not bringing in the body, if the allowance of bail be not served, though the bail justified. *Rex v. Middlesex (Sheriff.)*

4 T. R. 493

- 5 A sheriff ought not to be ruled to bring in the body until the day after the expiration of the rule to return the writ, and if he be, and be attached for not obeying it, the Court will set aside the attachment for irregularity. *Hutchins v. Hird.*

5 T. R. 479

- 6 The sheriff cannot be ruled to bring in the body until the time for putting in bail has expired. *Rex v. Middlesex (Sheriff.)*

8 E. R. 525

- 7 Where an exception to bail was regularly entered, and the defendant's attorney having *verbal* notice of it, proceeded by giving notice of justification, and attempting to justify; yet, the Court of C. P. held, that notice *in writing* of such exception must have been given, to make the sheriff liable to an attachment for not bringing in the body. *Cohn v. Davis.*

1 H. B. 80

- 8 The Court of C. P. held, that notice of justification of bail is not such a waiver of the default of not giving notice of exception, as to support a rule on the sheriff to bring in the body; though it is a waiver as between the plaintiff and defendant. *Rogers v. Mapleback.* 1 H. B. 106
- 9 The Court determined, that if the sheriff be once in contempt for not bringing in the body, that contempt is not purged by the defendant surrendering on a subsequent day; though before an attachment be moved for against the sheriff. *Rex v. Middlesex (Sheriff.)* 7 T. R. 527
(In the Case of *Taylor v. Odin.*) N.B. The rule of Court of T. 33 G. 3. as to rendering a defendant, (for which see 5 T. R. 368,) extends to the case of a sheriff. 7 T. R. 527
- 10 The practice of the Court of Common Pleas differs on this point, for it was held by the latter, that though the rule to bring in the body has expired, yet if the defendant justify bail, before the plaintiff moves for an attachment against the sheriff, it is in time to prevent the attachment. *Thorold v. Fisher.* 1 H. B. 9
- 11 A sheriff who is ruled on the last day of a Term to bring in the body, but goes out of office before the next Term, is liable to an attachment for not bringing in the body. *Meakins v. Smith.* 1 H. B. 629
- 12 Upon an application to set aside an attachment against the sheriff for not bringing in the body, bail having been put in and no trial lost, the Court require an affidavit of merits, if the application come from the defendant, but not if it come *bonâ fide* from the sheriff. *Rex v. Surrey (Sheriff.)* 7 T. R. 239
- 13 But where such attachment has regularly issued, the Court will on no account relieve the sheriff, if it appear that he let the defendant out of custody without taking from him such a bail-bond as is required by the statute. 7 T. R. 239
- 14 After an attachment against the sheriff for not bringing in the body, the Court will only relieve him upon paying the whole debt and costs, and not merely the sum sworn to and costs. *Heppel v. King.* 7 T. R. 370
- 15 An attachment against the sheriff granted on the 24th of January, was set aside for irregularity, he having been ruled to bring in the body on the 23d of November preceding, which expired on the 28th, and having put in bail above on the 24th, though the time for putting it in expired on the 22d; and the defendant being surrendered in discharge of his bail on the 28th, without the bail having justified. *Rex v. Middlesex (Sheriff.)* 7 T. R. 527
- 16 The sheriff having returned *cepi corpus* in Hilary Term 1797, upon which the plaintiff proceeded no further until Michaelmas Term following, the Court thought it unreasonable that the sheriff should be called upon to bring in the body after such delay, and set aside an attachment which had issued against him for not doing it. *Rex v. Surrey (Sheriff.)* 7 T. R. 452
- 17 The Court holds that where bail are put in, in due time, an exception must be entered before the sheriff can be ruled to bring in the body: and that the adding bail afterwards, does not supersede the necessity of such exception, before an attachment can issue against the sheriff on account of the added bail not having justified in due time. *Rex v. Middlesex (Sheriff)* 8 T. R. 258
- 18 Where the rule to bring in the body was served on the last day of a Term, the Court held, that the bail have the whole of the first day of the next Term to justify: and that if the defendant surrender in discharge of his bail on any part of that day, the sheriff cannot be attached for not bringing in the body. *Rex v. Middlesex (Sheriff.)* 8 T. R. 464
- 19 The Court of C. P. will not discharge an attachment against the sheriff for not bringing in the body, except upon payment of the whole debt due, and costs beyond the sum sworn to and indorsed on the writ. *Fowld v. Mackintosh.* 1 H. B. 233
- 20 But the Court will relieve him on payment of what is due to the extent of the penalty in the bail-bond, though less than the plaintiff's demand. *Rex v. Middlesex (Sheriff.)* 3 E. R. 604
- 21 A rule to bring in the body tested

- on the day of the sheriff's return of *cepi corpus*, though issuing afterwards in the vacation, is irregular. *Rex v. London (Sheriff)*. 2 E. R. 241
- 22 A rule for an attachment against the sheriff for not bringing in the body, having been obtained on the 19th of *November*, and the attachment not sued out and served on the sheriff until the 9th of *March* following, the Court of C. P. held the sheriff discharged, and set aside the attachment. *Rex v. Per-ring*. 3 B. & P. 151
- 23 Where the rule for an attachment against the sheriff for not bringing in the body was obtained on the 11th of *February*, which attachment was returnable on the 4th of *May*, and the plaintiff did not issue the attachment till the 3d of *May*, and the defendant in the action became bankrupt on the 19th of *March*, whereby the sheriff lost his opportunity of paying the debt, and proving it under the commission, the attachment was set aside for such laches. *Rex v. Surrey (Sheriff)*. 9 E. R. 467
- 24 The Court of C. P. held, that though an attachment is irregular, if the rule to bring in the body issues before the time for putting in bail has expired, yet if the sheriff neglect to apply to the Court in due time to set aside the attachment, the irregularity is waived. *Rolfe v. Steele*. 2 H. B. 276
- 25 If the affidavit upon which a motion for an attachment be founded, merely state that the officer of the sheriff was served with a copy of the rule to bring in the body, but do not add that the original rule was shown to him: the Court of C. P. will set aside the attachment. *Bernard v. Berger*. 1 N. R. 121
- 26 In the Court of C. P. bail were allowed to justify after the rule on the sheriff had expired, on payment of the costs of the opposition. *Weddall v. Berger*. 1 B. & P. 325
- 27 And in the same Term, that Court allowed the defendant to justify bail, after an attachment issued against the sheriff, but gave leave to the plaintiff to oppose them without prejudice. *Williams v. Waterfield*. 1 B. & P. 334
- 28 And where bail were brought up on the same day on which an attachment had been obtained against the sheriff, that Court permitted the bail to justify and set aside the attachment, on payment of costs: and as the rule for the attachment had not been drawn up, the costs given were only those of preparing it. *Turner v. Bristow*. 2 B. & P. 38
- 29 Time for putting in bail expired on the 30th; defendant on the 31st moved to justify, pursuant to a notice previously given: Held, that the plaintiff was entitled to the costs of preparing to move for an attachment. *Jarret v. Creasy*. 3 B. & P. 603
- 30 If the plaintiff has incurred the costs of instructing counsel to move for an attachment against the sheriff, before the defendant gives notice of his surrender, though he surrenders before the attachment is actually obtained, the Court will order the costs of those instructions to be paid by the defendant upon setting aside the attachment. *Rex v. Middlesex (Sheriff)*. 1 Taunt. 56
- 31 Since the stat. 43 G. 3. c. 46. s. 2. the sheriff cannot relieve himself from an attachment for not bringing in the body by payment of the debt sworn to and endorsed on the writ, he having neglected to take the money at the time of the arrest as directed by that Act; but he must pay the whole debt and costs. *Rex v. London, (Sheriff)*. 9 E. R. 316
- 32 The plaintiff must proceed against the sheriff within a reasonable time, and after that is elapsed he cannot resort to the sheriff, although the plaintiff has been delayed by listening to a compromise offered by the defendant. *Rex v. London (Sheriff)*. 1 Taunt. 111
- 33 An attachment against the sheriff for not bringing in the body after the defendant has surrendered is irregular, though the surrender be not made until after the rule for bringing in the body has expired. *Rex v. Middlesex (Sheriff)*. 2 M. & S. 562
- 34 Where a defendant has been arrested by a wrong christian name, and the sheriff returns, "I have taken A. B., sued by the name of C. B.," the sheriff is a trespasser: and the Court of C. P. will set aside an attachment issued against him for not bringing in the body. *Rex v. Surrey (Sheriff)*. 1 Marsh. 75

III. FEES.

N. B. For the Fees of Sheriffs' Officers, see ante, page 60.

- 1 If it appear by the sheriff's return of a writ of execution, that greater fees have been taken for the levy than are allowed by stat. 29 Eliz. c. 4., the sheriff is liable to an action on the statute for treble damages at the suit of the party grieved. *Woodgate v. Knatchbull*. 2 T. R. 148
- 2 Under that statute the sheriff cannot take any other charge but that for the poundage. 2 T. R. 148
- 3 An action brought on stat. 29 Eliz. c. 4. for fees, must be brought by the sheriff and not by the bailiff. 2 T. R. 155-8
- 4 If a sheriff levy under a *fi. fu.* he is entitled to poundage, though the par-

ties compromise before he sell any of the defendant's goods. *Alchin v. Wells*.

5 T. R. 470

- 5 And if after such compromise, either party rule the sheriff to return the writ, the Court will discharge that rule with costs, to be paid by the party obtaining it. 5 T. R. 470
- 6 The Court directed the sheriff to refund his poundage which he had retained out of money levied upon an attachment for non-payment of money, there being no practice to warrant it; and referred him to his action, if he were supposed to have a right to it under the stat. 23 H. 6. c. 91. *Rex v. Palmer*. 2 E. R. 411
- 7 Upon a *capias utlagatum* on mesne process, under which the sheriff has seized and taken an inquisition, but there has been no *venditioni exponas*, the sheriff is not entitled to poundage. *Graham v. Grill*. 2 M. & S. 294

SHIP AND SHIPPING.

I. REGISTRY, SALE AND TRANSFER OF.

II. OWNERS.

Liability of.

III. MASTERS AND COMMANDERS.

Duties and Liabilities.

IV. AVERAGE.

V. SALVAGE.

VI. SEAMEN.

Hiring and Payment of Wages.

I. REGISTRY, SALE AND TRANSFER.

N. B. See ante, *tits*. CHARTER-PARTY,
DEMURRAGE,
FREIGHT.

- 1 A registry is not a document required by the law of nations as expressive of a ship's national character. *Le Che-minant v. Pearson*. 4 Taunt. 367
- 2 A foreign-built ship, *British* owned, is not required to be registered. *Long v. Duff*. 2 B. & P. 209
- 3 An absolute bill of sale of a ship at sea is void by stat. 26 G. 3. c. 60. s. 17.

unless the certificate of the registry be recited therein; although the vendee give at the same time an undertaking to restore the ship on a future day on payment of a certain sum advanced by him on the credit of this security. *Rolleston v. Hibbert*. 3 T. R. 406

- 4 And though the vendee had also the grand bill of sale, and had taken possession of the ship immediately on her arrival: it was held, that he could not retain the ship as having a lien on her, against the assignees of the vendor, who became a bankrupt after this transfer of the ship. 3 T. R. 406
 - 5 Notwithstanding the 26 G. 3. c. 60. s. 17. enacts that a bill of sale of a ship shall be absolutely void unless the certificate of the registry be truly and accurately inserted therein, a mere clerical mistake will not vitiate it. *Rolleston v. Smith*. 4 T. R. 161
 - 6 And the Court of C. P. held, that the indorsements on such certificate of registry need not be recited in the deed of assignment of a ship. *Capadose v. Codnor*. 1 B. & P. 483
- And see 34 G. 3. c. 68. s. 15.

- 7 *A.* and *B.* being joint-owners of a ship, *A.* conveyed his moiety to *B.*; but in the bill of sale the certificate of registry was not truly recited: *B.* took possession, and afterwards mortgaged the whole ship to *A.*; who did not take possession; then *B.* ordered *C.* to repair the ship: afterwards *B.* conveyed one part of the ship to *A.*, and the other to *D.*: Held, that the first bill of sale was an absolute nullity under the statute 26 *G. 3. c. 60. s. 17.*, and that *A.* was liable to *C.* for the repairs of the ship in an action for work and labour brought by *C.*; *A.* not having pleaded in abatement that *B.* ought also to have been sued. *Westerdell v. Dale.* 7 *T. R.* 306
- 8 Under the Ship Register Acts (26 *G. 3. c. 60.* and 34 *G. 3. c. 68.*) a bill of sale transferring the property to a trustee, in trust for the underwriters not named, is at most only void (if at all) as to the objects of the trust, but sufficient to convey the legal title to the trustees: And such bill of sale of a ship at sea is valid, notwithstanding the omission of the officer at the out-port to which the ship belonged, to indorse the entry of the transfer on the oath on which the original certificate of registry was obtained, and to make a memorandum thereof in the book of registry, and to give notice of the same to the commissioners in *London*, as required by section 16 of the 34 *G. 3. c. 68*; such acts to be done by the public officer being only directory. But the delivery of a copy of the bill of sale of a ship at sea for the purpose of making such entry and memorandum and giving such notice, being an act required to be done by the party himself to whom the transfer is made, for want of which the statute avoids the sale, must be complied with in order to convey the property: and therefore, the purchaser under such circumstances, having omitted to do so, cannot make a title to the ship *per saltum*, by getting her registered *de novo*, in another port where he resided at the time: for whatever may amount to a transfer of a ship to another port within the meaning of the statutes; at all events such transfer cannot be made by one who has no interest in the ship. *Heath v. Hubbard.* 4 *E. R.* 110
- 9 The Ship Register Acts do not apply to a transfer of property by operation of law, such as from the commissioners to the assignees of a bankrupt. *Bloxam v. Hubbard.* 5 *E. R.* 407
- 10 Under the Ship Register Acts 7 and 8 *W. 3. c. 22. s. 21.*, and 26 *G. 3. c. 60. ss. 3, 4, 5, 16.*, and 34 *G. 3. c. 68. ss. 15, 16.*, in order to make title to a ship sold at sea, whether in whole or in part, such sale must be acknowledged by indorsement of the certificate of registry in the manner therein described, and a copy of such indorsement be delivered by the vendee to the persons authorised to make registry, (which officers are directed to make an entry thereof, to be indorsed on the oath or affidavit upon which the original certificate of registry was obtained, and to make a memorandum in the book of registers, and to give notice thereof to the commissioners of the customs); and it is not sufficient for the vendee to register such ship *de novo*, in another port, where he resided, though he removed the ship there, and she never returned to her original port after the sale. 5 *E. R.* 407
- 11 If a ship, registered at one port, is transferred, while at sea, to a purchaser residing at another port in this kingdom, the proper mode of perfecting the transfer within the requisitions of the Ship Register Acts, is, by a registration *de novo* in her new port. *Hubbard v. Johnstone.* 3 *Taunt.* 177
- 12 It is not necessary for a ship to return to her former port, in order to have a memorandum of the transfer indorsed on her certificate of registration. Nor is it necessary for the purchaser to send a copy of the bill of sale to her former port: Nor to indorse a memorandum of the transfer on her certificate of registry within ten days after the ship returns to *England*. 3 *Taunt.* 177
- 13 The property of a ship vests in the purchaser instantly upon the execution of the bill of sale, not from the time of compliance with the Register Acts, defeasible, nevertheless, upon failure to comply with these Acts. *Per Wood B.* 3 *Taunt.* 177
- 14 The statute 34 *G. 3. c. 68. s. 16.* applies to the sale of the entirety of

a ship in the same port, as well as to the sale of a share or shares therein. *Hubbard v. Johnstone*. 3 Taunt. 177

15 The Ship-Register Acts, so far as they apply to defeat titles, and create forfeitures, are to be construed strictly, as penal; not liberally, as remedial laws. *Per Wood B. and Heath J.* 3 Taunt. 220

16 An indorsement of a transfer of a ship in the same port made upon the certificate of the registry, and bearing date at the time of the transfer, but not signed by the vendor till three years after such certificate had been delivered up and cancelled, and had remained dormant during all the intermediate time: Held, not to confer a title to the ship under the Register Act 34 G. 3. c. 68. s. 15. and other Acts; such certificate having been so cancelled and delivered up upon occasion of the vendee's obtaining a register *de novo*, (issued without authority), which recited the cancellation of the former certificate: For the object of the Register Acts in requiring such indorsement, is in order to notify the change of property to the public; and therefore it is required to be made on an existing acknowledged certificate, in use at the time; and consequently no title passed to the assignees of the vendee, who had become bankrupt between the time of the original transfer to him, and the signing of such indorsement by the vendor; the vendee having also, before his bankruptcy, conveyed away the ship to third persons for a valuable consideration, who were in possession of it. But *quære*, whether any title could be made under such register *de novo*, issued without authority, upon a transfer of the ship in the same port? And therefore the vendees of the bankrupt only held their possession on such defect of title in the assignees of the bankrupt. *Moss v. Mills*. 6 E. R. 144

17 Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, as required by *stat.* 26 G. 3. c. 60. s. 17. yet the mortgagor may be sued upon his personal covenant contained in the same in-

strument for the repayment of the money lent. *Karison v. Cole*.

8 E. R. 231

18 The *stat.* 34 G. 3. c. 68. s. 15. reciting that by the laws in force, upon any alteration of property in any vessel *in the same port* to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such indorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering officer; or otherwise the sale shall be utterly null and void; and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then, *s. n.* 16. provides that if any vessel shall be at sea, or *absent from the port to which she belongs*, when such alteration in the property shall be made: so that an indorsement on the certificate cannot be made; (assuming that the certificate is always with the ship); then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as was required for the indorsement of the certificate by the prior section, but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made, as before required: Held, that the provisions of the two sections comprehend every transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was *in the port of London*, was void, for want of complying with the requisites of one or other of those sections; neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the *stat.* 7 & 8 W. 3. c. 22. s. 21., which requires a registry *de novo* upon any transfer of property to another port, and that the former certificate shall be delivered up to be cancelled. *Hayton v. Jackson*. 8 E. R. 511

19 A delivery of the grand bill of sale of a ship at sea is equivalent to a delivery of the ship itself. *Atkinson v. Maling.* 2 T. R. 462

And see post, tit. TROVER.

20 The plaintiff bought and paid for a ship stranded on the *English* coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck, which drifted on his farm: the Court of C. P. held that the plaintiff's possession enabled him to recover for them in trover. *Sutton v. Buck.* 2 Taunt. 302

21 The Vice-Admiralty Courts abroad have no authority, upon the mere petition of the captain of a ship bound on a foreign voyage, to decree the sale of such ship reported upon survey not to be sea-worthy or repairable so as to carry the cargo to its place of destination, but at an expense exceeding the value of the ship when repaired. Nor does it appear that the master has any original authority to sell the ship under such circumstances, and to put an end to the adventure by such discretionary act of his own, when he might in fact have repaired the ship and continued the voyage. But supposing he has such authority exercised *bonâ fide* in a case of necessity; still the vessel subsisting as such, and capable of being used for the purposes of navigation, and so used in fact after some repair on the spot, can only be conveyed by the captain in the form prescribed by the Register Acts; and the requisites of those Acts not having been complied with, the sale in question was held to transfer no property to the vendee. *Reid v. Darby.*

10 E. R. 143

22 Upon the transfer of a share in a vessel, it is not necessary that the indorsement upon the certificate of registration should express the share to be all the vendor's interest: The omission of the officer at the out-port to transmit a copy of the instrument to the Custom-house in London, does not invalidate the transfer. *Underwood v. Miller.* 1 Taunt. 387

23 The purchaser of a ship, which appears by the sentence of condemnation in the Vice-Admiralty Court abroad, to have been taken and con-

demned for being engaged in the slave trade, is not entitled to register such ship at the Custom-house under the *stat.* 26 G. 3. c. 60., as the owner of a ship taken and condemned as lawful prize, although he produce a certificate from the Judge of the Court abroad, certifying that the ship was condemned as lawful prize. *Re v. The Collector and Comptroller of the Customs in London.* 1 M. & S. 262

24 A bill of sale of three fourth parts of a ship, then being in the port to which she belongs, executed by three or four joint-owners, transfers the property to the vendee at the time of its execution: if, at that time, a memorandum of such transfer be indorsed on the certificate of registry, and signed by the three, and a copy of such indorsement be delivered to the proper officer on the next day, and afterwards, within a reasonable time the other owner execute the bill of sale and sign the indorsement, and a copy of the indorsement signed by the four be left with the proper officer; therefore, where upon a writ of *feri facias* against one of the three, the sheriff seized his share after the execution of the bill of sale and signature of the indorsement by the three, but before the delivery of the copy of such indorsement to the proper officer: Held, that the sheriff might abandon the seizure and return *nulla bona.* *Palmerv. Moron.* 2 M. & S. 43

25 It seems that an averment that *A.* is the sole owner of a ship to a certain day, is not disproved by evidence that he executed a bill of sale of a part, before that day, and that on that day the requisites of the Register Acts were complied with. *Ritchie v. St. Barbe.*

4 Taunt. 768

II. OWNERS.

Liability of.

- 1 *Quære.* Whether a mortgagee of a ship out of possession be not liable to repairs? *Westerdell v. Dale.* 7 T. R. 306
- 2 If a ship be chartered to the commissions of the navy as an armed vessel, and an injury be done to another vessel by the misconduct of the persons on board the former, while a commander of the navy and a King's pilot are on board, an action for the injury may be sustained against the owners

of the chartered ship. *Fletcher v. Braddick*. 2 N. R. 182

- 3 The registered owner of a ship having chartered her to the then captain at a rent, for a certain number of voyages; is not liable for stores furnished to the ship by order of the captain, during the charter-party. *Frazer v. Marsh*. 13 E. R. 238

- 4 A., the owner of a ship, executes an absolute bill of sale of it to B., and by another deed of the same date, assigns other property to B., which deed of assignment (reciting that the bill of sale was for the better securing a sum of money lent by B. to A., and also reciting a bond and warrant of attorney to secure the same sum), declares that those "several deeds and instruments were made to enable B., by sale of all the things comprised in them, to raise the sum lent, without the concurrence of A., at any time before the money should be paid off;" but in this deed there is a covenant that, upon repayment of the money, "B. shall reconvey to A., but so as not to prevent B. from selling, &c. at any time before the full payment, &c." Under these conveyances, B. is not absolute owner of the ship, but only mortgagee; and, therefore, is not liable for necessities provided for the ship before he takes possession. *Jackson v. Vernon*. 1 H. R. 114

- 5 Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15.; yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee (who for this purpose must be considered as a stranger to the legal owners), and consequently had no authority express or implied to bind them. *Young v. Brander*. 8 E. R. 10

- 6 The sole registered owner of a ship gave orders for materials to be furnished and work to be done for the repairs of it: but before all the articles were delivered on board, he conveyed the vessel, with all its furniture to another by a bill of sale, which was duly register-

ed: Held, that the vendee was not liable for any of the goods furnished before the legal title was conveyed to him, and registered in the manner prescribed by the Registry Acts: whatever equitable agreement might have existed before between him and the vendor for the conveyance of the whole or a share of the ship, which was unknown to the tradesmen, nor was the vendee even liable for any of the goods delivered on board after the sale to him, by virtue of the previous orders of the vendor, to whom the credit was personally given: but the vendee was held liable for articles which were ordered by the captain for the use of the vessel after the legal title was transferred to him. *Trachella v. Rowe*. 11 E. R. 435

- 7 Part-owners of a ship having agreed "each and every of them with the others, and each and every of the others," that the ship should proceed on a certain voyage under the exclusive management and controul of one of them as ship's husband; and that after her return "a full account should be made of the said ship and her concerns," and the net profits be divided in proportion after deducting all charges; the duty of making out such an account is cast upon the ship's husband; and for not doing so, and not dividing the net profits, after deducting all charges, within a reasonable time after the ship's return, an action lies against him, upon the agreement by each of the part-owners; though it be not averred in terms that the charges were or could have been ascertained before the action brought; for that is matter of defence. *Owston v. Ogle*. 13 E. R. 538

III. MASTERS AND COMMANDERS.

Duties and Liabilities.

See FREIGHT, ante, page 345.

- 1 Where goods are ordered for a ship by the owners, before the appointment of the captain, though some are not delivered till afterwards, yet as no personal credit is given to the captain, he is not answerable for any of them. *Farmer v. Davies*. 1 T. R. 108
- 2 The master of a ship is not discharged of his responsibility for the acts of his crew, although done under the direc-

tion of a pilot, who by the regulations of a statute supersedes the master for the time in the government of the ship. *Bowcher v. Noidstrom.*

1 Taunt. 568

- 3 The master of a ship detained as prize, and libelled in the Prize Court at *Jamaica*, gave bills of lading of the cargo, to one who became bail for the ship and cargo there: Held, that the master had no authority to contract that the cargo should be sold in *London*, and the proceeds remitted back to *Jamaica*, the owners being ready to give a sufficient security to indemnify the bail in *London.* *Johnson v. Greaves.*

2 Taunt. 344

- 4 The master and freighter of a vessel of 400 tons, having mutually agreed in writing, that the ship, being fitted for the voyage, should proceed to *St. Petersburg*, and there load from the freighter's factor a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight, &c.: Held, that the master, after the taking in at *St. Petersburg*, about half a cargo, having sailed away upon a general rumour of a hostile embargo being laid on British ships by the Russian government, was liable in damages to the freighter for the short delivery of the cargo; though the jury found that he acted *bonâ fide*, and under a reasonable and well-grounded apprehension at the time; and a hostile seizure under an embargo was in fact made in six weeks afterwards. *Atkinson v. Ritchie.*

10 E. R. 530

- 5 The statute 34 G. 3. c. 68. s. 18. giving a summary conviction against any master of a vessel, who, having received the certificate of its register, shall wilfully detain and refuse to deliver up the same to the proper officers empowered to make registry, &c. on the requisition of the owner or major part-owners, will not authorize the conviction of a master who did not comply with the requisition of the sole owner to deliver up such certificate to him, though expressed to be for the purpose of providing the necessary indorsement to be made on it at the custom-house upon the transfer of the ship. *Rex v. Pixley.*

13 E. R. 91

- 6 An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for

not safely keeping and delivering it. *Hodgson v. Fullarton.* 4 Taunt. 787

IV. AVERAGE.

See INSURANCE. XII. (c) *ante*, 423, 4

- 1 If *A.* let his ship to *B.* for a voyage, engaging to keep it in repair during the whole time, for which he is to receive freight on the return of the ship; and, for the safety of the ship, it becomes necessary during the voyage to put into a port to refit; the expense of refitting must be borne entirely by *A.*; and *B.* is not liable to contribute to it in proportion to his interest in the cargo, as for a general average. *Jackson v. Charnock.* 8 T. R. 509

- 2 An action upon promises, lies by a ship-owner to recover from the owner of the cargo his proportion of general average loss incurred by sacrificing the tackle belonging to a ship for an unusual purpose, or on an extraordinary occasion of danger, for the benefit of the whole concern. *Birkley v. Presgrave.* 1 E. R. 220

- 3 The owners of a ship's cargo are liable to contribution, for ship's stores necessarily thrown overboard, after a vessel was captured, and while she was in the hands of an enemy. *Price v. Noble.*

4 Taunt. 123

- 4 The accident that an owner has effected an insurance, does not impeach his right to recover general average.

4 Taunt. 123

V. SALVAGE.

- 1 The lord of a manor is not entitled to salvage for taking against the consent of the owner parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him. *Sutton v. Buck.* 2 Taunt. 302

- 2 A ship being in danger, and the captain and part of the crew having made their escape, a passenger at the request of the crew took the command, and brought the ship safe into port. The merits of the passenger in saving the ship were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed his desire to make him a compensation: Held, that the passenger was entitled to sue the owner for the salvage. *Newman v. Walters.* 3 B. & P. 612

- 3 The commander of a stranded vessel having, by the recommendation of the pilot, who came to his assistance, sent

to the defendant on shore, till then a stranger to him, to send all the help which was necessary, which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs, and he paid all the salvors: the Court held, that this constituted him the agent of the owners, and took the case out of the statute 12 *Ann. st. 2 c. 18. s. 2.* for regulating the quantum of salvage by the award of three justices of the peace; which statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders. *Baring v. Day* 8 E. R. 57 N. B. See the statutes 48 G. 3. c. 130. s. 21. 49 G. 3. c. 192. s. 32. which extend to cases where officers of the customs do not interfere.

VI. SEAMEN.

Hiring and Payment of Wages.

- 1 The stat. 37 G. 3. c. 73. s. 3. having prohibited more than double monthly wages being given to seamen coming from the *West Indies*, unless the captain be specially licensed to give a greater rate by the chief officer of the port; a general licence by such chief officer to a captain "to procure men on such terms as he can," is void. *Rogers v. Lacy*. 2 B. & P. 57
- 2 A sailor, in addition to the wages contained in the ship's articles, sued for the average price of a negro slave for which he had agreed with the captain, though no mention of such perquisite was made in the articles: Held, that the contract for the average price of a negro slave was void: such additional perquisite being in fact wages, and therefore only to be recovered where included in the articles according to stat. 2 G. 2. c. 36. *White v. Wilson*. 2 B. & P. 116
- 3 If foreign seamen at a foreign port enter into articles with the master, who is also a foreigner, for a voyage on board a foreign ship, and thereby agree, among other things, not to institute any suit against the master in foreign countries, or cite him before any judge or magistrate, but that they

will abide by the maritime code of their own country, and the adjudication of their own Courts: Having made this agreement in their own country, they cannot maintain an action in *England* against the master for wages; though the ship and cargo be confiscated in an *English* port, and the voyage thereby ended. *Gienar v. Meyer*.

2 H. B. 603

- 4 A seaman belonging to a merchant ship, which is articulated for a certain voyage, is prevented from performing the whole voyage, by being disabled by an accident happening in the course of his duty, is entitled to wages for the whole voyage. *Chandler v. Grieves*. 2 H. B. 606, n.

- 5 If a sailor, hired for a voyage, take a promissory note from his employer for a certain sum, provided he proceed, continue, and do his duty on board for the voyage; and before the ship's arrival he die, no wages can be claimed, either on the contract, or on a quantum meruit. *Cutter v. Powell*.

6 T. R. 320

- 6 A seaman having contracted to go a voyage from *A.* to *B.* and back again, with a stipulation that he should not be entitled to his wages till the end of the voyage, cannot maintain a general *indebitatus assumpsit* to recover his wages *pro rata* as far as *B.*; though he were there wrongfully dismissed by the defendant, the captain; but his remedy is either for the breach of the special contract, or for such *tortious* act of the captain's, whereby he was prevented from earning his wages. *Hulle v. Heightman*. 2 E. R. 145

- 7 A foreign prince, under pretence of precaution against a supposed act of aggression of our government, made a hostile seizure of *British* ships in his ports, and imprisoned our seamen on shore; and after six months they were released, and resumed and concluded their voyage, and the owners received their freight: Held, that such seizure, however hostile in the manner, so far partook of the nature of an *embargo* in its result, and not of a capture, that it did not put an end to the contract of a mariner for wages, even during the time of such detention and imprisonment: But, even considering it as a temporary capture, yet, like the case of a capture and recapture, the mariner was still entitled to his wages;

for a mariner's title to wages depends on the ship's earning her freight on the voyage, and the performance of his stipulated duty; and here freight for the voyage was ultimately earned: and the mariner was guilty of no breach of duty; for his stipulation *and to be on shore under any pretence, without leave before the voyage was ended*, must be understood of his being on shore *by the party's own unauthorized act*. And even if such imprisonment on shore could be so considered, yet the master's having afterwards received him again on board without objection, amounting to a dispensation of the service in the interval, and entitled him to wages, according to his original contract. *Beale v. Thompson, (in error from C. P.)*

4 E. R. 546

N. B. *The Judges in C. P. were equally divided upon this case.*

Sec 3 B. & P. 405—434

S. P. in the case of foreign seamen, *Johnson v. Broderick.*

4 E. R. 566

- 8 *Assumpsit* lies to recover wages by the master of a vessel against his owners which accrued during the detention of a vessel under a hostile embargo in a foreign port, when the crew were made prisoners, but were finally released, together with the vessel, and afterwards completed the voyage; it appearing that freight was received. *Pratt v. Cuff.*

4 E. R. 43, n.

- 9 Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*;" and it is agreed that they shall not demand or be entitled to their wages or any part thereof, until the arrival of the ship at the port of discharge, &c. (meaning *London*): Held, that though the ship earned freight upon the delivery of an outward bound cargo at *Madeira*, and of another cargo taken in at *Madeira*, and delivery in the *West Indies*; yet, that being lost in her passage home in a storm, the seamen could not recover wages *pro rata* upon the outward voyage, by reason of the express terms of the stipulation respecting wages. *Appleby v. Dods.*

8 E. R. 300

- 10 A seaman who quits his ship, after her arrival in port, but before she is

moored, does not thereby subject himself to the forfeiture of the whole of his wages under the stat. 2 G. 2. c. 36. s. 3. *Frontine v. Frost.*

3 B. & P. 302

- 11 To entitle the master to deduct a month's wages for the benefit of *Greenwich Hospital* under the 2 G. 2. c. 36. ss. 6. and 9. it is incumbent on him to shew that the seaman quitted his ship without leave in writing: And such a deduction cannot be set off by the master in an action for wages by the seaman, unless the master has previously debited himself to *Greenwich Hospital* for the amount in a book kept according to the direction of the statute.

3 B. & P. 302

- 12 Where the captain of a ship has accounted upon oath to the collector of the port for a sum of money as the wages due to a deceased seaman, and paid the same to *Greenwich Hospital* under 37 G. 3. c. 73., the representatives of such seaman may still sue the captain for any wages due beyond the sum so paid. *Armstrong v. Smith.*

1 N. R. 299

- 13 If a sailor executes the articles prescribed by 37 G. 3. c. 73. and serve accordingly, and during the voyage part of the cargo be plundered, but by whom cannot be ascertained, he does not, in consequence of such plunderage, forfeit his wages. *Thompson v. Collins.*

1 N. R. 347

- 14 And it seems, that in such case he is not even liable to a proportionable deduction from his wages, in common with the other sailors, on account of such plunderage.

1 N. R. 347

- 15 If there be a clause in a ship's articles that the seamen may leave at the end of three months, if the ship is in port, or in perfect safety, of which the captain is to be the sole judge, and the ship be in port in safety after three months, the seamen may leave the ship, without the permission of the captain. *Neave v. Pratt.*

2 N. R. 408

- 16 *Semb.* That nothing but a power of attorney or will, complying with the provisions of 26 Geo. 3. c. 63. and 32 Geo. 3. c. 34. will warrant the payment to third persons of money due from the public to sailors and marines. *Macdonald v. Pasley.*

1 B. & P. 161

- 17 The statute 31 G. 2. c. 10. s. 30. (inflicting a penalty of 50*l.* on navy-agents

taking more than *6d. per £.* for receiving and paying over wages, &c. to any officer, seaman, &c. in the royal navy, and for all their trouble and attendance therein), is not confined to *inferior* officers and seamen: and therefore navy agents receiving of a lieutenant more than *6d. per £.* on the sum received and paid over by them, though not more than that rate on the whole account of debtor and

creditor, including sums drawn for by the lieutenant on the navy-office, and carried to his account there (which is authorized by 35 *G. 3. c. 94.*, making special provision for paying the wages, &c. of commissioned officers), are liable to the penalty: and the latter Act is not a repeal of the former in this particular. *Walsh v. Toulmin.* 6 E. R. 541

SIMONY.

1 In an action for use and occupation by an incumbent against a tenant of the glebe lands, who has paid him rent, the defendant cannot give evidence of a simoniacal presentation of the plaintiff, in order to avoid his title. *Cooke v. Loxley.* 5 T. R. 4

2 A chapel in the township of *P.* was endowed in 1423, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan: whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an Act passed for inclosing open lands in the township, in which it is stated, as a matter of doubt, whether the curate were entitled to the small tithes or to a *modus* in lieu of tithes, the decision of which is left untouched by the Act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and to the money payment of 40*l.* 8*s.* 2*d.* annually payable out of the lands and hereditaments in *P.* in right of the said curacy, together with surplice fees and all other profits, privileges, and appurtenances to the same belonging and of right payable: that the inhabitants considering that sum not sufficient for the proper support of the curate, had voluntarily agreed with him to pay a

further annual sum of 29*l.* 11*s.* 10*d.* with a *proviso* that "it shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been TIME IMMEMORIAL charged in right of the said church." The Court held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved upon the Crown by stat. 31 *Eliz. c. 6. s. 5.*, whose presentee had been licensed by the ordinary, a *mandamus* to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *Rex v. Oxford, Bishop.*

7 E. R. 600

3 The ordinary of a diocese cannot refuse to admit a clerk to a rectory to which he was presented, because he had given a general bond to resign upon the request of his patron. *Bishop of London v. Iffytche.* 1 E. R. 487 N. B. This judgment was reversed in *Dom. Proc.* *ib.* And see *Bagshaw v. Bossley.*

4 T. R. 78

4 *A.*, the incumbent of a living, and owner of the advowson, agrees with *B.* for the sale of the advowson, and for the immediate resignation to the bishop, who refuses to accept it. Another agreement is then entered into

between the same parties, for the sale of the advowson only, without any contract for the resignation, and at the same time, by a separate agreement, *A.* grants a lease of the tithes and profits to *B.* for 99 years, if *A.* should so long live; under which lease *B.* receives the profits till *A.*'s death. On *A.*'s death, the Crown presents for that term, only by reason of simony. The incumbent presented by the Crown dies, whereupon *B.* claims the right to present. It is objected by *A.*'s heir, that the second contract for the sale of the advowson, and the lease of the tithes of the same date, being for the purpose of carrying the former simoniacal contract

into effect, was also simoniacal and void: Held, that whether the second agreement were simoniacal or not, the illegality, if any, extended to the next presentation only; and that, therefore, the Crown having presented for one term, *B.* had a good title to the advowson, and had a right to present on the present vacancy. *Greenwood v. The Bishop of London.*

1 Marsh. 292

5 *Quare*, whether a bond of resignation with condition to reside, to resign for the patron's son to be presented, and to keep the premises on the living in repair, be not good in law? *Partridge v. Whiston.*

4 T. R. 359

SLANDER.

I. ACTION FOR—WHEN MAINTAINABLE.

II. PLEADINGS AND EVIDENCE.

I. ACTION FOR—WHEN MAINTAINABLE.

See LIBEL, *ante*, *passim*.

1 Words are not actionable in themselves, unless they contain an express imputation of some crime liable to punishment. *Holt v. Schofield.*

6 T. R. 694

2 Saying of the plaintiff that he had *for-sworn* himself, and that the defendant had three witnesses to prove it, is not actionable, unless the words be spoken with reference to some judicial proceeding in which the plaintiff had been sworn.

6 T. R. 691

3 *Secus*, saying that he was *perjured*.

6 T. R. 694

4 A defendant saying of the plaintiff that "he was under a charge of a prosecution for perjury; and that *G. W.* (an attorney of that name) had the *Attorney-General's* directions to prosecute the plaintiff *for perjury*," is actionable: For after verdict (by which the jury, who are to judge of the intent of the speaker, must be taken to have negatived that he meant to speak of a prosecution for a perjury which the plaintiff had *not* committed,) the words, not having been justified, must be taken to be *false*; and, being unqualified by any context, and unexplained by any

occasion to warrant them, the law infers *malice* from the *falsehood* of an accusation which, in the common acceptance of the words, imputes *perjury* to the plaintiff. *Roberts v. Camden.*

9 E. R. 93

5 If one call another a thief, together with many other names of general abuse not imputing crime, and no other evidence being given to explain the sense in which the word thief was used, the jury find for the plaintiff, the Court of C. P. will not set the verdict aside, for the action may be maintained for the word thief. *Perfold v. Westcott.*

2 N. R. 335

6 Slanderous words must be understood by the Court in the same sense in which the rest of mankind would ordinarily understand them: Therefore, where one said of another that *his character was infamous, &c.*; that *delicacy forbade him from bringing a direct charge, but it was a male child who complained to him*: such words were understood to mean a charge of unnatural practices, and sufficiently certain in themselves to be actionable, without the aid of an *inuendo* to that purpose, which it was admitted could not enlarge the sense: And held, that such words could not be justified by any plea naming for the first time the person from whom the defendant heard the complaint. *Woolnoth v. Meadows.*

5 E. R. 463

7 Simply saying to another, "*you are a swindler*," held by the Court of C. P. not to be actionable. *Savile v. Jardine*. 2 H. B. 531

8 These words spoken of a woman, "I have kept her common these seven years; she *hath given* me the bad disorder, and three or four other gentlemen," are not actionable, because they may refer to a time past; and no prohibition will be granted to a Spiritual Court, in which a sentence has been pronounced on a libel for this charge. *Carslake v. Mappledoram*. 2 T. R. 473

9 Charging a person with *having had* a contagious disorder is not actionable, because it is no reason why the company of a person so charged should be avoided at that time, it referring to a time past. 2 T. R. 473

10 An action for saying of a merchant, "he has brought a false bill of lading for half the cargo (meaning the lading of a particular ship) already," whereby he was injured as such merchant, and lost the confidence of several persons (without naming them), was held not maintainable, and judgment accordingly arrested, because the words did not of themselves impute any crime. *Feise v. Linder*. 3 B. & P. 372

11 A servant cannot maintain an action against his former master for words spoken, or a letter written by him in giving a character of the servant, unless the latter prove the malice as well as falsehood of the charge, even though the master make specific charges of fraud. *Weatherstone v. Hawkins*. 1 T. R. 110

12 Although a master be not in general bound to prove the truth of a character given by him to a person applying for the character of his servant, yet, if he officiously state any trivial misconduct of the servant to a former master, in order to prevent him giving a second character, and then himself upon application for a character, give the servant a bad character, the truth of which he is not able to prove, the jury may, from these circumstances, infer malice against the master, in an action against him by the servant. *Rogers v. Clifton*. 3 B. & P. 587

13 If, in consequence of words spoken, the plaintiff is deprived of substantial benefit arising from the hospitality of

friends, this is a sufficient temporal damage whereon to maintain an action. *Moore v. Meagher*, (*in error*.) 1 Taunt. 39

14 If defamatory words be spoken of two partners respecting their trade, they may maintain a joint action. *Cook v. Batchellor*. 3 B. & P. 150

15 A lease, in which was a proviso for re-entry if the rent were in arrear 28 days, being exposed to sale by the assignee, and rent being then in arrear, the lessor announced at the sale that the vendors could not make a title, in consequence of which, bidders who came to buy went away: He afterwards offered 100*l.* for the lease, but subsequently recovered the premises in ejectment: Held, that no action for slander of title lay against him. *Smith v. Spooner*. 3 Taunt. 246

II. PLEADINGS AND EVIDENCE.

1 In a declaration for slander, the plaintiff stated that he was a jobber or dealer in the funds, and as such jobber or dealer had been accustomed lawfully to contract, and had from time to time lawfully contracted, &c. that the defendant said of him as such jobber or dealer, "he is a lame duck," meaning that he had not fulfilled his contracts in respect of the said stocks or funds, in consequence of which divers persons refused to fulfil their contracts with him (specifying the contracts,) and he was prevented from fulfilling his contracts with other persons: Held, that it did not sufficiently appear either that the words were spoken of lawful contracts, or that the plaintiff was a lawful jobber or dealer in the funds; and that the declaration was therefore bad. *Morris v. Langdale*. 2 B. & P. 284

2 *Quare*, whether, under such circumstances it can be stated as special damage, that divers persons refused to fulfil their contracts with the plaintiff, since he might recover a compensation by action, if the contracts were lawful. 2 B. & P. 284

3 In slander, the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, but did not proceed to aver any *colloquium* respecting that answer, with reference to which the

words were spoken); and then alleged that the defendant said of him, that he was *forsworn*, *inuendo*, that the plaintiff had *perjured* himself in what he had sworn, *in his aforesaid answer to the bill so filed against him*: Held, that this *inuendo* could not, without the aid of such a *colloquium*, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes v. Hawkes*. 8 E. R. 427

4 If defamatory words be spoken of two partners respecting their trade, they may maintain a joint action for the slander, averring special damage. *Cook v. Batchellor*. 3 B. & P. 150

5 "Forsworn" cannot be explained by an *inuendo* to mean false swearing in a court of justice. *Holt v. Scholfield*. 6 T. R. 694

6 Where new matter introduced by an *innuendo*, without any antecedent *colloquium* to which it can refer to support it, is not necessary to sustain the action, it may be rejected as surplusage: And therefore, an *innuendo* that the Attorney-General spoken of meant the Attorney-General for the County Palatine of Chester, was so rejected. *Roberts v. Camden*. 9 E. R. 93

7 In an action for consequential damage from slander, imputing incontinence to the plaintiff, it is enough to state, that he was occasionally employed to preach to dissenters at a certain licensed chapel, from which he derived considerable profit, and that, by reason of the scandal, "the persons frequenting the said chapel refused to permit him to preach, and had discontinued the emoluments which they would otherwise have given him;" without saying who those persons were, or by what authority they excluded him, or that he was a preacher qualified under stat. 10 Ann. c. 2. *Hartley v. Herring*. 8 T. R. 130

8 Where a declaration stated that the plaintiff was lawfully possessed of mines and ore gotten and to be gotten from them, and was in treaty for the sale of the ore, and that the defendant published a malicious, injurious, and unlawful advertisement, cautioning persons against purchasing the ore, &c., *per quod* he was prevented from selling; to which the defendant pleaded in justification, that the adventurers of, or

persons having an interest or shares in the mines, thought it their duty to caution persons against purchasing the ore, &c. (pursuing the words of the advertisement); this plea was held ill on special demurrer; 1st, because it did not disclose the names of the adventurers, or who they were; and 2dly, because it did not shew that the defendant, in publishing the advertisement, acted under the direction of the adventurers. The allegation by plaintiff that he was lawfully possessed of the mines and ore, seems a sufficient allegation of title, unless specially demurred to. The allegation that the defendant published a malicious, injurious, and unlawful advertisement, seems good without the word false. *Rowe v. Roach, & Hoar*. 1 M. & S. 304

9 Proof of words spoken to a person will not support an indictment charging that the defendant spoke them of such a person. *Rex v. Berry*. 4 T. R. 217

10 Defamatory words, which are actionable in themselves, are not the less so because they are alleged to have been spoken of one as a candidate to serve in parliament. In such an action it is not necessary to set out the writ in order to shew that the plaintiff was a candidate. *Harwood v. Astley, Bart. (in error)*. 1 N. R. 47

11 Action for these words spoken by defendant of the plaintiff in his profession of a physician: "Dr. S. has upset all; we have done, and die he (the patient) must." It was proved that the plaintiff had practised several years as a physician, and having been called in during the absence of a physician, who, with the defendant, attended the patient, the defendant as apothecary made up the medicines prescribed by the plaintiff for the patient in question. *Quare*, Whether, on this declaration, it was necessary for the plaintiff to produce a *diploma*, or other direct evidence that he had taken a degree in physic, in order to maintain the action? *Smith v. Taylor*. 1 N. R. 196

12 A count for slanderous words spoken affirmatively, is not supported by proof that they were spoken by way of interrogation: The words must be proved as they are laid. *Barnes v. Holloway*. 8 T. R. 150

13 Where the plaintiff declared that he had been a woolstapler at Cirencester,

and was a brewer at *Oxford*, and that defendant spoke of him as such trader these words: "Mr. H. (the plaintiff) and B. have both been bankrupts, Mr. H. at *Cirencester*," and gave no evidence of his having been a woolstapler, but only that he was a brewer at *Oxford*, and proved the words spoken to have been these, "He was a bankrupt at *Cirencester*, &c.:" Held, that this proof sustained the allegation that the words were spoken of him in his trade of a brewer, for a trader at *Oxford* may be a bankrupt at *Cirencester*. *Hall v. Smith.* 1 M. & S. 287

14 It is no justification to an action of slander, to plead that A. B. told the slander to the defendant. *Davis v. Lewis.* 7 T. R. 17

15 But if the person repeating the slander at the same time mention the name of the person from whom he heard it, that may be pleaded in justification to an action brought against the former. 7 T. R. 17

16 In a justification for slander, that the defendant named the original author of it at the time, it is not sufficient to allege that the original slanderer used such and such words, or to that effect; although in the libel declared on, the defendant stated that another had spoken the same slanderous words of the plaintiff, or words to that effect; but the defendant must give the very words used, though it be only necessary to prove some material part of them. *Maitland v. Goldney.*

2 E. R. 426

17 *Qu.*—Whether a defendant can, by naming the original author, justify the publishing in writing slanderous words spoken by such other; especially after knowing that they were unfounded?

2 E. R. 426

18 Where special damage is necessary to be shewn in order to maintain an action for slander, it is not sufficient to prove a mere wrongful act of a third person, induced by the slander, such as that he dismissed the plain-

tiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander. *Vicars v. Wilcocks.* 8 E. R. 1

19 In an action of slander, imputing a specific charge of unnatural practices to plaintiff, where the declaration contains the usual allegation of good fame, &c.; the defendant may, upon cross examination, ask the plaintiff's witness, whether he had not heard reports in the neighbourhood that the plaintiff had been guilty of similar practices, in order to diminish the damages. — *v. Moor.* 1 M. & S. 284

20 In an action for slander of title, the defendant may give evidence on the general issue, that he spoke the words claiming title in himself. *Smith v. Spooner.* 3 Taunt. 246

21 In an action for slander of title, it is necessary for the plaintiff to prove malice in the defendant. 3 Taunt. 246

22 In an action for slander of title conveyed in a letter, to a person about to purchase the estate of plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and that the title would therefore be disputed, *per quod* the person refused to complete the purchase: Held, that the defendant, who had married the sister of Y., who was heir at law to her brother, in the event of his dying without issue, was not to be considered as a mere stranger; and that the question for the jury was not whether they were satisfied as men of good sense and good understanding that Y. was insane, or that the defendant entertained a persuasion that he was insane upon such grounds as would have persuaded a man of sound sense and knowledge of business, but whether he acted *bond fide* in the communication which he made, believing it to be true, as he judged according to his own understanding, and under such impressions as his situation and character were likely to beget. *Pitt v. Donovan.* 1 M. & S. 639

SMUGGLING.

1 An inhabitant of *Guernsey* cannot recover in the Courts of this country the price of goods sold by him there, if he knew it to be the buyer's intention to smuggle the goods into *England*,

and gave him assistance for that purpose, as in the mode of packing the goods. *Clugas v. Penaluna.* 4 T. R. 466 And see *Biggs v. Lawrence.* 3 T. R. 454, *ante*, page 498.

- 2 The vendor of goods abroad having packed them up by order of the buyer in a particular manner for smuggling them into this country, and knowing at the time that they were to be smuggled, cannot recover the value of them against the buyer, although he was not concerned in the risk of importing the goods into this country. *Waymell v. Reed*. 5 T. R. 599
- 3 If goods, prohibited from being sold in this country by 11 & 12 W. 3. c. 10. are taken out of a warehouse and put on board a vessel as if for exportation, but in fact, with a view to be re-landed; they are liable to be seized, though before any actual attempt to re-land them has been made. *Wilson v. Saunders*. 1 B. & P. 267
- 4 By stat. 24 G. 3. c. 47. and the excise laws, the forfeiture of a vessel attaches the moment an act of smuggling is done; so as to avoid mesne incumbrances or alienation between that time, and the time of condemnation. *Lockyer v. Offley*. 1 T. R. 260
- 5 But the Crown is not entitled to the intermediate earnings of the vessel. 1 T. R. 260
- 6 Neither is the actual property of the vessel altered till after the seizure, though it may be before condemnation. 1 T. R. 260
- 7 Custom-house officers may seize for the forfeiture within three years after the act committed; and the Attorney-General may file an information at any time whilst the ship is in being. *Lockyer v. Offley*. 1 T. R. 261
- 8 A vessel hired by the Admiralty, and employed to cruise against smugglers, the master and crew of which were appointed by the owner, but which was placed under the superior command of a captain appointed by the Board, is forfeitable for an act of smuggling committed on board by such Admiralty captain as well as by the owner's master and crew; and the owner has his remedy over by action on the case against such Admiralty captain to recover damages for the loss of his ship by the condemnation, though that condemnation proceeded upon acts of smuggling stated to be by persons unknown, and though it appears in fact that the master and mate appointed by the owner were also concerned in acts of smuggling on board. *Blewitt v. Hill*. 13 E. R. 13
- 9 An action of debt for 100*l.* lies upon the stat. 19 G. 2. c. 34. s. 6. against the inhabitants of a lath in Kent by the executor of a revenue officer, who being in a boat between high and low water mark in pursuit of a smuggling boat in which were offenders against the Act, received a mortal wound from a shot fired by a person on the shore within the lath, though the officer afterwards died on the high sea, beyond the low water mark, and consequently out of the lath; and the Act gives the remedy against the inhabitants of the lath, &c. where the offence shall be committed, *i. e.* where the officer, endeavouring to apprehend the offender, shall be killed. *Grosvenor v. St. Augustine's Lath (Kent.)* 12 E. R. 244
- 10 A record of condemnation of goods in the Exchequer, for being smuggled, is a good defence to an action for goods sold and delivered for the same goods, although it did not appear that the plaintiff had any notice of the proceedings in the Exchequer. *Thomas v. Whithers*. 5 T. R. 117, n.
- 11 So it is a good defence if the goods be afterwards seized as having been smuggled, though no condemnation be proved. *Hennel v. Perry*. 5 T. R. 117, n.

SOUTH SEA COMPANY.

- 1 In the case of the "*South Sea Company*," the stat. 7 G. 1. c. 28. by which all their property was taken out of their hands, and vested in trustees for the satisfaction of their creditors, was held no bar to an action of covenant. *Hornby v. Houldich*. 1 T. R. 92, 93, n.
- 2 All trading within the limits of the *South Sea Company's* charter is illegal, unless it is licensed by them. *Lucena v. Crawford*. 1 Taunt. 227
- 3 The statute 42 Geo. 3. c. 77. has repealed the necessity of a licence from the *South Sea Company*, or *East India Company*, for ships passing through the Straights of *Magellan*, or round *Cape Horn*, and trading in the *Pacific Ocean* from *Cape Horn* to 180 degrees

West longitude from *London*, whether they combine fishing with their trading or not. *Jacob v. Janson*. 3 Taunt. 534
It is no infraction of the monopoly of the *South Sea Company* to send home

from the *South Seas*, in a ship of war, dollars the proceeds of an adventure to *South America*, sent out in another ship named and licensed by the Company. *Hodgson v. Fullarton*. 4 Taunt. 787

SPECIAL OCCUPANCY.

See *Sheffield v. Mulgrave*. 5 T. R. 571, ante, page 260.

- 1 If an estate *pur autre vie*, be limited in trust for a man, his heirs, executors, administrators and assigns, and be not devised, it descends to the heir as a special occupant, chargeable according to the Statute of Frauds (29 Car. 2. c. 3.); and therefore the administratrix of the person last seised cannot recover

the title deeds thereof from the heir. *Atkinson v. Baker*. 4 T. R. 229

- 2 The stat. 29 Car. 2. c. 3. s. 12. nor the stat. 14 G. 2. c. 20. s. 9. appropriating estates *pur autre vie*, where there is no special occupant, do not extend to copyholds. *Zouch d. Forse v. Forse*. 7 E. R. 186
- 3 There can be no general occupancy of a copyhold, because the freehold is always in the lord. 7 E. R. 186

STAMPS.

I. ON ADMINISTRATION—LETTERS OF.

- II. AGREEMENTS.
- III. APPRAISEMENTS.
- IV. APPRENTICESHIP—INDENTURES OF.
- V. AWARDS.
- VI. BANKERS' DRAFTS.
- VII. BILLS OF EXCHANGE AND PROMISSORY NOTES.
- VIII. BILLS OF LADING.
- IX. BILLS OF SALE.
- X. BONDS.
- XI. DEEDS.
- XII. INSURANCE—POLICIES OF.
- XIII. LEASES.
- XIV. LEGAL PROCEEDINGS.
- XV. NOTES GIVEN TO PRISONERS.
- XVI. WARRANTS OF ATTORNEY.

I. ADMINISTRATION—LETTERS OF.

- 1 If an administrator shews that he sues for a greater value than is covered by the *ad valorem* stamp of his letters of administration, he shews his administration to be void, and cannot recover, although he sues for a doubtful claim. *Hunt v. Stevens*. 3 Taunt. 113

- 2 And he must prove his administration, for that constitutes his title to recover. And it will not suffice to sue out new letters of administration on a larger stamp after he has obtained judgment. 3 Taunt. 113

- 3 *Assumpsit* by an administrator upon promises laid to the intestate, with a *profect* of the letters of administration, and *non assumpsit* pleaded, the defendant cannot, upon the production of the letters of administration, object that they are not properly stamped; for the plea admits that plaintiff is administrator. *Thynne v. Protheroe*. 2 M. & S. 553

II. AGREEMENTS.

- 1 An unstamped agreement to sell a share of a ticket in the lottery, before the tickets are deposited with the commissioners, is within the penalty inflicted by 22 G. 3. c. 47. s. 21. *Rex v. Hawksworth*. 1 T. R. 450
- 2 A broker, when he bought goods for his principal, agreed for an half per cent. to indemnify him from any loss on the re-sale: it was held that this agreement, if reduced to writing, need not be stamped under stat. 23 G. 3. c. 58. it being a *contract relating to the sale of goods*, which by s. 4. of that statute is exempted. *Curry v. Edensor*. 3 T. R. 524

- 3 A letter written by a son who managed his mother's trade for her to a creditor of hers, containing a promise to pay her debt, need not be stamped, by statute 23 G. 3. c. 58., as falling within the exception in *stat. 32 G. 3. c. 51.*, by which letters between *persons carrying on trade* are exempted from the duty. *Mackenzie v. Banks.* 5 T. R. 176
- 4 A guarantie in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp Acts, "a contract for or relating to the sale of goods," and need not be stamped. *Warrington v. Furbor.* 8 E. R. 249
- 5 An executory agreement for the making and putting up of certain machines in the party's house is required to be stamped like any other agreement, not being within the exception. *Buxton v. Bedall.* 3 E. R. 303
- 6 So a written agreement for the sale of all the hops which shall be grown upon a certain number of acres of land, to be delivered in pockets at a certain place, must be stamped, not being within the exception. *Waddington v. Bristow.* 2 B. & P. 452
- 7 A mere *cognovit* need not be stamped. *Ames v. Hill.* 2 B. & P. 150
- 8 But if it contain any terms of agreement it must. 2 B. & P. 150
S. P. Reardon v. Swaby. 4 E. R. 188
- 9 An agreement to confess judgment for 30*l.* to secure 5*l.* and costs, is not an agreement for more than 20*l.* within the 23 G. 3. c. 58. s. 4. and therefore need not be stamped. 2 B. & P. 150
- 10 An agreement for the assignment of an apprentice from one master to another must be stamped by *stat. 23 Geo. 3. c. 58. Rex v. Inhabitants of St. Paul's, Bedford.* 6 T. R. 452
- 11 Where a man agrees to sell a quantity of oil, he not having at the time the oil ready made, but only the raw materials for making it: Held, that this is a contract for "the sale of goods, wares, and merchandise," within the exemption of the 48 G. 3. c. 149. *Wilks v. Atkinson.* 1 Marsh. 412
- 12 The defendant agreed in writing to take one-half share of certain goods bought by the plaintiff on their joint account, half in the profit or loss, and to furnish the plaintiff with half the amount in time for the payment thereof, the goods being to be paid for by bills: Held, that this was an agreement relating to the sale of goods within the exemption in the Stamp Act, 44 G. 3. c. 98, schedule A, and did not require a stamp. *Venning v. Leckie.* 13 E. R. 7
- 13 If an interest in land be of the value of 20*l.* an agreement for it requires an agreement stamp. *Emmerson v. Heelis.* 2 Taunt. 38
- 14 If on a sale by auction, the same person is declared the highest bidder for several lots, a distinct contract arises for each lot; and although all the lots together amount to a greater value than 20*l.* no stamp is required if the lots were separately of less value than 20*l.* *Emmerson v. Heelis.* 2 Taunt. 38
- 15 A written paper, delivered by an auctioneer to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not signed by the auctioneer or any of the parties, was held not to be such a minute of the agreement, as was required to be stamped, pursuant to *stat. 48 G. 3. c. 149.* nor such a writing as would exclude parol evidence. *Ramsbottom v. Tunsbridge.* 2 M. & S. 431
- 16 But a written paper, signed by an auctioneer, and delivered to the bidder, to whom lands were let by auction, containing the description of the lands, the term for which they are let to the bidder, and the rent payable, must be stamped pursuant to *stat. 48 G. 3. c. 149.* *Ramsbottom v. Mortley.* 2 M. & S. 445
- 17 The same paper, containing two different contracts for the purchase of different lots by different persons at an auction, one stamp affixed on that part of the paper which contained the contract of sale with the defendant, and to which the stamp-officer's receipt for one penalty referred, is sufficient to legalize the evidence of such contract. *Powell v. Edmunds.* 12 E. R. 6
- 18 Articles of agreement under seal cannot be given in evidence, unless stamped with a deed stamp; although the agreement stamped is of the same value but differently formed. *Robinson v. Drybrough.* 6 T. R. 317
(But see *stat. 37 G. 3. c. 136.*)

19 An assignment of the prize-money of several seamen on board a privateer, being payable out of one fund, only requires one stamp. *Baker v. Jardine*. 13 E. R. 235, n.

20 An agreement by several for a subscription to one common fund, such as for making a wet dock at *Bristol*, though several as to each subscriber, only requires one stamp. *Davis v. Williams*. 13 E. R. 232

21 Where an instrument contained a general written contract of demise to several different tenants for different estates at different rents, set against each signature, and one stamp only appeared on the paper, the Court held that it was matter of circumstantial evidence to which contract such stamp should be applied. *Doe d. Copley v. Day*. 13 E. R. 241

III. APPRAISEMENTS.

1 Nothing being referred to appraisers except the mere value of goods and of the repairs of a farm; an appraisement stamp upon the written valuation is sufficient under the statute 46 G. 3. c. 43. and an award stamp is not necessary. *Leeds v. Burrows*.

12 E. R. 1

IV. APPRENTICESHIP, INDENTURES OF.

See *poor, Settlement by Apprenticeship, ante*, 535.

1 Service under indentures of apprenticeship, not stamped, gives no settlement. *Rex v. Edgworth*.

3 T. R. 353

2 Money given by the parish officers, in the case of a voluntary binding, as the consideration of taking an apprentice, is not liable to the stamp duty imposed by stat. 8 Anne, c. 9. s. 35. for it comes within the exception to it, as being at the public charge of the parish. *Rex v. The Inhabitants of St. Petrox, Dartmouth*. 4 T. R. 196

3 Neither is any duty payable for any consideration-money under s. 35. of that Act, (or thing actually given or contracted to be given under s. 45.) unless it be given to, or to the use of the master or mistress of the apprentice. 4 T. R. 196

And see *Rex v. The Inhabitants of Leighton*. 4 T. R. 732

4 A master stipulating for 4d. out of every 1s. of the earnings of his ap-

prentice, is no benefit to him within the statute of 8 Anne, for which an additional duty is to be paid, being by law entitled to the whole. *Rex v. Wantage (Inhab.)* 1 E. R. 601

5 Where a sum agreed to be given with an apprentice was five guineas, which was inserted in the indenture, and the duty paid accordingly by stat. 8 Anne, c. 9.: Held well, though in fact only four guineas were paid for the full sum received, given, paid, agreed, or contracted for, as required by the Act, was inserted, and the duty paid for it, and the stamp used was of the same description and the duty appropriated to the same fund, as if four guineas only had been inserted and paid for supposing, that would have sufficed. *Rex v. Keynsham (Inhab.)* 5 E. R. 309

6 The sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him and proved to be lost, and where the parish in which he was settled under such indenture, had relieved him the last 12 years, was properly stamped in proportion to the apprentice fee of 12l. received by the master, although the deputy-registrar and comptroller of the stamp duties proved that it did not appear in that office, that any such indenture had been stamped or enrolled during that period, and the judgment of the justices was confirmed. *Rex v. Long Buckby (Inhab.)* 7 E. R. 45

7 An agreement for the assignment of an apprentice from one master to another must also be stamped by stat. 23 G. 3. c. 58. *Rex v. St. Paul's, Bedford (Inhab.)* 6 T. R. 432

8 In an indenture of apprenticeship, a covenant by the apprentice to allow his master 2s. per week, and to have wages, and provide for himself during the term, does not require the additional stamp required by 44 G. 3. c. 98. upon an indenture, where a sum of money is contracted for with the apprentice. *Rex v. Bradford (Inhab.)* 1 M. & S. 151

9 The stamp-duty on indentures of apprenticeship, where the premium exceeds 50l., and is less than 100l. is 50s. by 48 G. 3. c. 149. *Gye v. Felton*. 4 Taunt. 876

V. AWARDS.

See *Leeds v. Burrows*, III. last page.

- 1 An award in writing, and under seal, need not have a deed stamp, unless delivered as a deed; but being only delivered as an award, it is sufficient if it have the award stamp of 10s. *Brown v. Fauser.* 4 E. R. 584
- 2 If an award be made on an improper stamp, and no application be made to enforce it, the Court will not set it aside. *Preston v. Eastwood.*

7 T. R. 95

The appointment of an umpire made in writing by two arbitrators requires no stamp. *Routledge v. Thornton.*

4 Taunt. 704

VI. BANKERS' DRAFTS.

See *Rex v. Pooley*. 3 B. & P. 311, ante, page 561.

- 1 An unstamped draft drawn on *A. B.* bricklayer, is not within the exception of 23 G. 3. c. 49. s. 4. in favour of drafts drawn on persons acting as bankers within 10 miles of the place where the draft is drawn: and if at the bottom of such draft there be an acknowledgment of the drawer, that a third person paid it for him, that acknowledgment cannot be received in evidence; because, if received, it would give effect to the draft. *Castleman v. Ray.* 2 B. & P. 383
- 2 A draft on a banker, post-dated and delivered before the day of the date, though not intended to be used till that day, requires to be stamped by the stat. 31 G. 3. c. 25. *Allen v. Keeves.* 1 E. R. 435
Whitwell v. Bennet. 3 B. & P. 559

VII. BILLS AND NOTES.

- 1 A bill of exchange was drawn on a proper stamp dated 2nd of September, payable 21 days after date; it was afterwards altered and made payable 51 days after date, and on the 30th of September was again altered to 21 days after date, and the date brought forward to the 14th of September: Held, that the bill should have had a new stamp, though the alterations were made with the consent of the acceptor before the bill was negotiated. *Bowman v. Nicholl.* 5 T. R. 537
- 2 A bill drawn on the 1st of August, at two months, by *A.* on *B.*, payable to the order of the drawer, and accepted

and re-delivered by *B.* as a security for a debt, and kept by *A.* for 20 days; cannot be altered in its legal effect by bringing forward the date to the 21st, without a new stamp; though by the consent of the acceptor, and before indorsement and delivery to a third person; the alteration not being made to correct a mistake in the original form of the bill, which was drawn conformably to the original intention of the parties, and available in that form. *Bathe v. Taylor.*

15 E. R. 412

- 3 *A.* and *B.* having exchanged their acceptances of bills drawn by each on the other at so many days' date: Held, that the delivery of the respective bills for acceptance, and the re-delivery of the same by the acceptors to the respective drawers, was a negotiation of the bills; and that such bills could not, after they had been so exchanged for valuable consideration (as the exchange of acceptances is) for 20 days, be post-dated without a new stamp, as upon new bills; although during all that time, each had remained in the hands of the original drawer. *Cardwell v. Martin.* 9 E. R. 190
- 4 If a bill given in discharge of a debt is admissible by being on an improper stamp, the plaintiff may prove his original debt. *Brown v. Watts.*

1 Taunt. 353

- 5 Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to *B.* in England, for his use, who filled up the blanks and negotiated it: Held, that this was to be considered a bill of exchange by relation, from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary. *Snaith v. Mingay.*

1 M. & S. 87

- 6 *A.* in Jamaica draws a bill on *B.* in London on a Jamaica stamp, leaving the payee's name in blank; *C.* gets possession of the bill, and inserts his own name as payee, without any other authority than a letter from *B.* promising to accept it; but having the address torn off, and containing nothing to shew to whom it was addressed: Held, that this was not evidence to shew that *C.* was the payee

of the bill; and that though the bill might require an *English* stamp, the letter, had it been sufficient, being a separate contract, would require a stamp. *Crutchley v. Mann.*

1 Marsh. 29

- 7 A bill of exchange written on a wrong stamp, is no payment, although the parties would have paid it if presented in due time. *Wilson v. Vysar.*

4 Taunt. 288

- 8 A promissory note, written upon a stamp of greater value than the proper stamp required, cannot be received in evidence, though the stamp were applicable to the same kind of instrument. *Farr v. Price.* 1 E. R. 55

- 9 So a promissory note, drawn before the 37 G. 3. c. 136. upon a receipt stamp of equal value with that required for such promissory note, is not valid. *Chamberlain v. Porter.*

1 N. R. 30

- 10 The proper stamp for a promissory note of 45*l.* was by the former Stamp Acts, 1*s.* 6*d.* composed of three different sums, applicable to different funds under three Acts of Parliament. But such a note on a 2*s.* stamp composed of three different sums applicable to the same funds, though in larger proportions to each than was required, was holden valid. *Taylor v. Hague.* 2 E. R. 414

- 11 A promissory note for 100*l.* payable to the plaintiff, or order, and originally expressed to be *for value received*, generally, being altered the next day upon the suggestion of one of the parties, by the addition of the words *for the good-will of the lease and trade of Mr. K. deceased*, requires a new stamp; such words being material, and not having been originally intended to be inserted, and omitted by mistake. *Knill v. Williams.*

10 E. R. 431

VIII. BILLS OF LADING.

- 1 Goods carried from a port in *Scotland* to a port in *England*, are not to be considered as exported, so as to make it necessary to have the bill of lading stamped. *Scotland v. Wilson.*

1 Marsh. 204

IX. BILLS OF SALE.

- 1 The *stat.* 26 G. 3. c. 60. s. 17. avoid-

ing a bill of sale of a registered ship, which does not truly and accurately recite the certificate of registry where parties by mistake mis-recite in a bill of sale the certificate of registry, by stating *Guernsey* as the port where the certificate was granted, instead of *Weymouth*, which mistake was rectified when discovered, by consent of all parties, and the deed delivered *de novo*: Held, that no new stamp was necessary upon such re-execution, the deed taking no effect from its first delivery, and the defect arising not from intention but from mistake, and the alteration merely making the contract what it was originally intended to have been. *Cole v. Parkin.*

12 E. R. 471

X. BONDS.

- 1 If a number of persons severally bind themselves in a penalty by one bond, conditioned for the performance by each and every of them, of the same matter, such bond requires only one stamp. *Bowen v. Ashley.*

1 N. R. 274

- 2 A bond conditioned for the payment, by quarterly payments, of an annual rent, is within the 48 G. 3. c. 149. *sched. part I.* which imposes a duty on bonds given as a security for the payment of any definite and certain sum of money, and must be stamped accordingly. *Attree v. Ancomb.*

2 M. & S. 88

XI. DEEDS.

- 1 A schedule of goods referred to in a deed, to which it was annexed, must have the proper deed stamp by *stat.* 37 G. 3. c. 90. s. 7. according to the number of words and sheets, and not merely the single schedule stamp of 2*s.* 6*d.* imposed by the first section of the Act. *Lake v. Ashwell.*

3 E. R. 326

- 2 A deed which is produced, stamped with the stamp required by 48 G. 3. c. 149., is admissible in evidence, although it has not affixed the deed stamp, of less value, required by the statutes in force at the time when such deed was executed. *Doe d. Dyke v. Whittingham.*

4 Taunt. 20

- 3 An indorsement on an annuity deed, containing a clause of redemption, if made subsequent to the execution of

it, must be stamped, otherwise it cannot be received in evidence. *Schumann v. Weatherhead.* 1 E. R. 537

- 4 An annuity deed and memorial require but one stamp. *Cook v. Jones.* 15 E. R. 237

XII. INSURANCE—POLICIES OF.

- 1 Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of *October*, 1799, and the 1st of *June*, 1800; a memorandum written on the policy on the 11th of *June*, extending the time of sailing to the 1st of *August*, 1800, does not require a new stamp; being within the 13th section of the *stat. 35 G. 3. c. 63.* which provides that the Act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c. *Kensington v. Inglis (in Error.)* 8 E. R. 273
- 2 A policy effected on "ship and outfit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent after the ship sails, and the risk attaches to an insurance on "ship and goods," without a new stamp; *outfit*, the subject-matter of insurance, being essentially different in such a voyage from *goods*; and therefore not within the exception of the *stat. 35 G. 3. c. 63. s. 13.* which allows alterations in the *terms or conditions* of a policy, without having a new stamp, so that *the thing insured remains* the property of the same persons, &c. *Hill v. Patten.* 8 E. R. 373

And see *French v. Patten.*

9 E. R. 351, *ante*, page 415

- 3 By the statutes 35 G. 3. c. 63. s. 14. and 48 G. 3. c. 149. if several distinct interests be insured in the same policy, though as for one entire sum, on goods "to be thereafter declared and valued;" and it appear in fact that the several interests included fractional parts of 100*l.* which interests were afterwards declared and indorsed on the policy, such policy cannot be given in evidence, nor is available in law to any extent, unless stamped with a stamp of sufficient value to cover all such fractional parts; though it were sufficient to cover the entire sum insured. *Rupp v. Allnutt.* 15 E. R. 601

- 4 A mistake made by an agent in declaring the interest in the margin of the policy to be on a ship by a wrong name, may be rectified by inserting the true name, without a fresh stamp. *Robinson v. Touray.* 1 M. & S. 218

- 5 A broker instructed to effect a policy on goods, effected it on ship, the mistake was afterwards rectified by the underwriter subscribing a memorandum in the margin: Held, that no new stamp was necessary. *Sawtell v. Loudon.* 5 Taunt. 359

S. C. 1 Marsh. 99

- 6 A policy was effected at four guineas *per cent.* on hemp, marked *R.* and valued, with certain returns of premium, upon arrival at certain ports, and warranted to sail before the 20th of *August*, which was a summer risk and premium: By a memorandum indorsed, the underwriter for four guineas additional and the return of 5*s.* less for arrival, absolved the assured from the warranty of sailing before 20th *August*, so making it a winter risk, and withdrew the mark of the hemp: Held, that these were not such alterations of the subject-matter insured, and of the terms of the policy, but that they might be made by *stat. 35 G. 3. c. 63. s. 13.* without any new stamp. *Hubbard v. Jackson.* 4 Taunt. 169

- 7 Upon an indictment on 43 G. 3. c. 58. s. 1. for feloniously setting fire to a house, with intent to defraud the insurers, an unstamped memorandum indorsed on a stamped policy effected by deed, is not admissible in evidence against the prisoner. *Rex v. Gilson.* 1 Taunt. 95

XIII. LEASES.

See LEASE I. *ante*, 453.

- 1 The assignment of a lease in writing without seal, did not require a stamp before the 44 G. 3. c. 98. If a parol warranty and agreement to assign be reduced into writing, but not stamped, and the assignment be afterwards legally executed, the warranty cannot be proved by parol. *Hodges v. Drakeford.* 1 N. R. 270
- 2 If a lease in writing contain a contract for the purchase of goods, it cannot be given in evidence to prove

the sale of the goods, unless it has a lease stamp. *Corder v. Drakeford*.

3 Taunt. 382

3 An agreement stamp is not sufficient.

3 Taunt. 382

XIV. LEGAL PROCEEDINGS.

1 An instrument issuing, (as a commission of bankrupt), under the great seal of the empire, is not such a "process or mandate" issuing under the seal of the Court of Chancery as is subject to the stamp imposed by 44 G. 3. c. 98. *schd. I.* upon instruments of the latter denomination. *Rex v. Bullock*.

1 Taunt. 71

XV. NOTES GIVEN TO PRISONERS.

1 The Court on a first application gave an opinion that the notes for the weekly payments of 3s. 6d. under the Lords' Act must be stamped. *Pitman v. Haynes*.

7 T. R. 530

2 But afterwards, on mature deliberation, they held that such a note need not be stamped. *Tekell v. Casey*.

7 T. R. 670

S. P. Bowring v. Edgar.

1 B. & P. 270.

XVI. WARRANTS OF ATTORNEY.

1 A warrant of attorney to confess judgment being liable as a deed to a stamp duty of 10s. by various statutes prior to the 37 G. 3. c. 111. which imposes an additional duty of 10s. on all deeds, with an exception of bonds and letters of attorney, is within such exception, and therefore liable only to a duty of 10s. as before that statute. *Barrow v. Mashiter*.

4 E. R. 431

2 A defeazance upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney. *Cowthorne v. Holben*.

1 N. R. 279

STATUTES.

I. HOW CONSTRUED AND EXPOUNDED.

II. HOW PLEADED.

III. POINTS ON PARTICULAR STATUTES.

(a) *Relating to America.*

(b) — *Bond of Prince of Wales.*

(c) — *Compensation for Lands.*

(d) — *Costs—double.*

(e) — *Court of Requests—Jurisdiction.*

(f) — *Freemen—election of.*

(g) — *Irish Judgments.*

(h) — *Labourers.*

(i) — *Norwich.*

(k) — *Outlawry.*

(l) — *Paving Rates.*

(m) — *Plate—vendors of.*

(n) — *Portsmouth Water-works.*

(o) *Relating to Sessions—jurisdiction of.*

(p) — *Whale Fishery.*

(q) — *Woods—burning of.*

I. HOW CONSTRUED AND EXPOUNDED.

1 Acts of Parliament relating to trade in general are public Acts, but an Act which relates to a certain trade only is a private one. *Kirk v. Nowell*.

1 T. R. 125

2 Where the words of a statute are doubtful, general usage may be called in to explain them; but where they are clear, the usage of a particular place cannot controul them. *Rex v. Hogg*.

1 T. R. 723

3 Where a statute gives accumulative damages to the party grieved, it is still but a civil remedy. *Woodgate v. Knatchbull*.

2 T. R. 154

4 Though the preamble of an Act cannot controul the clear and positive words of the enacting part, it may explain them if ambiguous. *Crespigny v. Wittenoom*.

4 T. R. 793

5 An Act of Parliament which is to take effect "from and after the passing of"

- the Act,*" operates by legal relation from the first day of the session. *Lattless v. Holmes.* 4 T. R. 660
- 6 The Annuity Act (17 G. 3. c. 26.) is of this description. 4 T. R. 660
(*But see stat. 33 G. 3. c. 13. by which the operation of every statute is to commence from the time of receiving the royal assent, unless any other period is appointed in the Act.*)
- 7 Statutes allowing certain privileges to the members of the universities are confined to those of the two English universities, unless otherwise expressed. *Jones v. Smart.* 1 T. R. 49
- 8 The construction of statutes, though relating to matters of an ecclesiastical nature, belongs to the superior Courts of common law. *Gould v. Gapper.* 5 E. R. 345
- 9 The clauses of reference in the excise laws to former laws can only be taken to extend to the general powers and provisions of such Acts, and not to every special clause. *Rex v. Surry Justices.* 2 T. R. 510
- 10 The distinction is between the laws of excise, properly so called, and those Acts for raising inland duties under the management of the commissioners of excise. 2 T. R. 510
- 11 The bare recital in a subsequent statute is not sufficient to repeal the positive provisions of a former one. *Dore v. Gray.* 2 T. R. 365
- 12 If a statute expire, and afterwards be revived again by another statute, the law derives its force from the first. And therefore the *stat. 21 Jac. 1. c. 4.* extends to statutes made since, which revive statutes made before. *Shipman v. Henbest.* 4 T. R. 109
- 13 A contract declared by statute to be illegal, is not made good by a subsequent repeal of the statute. *Jaques v. Worthy.* 1 H. B. 65
- 14 Where a statute professes to repeal absolutely a prior law, and substitutes other provisions on the same subject, which are limited to continue only till a certain time, the prior law does not revive after the repealing statute is spent, unless the intention of the legislature to that effect be expressed. *Warren v. Windle.* 3 E. R. 205
- 15 A statute introductive of a new qualification as to the subject-matter, though penned in the affirmative, repeals a former statute concerning the same matter: Therefore, the *stat. 13 G. 2. c. 28. s. 5.* exempting from the impress service any harpooner, &c. seaman, &c. in the Greenland trade, is impliedly repealed by *stat. 26 G. 3. c. 41. s. 17.* which exempts such harpooner, &c. whose name shall be inserted in a list required to be delivered on oath by the owner of the vessel to the collector of the customs; and which also exempts any seaman entered on board any ship intended to proceed on the said fishery in the following season whose name shall be inserted in a list to be delivered as aforesaid, and who shall have given security, &c. to proceed and shall proceed accordingly: for the latter statute superadds the insertion of the seaman's name in such list as a condition precedent to the exemption. *Ex-parte Carruthers.* 9 E. R. 44
And see IMPRESSMENT OF SEAMEN, *ante*, page 362.
- 16 If the judgment of commissioners of appeal in certain cases be declared final by statute, it cannot be questioned in an action of trespass. *Radnor (Earl) v. Reece.* 2 B. & P. 391
- 17 If it be doubtful whether a statute declaring an instrument or contract void, shall be construed as making it voidable only, another clause of the same Act, inflicting a penalty for entering into such a contract is a clear test that it is *ipso facto* void. *Gye v. Felton.* 4 Taunt. 876
- 18 A statute made in 1663 by the Bishop, with the consent of the Chapter of Exeter, conferring upon every canon residentiary, who should cease to be such by promotion to a higher degree and dignity in the Church of England (unless it be by voluntary resignation, &c.) the right of receiving to his own use the whole profits and advantages of the canonry for the following year, supposing such a statute to be valid, is at all events contrary to the policy of the ecclesiastical establishment, and to be construed strictly: therefore, where the defendant, who was Dean and Canon of that Chapter, resigned the same in order to obtain promotion to another deanery, to which he was shortly afterwards promoted: it was held that he was not within the statute, not having ceased to be a member of the former church by promotion to the latter, but having ceased to be so before

his promotion: and besides, his resignation having been voluntary, he was expressly excluded by the terms of the exception; and a promotion from one deanery to another, seems not a promotion to a higher degree. The admission of the plaintiff as Canon into *plenum jus*, although not made until a year after his first admission, related back to the time when his title to the profits accrued, so as to enable him to maintain an action for them. *Garnett D.D. v. Gordon D.D.* 1 M. & S. 205

- 19 *Quare*.—Whether the misinterpretation of a statute by an inferior Court, the consideration of which arises incidentally in the course of a proceeding which is confessed to be within its jurisdiction, be a ground for a *prohibition*? Whether it be not rather a matter of appeal? But clearly in such a case a prohibition will not lie, unless it be made appear to the superior Court, that the party applying for the prohibition, has, in the course of the proceedings in the inferior Court, alleged a ground for a contrary interpretation of the statute, on which he applies for the prohibition, and that the inferior Court has proceeded notwithstanding such allegation. *Home v. Camden (Earl) in error.*

2 H. B. 533

II. HOW PLEADED.

- 1 The stat. 23 H. 6. c. 9. relating to bail-bonds being a public Act, need not be specially pleaded. *Lovell v. Plomer.* 15 E. R. 322
- 2 The statute written in the statute-book under the year *secundo* (*vulgo primo*) Jac. 1. c. 15. must be pleaded as of the first year. *Bryant v. Withers.* 2 M. & S. 132
- 3 Where an exception is in the enacting clause of a statute giving a right or a forfeiture, the party suing for the right or forfeiture must negative the exception in his declaration: Therefore, in a *sci. fa.* on a judgment against a person who had been twice a bankrupt, under stat. 5 G. 2. c. 30. s. 9., which says, "the future estate and effects of such person shall be liable to his creditors unless the estate shall produce sufficient to pay 15s. in the pound," &c. it is necessary for the plaintiff to aver that the bank-

rupt's estate has not paid 15s. in the pound. *Gill v. Scrivens.* 7 T. R. 27

III. POINTS ON PARTICULAR STATUTES.

N. B. For the Rules of Construction of Penal Statutes, see PENAL STATUTES, ante, page 507.

(a) America.

- 1 The stat. 16 G. 3. c. 5. which subjected to forfeiture all *American ships* and all other ships with their cargoes trading to any port of the colonies, does not extend to the property of *Americans* on board any other ship not trading to one of those ports; so, that an insurance on the property of *Americans* in a Dutch ship from Amsterdam to St. Eustatia is not prohibited by that Act. *Tyson v. Gurney.* 3 T. R. 477

(b) Bond of Prince of Wales.

- 1 The condition of a bond, after reciting the grant of an annuity by the Prince of Wales to J. C., an assignment of the same to the obligee with the assent of the Prince, and an agreement that the obligor should give his bond as an additional security was declared to be, that if the Prince or his treasurer, or any person for him should pay the annuity quarterly to the obligee, the bond should be void: Held, that upon failure of payment the obligee was entitled to sue the obligor, without having first presented a particular of his demand to the Prince's treasurer, pursuant to 35 G. 3. c. 125. s. 7. *Sparkes v. O'Kelly.* 2 N. R. 421 And *O'Kelly v. Sparkes* (*in error.*) 10 E. R. 369

(c) Compensation for Lands taken by Government.

- 1 When the stat. 43 G. 3. c. 55. s. 10. enabled a jury to assess a compensation to the owner or persons interested in land which was taken possession of by government; which compensation was to be made "for the possession or use thereof during the time for which the same should be required for the public service." Held, that the assessment of a compensation only in gross and without reference to time as by an annual rent was bad, because of the uncertainty of the period for which the land would be required, of which no pro-

bable average estimate could be formed pending the exigency. *Bingham v. Serle*.
5 E. R. 534

(d) *Costs—double.*

- 1 Neither a certificate from the judge, nor a suggestion on the roll, is necessary to entitle a defendant to double costs, under 11 G. 2. c. 19. s. 21. *Finlay v. Seaton*.
1 Taunt. 210

(e) *Court of Requests—Jurisdiction.*

- 1 By the statute 39 and 40 G. 3. c. 104. s. 1, the jurisdiction of the Court of Requests in London is enlarged from debts of 40s. to 5l. from the 30th September 1800: and by s. 12, if any action shall be commenced in any other Court to recover any debt not exceeding 5l. within the jurisdiction, the plaintiff shall not recover any costs, &c.: Held, that the words, "shall be commenced" must by necessary construction be restrained to the date of the 30th September, and not to the passing of the Act, which was on the 9th of July preceding. *Whitborn v. Evans*.
2 E. R. 135
And see tit. *Costs*, ante, page 215.

(f) *Freemen—election of.*

- 1 By the statute 3 G. 3. c. 15. no person claiming to vote at an election of members of parliament as a freeman can vote unless he has been admitted to his freedom for 12 months: this extends to *burgesses*, who vote at such elections, as well as freemen. *Williams v. Evans*.
8 T. R. 246

(g) *Irish Judgments.*

- 1 The Irish statutes 9 G. 2. and 25 G. 2., which permit conusees of judgments to assign them, and the assignees to sue in their own names, are confined to judgments upon *cognovits*. *O'Callaghan v. Marchioness Thomond*.
3 Taunt. 82

(h) *Labourers.*

- 1 The statute 20 G. 2. c. 19. giving magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers, employed for any certain time, or in any other manner,"

respecting wages within certain sums, extends to *labourers of all descriptions*, and not merely in the particular trades or business there enumerated: and consequently includes *wages* earned by a *labourer*, who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Lowther v. Radnor (Earl)*. 8 E. R. 113

(i) *Norwich.*

- 1 The payment of the fine fixed by statute 9 G. 1. c. 9. s. 3. to be discharged from serving the office of sheriff of *Norwich*, does not exempt the person paying it for more than a year, unless the corporation agree that he shall be discharged for a longer time. *Rex v. Woodrow*.
2 T. R. 731
- 2 *Freemen of Norwich*, substitutes in the militia quartered at *Colchester*, but having dwelling-houses in *Norwich* in which their families resided, and to which they at times resorted on furlough, held to be *inhabitants* within the meaning of the charter of *Norwich* and of a local Act requiring them to have been inhabitants for six calendar months previous to certain elections of corporate officers in order to qualify them to vote. *Rex v. Mitchell*.
10 E. R. 511

(k) *Outlawry.*

- 1 The stat. 25 Ed. 3. s. 5. c. 44. does not apply to a Court of *oyer and terminer* and gaol delivery. *Rex v. Yandell*.
4 T. R. 521

(l) *Paving Acts.*

- 1 Where the acts of commissioners, appointed by a Paving Act, occasion a damage to an individual, without any excess of jurisdiction on their part, the commissioners, or paviors acting under them, are not liable to an action. *The Governor, &c. of the British Cast Plate Glass Manufacturers v. Meredith*.
4 T. R. 794
- 2 The owner of stables in *Marylebone*, which were rented by the colonel of a troop of horse, for the use of the troop (by the authority of the King) is liable to be assessed for them to the rates made under stat. 10 G. 3. c. 23. for paving *Marylebone* parish. *Eckersall v. Briggs*.
4 T. R. 6

- 3 The Masters in Chancery are not rateable to occupiers of their respective apartments in *Southampton Buildings*, under the Paving Act, 11 G. 3. c. 92. *Holford v. Copeland.* 3 B. & P. 129
- 4 Houses built on land embanked from the *Thames* in pursuance of *stat.* 7 G. 3. c. 37. which vests those lands in the owners, free from taxes, are not liable to be assessed to the rates for paving of *London*, made under *stat.* 11 G. 3. c. 29. *Eddington v. Borman.*

4 T. R. 4

- 5 Under the Foundling Hospital Paving Act, 34 G. 3. c. 96. the landlord of a new-built house is not liable to be rated for it before it is inhabited. *Mayor v. Knowler.*

4 Taunt. 635

- 6 The *St. Alban's* Paving and Regulating Act, 44 G. 3. empowers five commissioners, assembled at a public meeting holden by virtue of the statute, to do certain acts; amongst others, to deliver notice in writing to any inhabitants to abate nuisances and encroachments in the street before their houses; and on failure, empowers the commissioners to abate them: and gives an appeal to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the Act;" the Court held that an appeal lay against such notice in writing; such construction being within the words of the Act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts. *Rex v. Kingston.*

8 E. R. 41

- 7 Though the Act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the Act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not tend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards reimburse themselves out of the fund in the treasurer's hands. 8 E. R. 41

(m) *Plate—vendors of.*

- 1 One, not a general trader in silver

plate, who sells a piece of plate in a particular instance for a price above the value of old silver, is not therefore a vendor of plate within the *stat.* 31 G. 2. c. 32. s. 6., which enacts that all persons using the trade of selling plate, &c. shall be deemed traders in, sellers, or vendors of plate, &c. and shall take out a licence. *Rex v. Buckle.*

4 E. R. 346

(n) *Portsmouth Waterworks.*

- 1 An Act passed in the 14 G. 2. enabling T. S. lord of the manor of F., his heirs and assigns, at their costs, to convey water in pipes from his estate there to *Portsmouth*, and through the streets, and for that purpose to break up the pavement, making good the same again, is not repealed by the Act of the 32 G. 3., passed above 50 years afterwards, vesting the property and controul of the pavement in commissioners, without exception of the former right; the two Acts not being inconsistent, but giving the several powers to be exercised for different purposes: and the water-works, &c. together with the powers under the first Act, may be afterwards executed by the assigns of *Smith*, to whom the same, apart from the manor, were conveyed by mesne assignments; though such powers had lain dormant since seven years after the passing of the Act, till the 49 G. 3. But if *Smith's* assigns break up the pavement for the purpose of executing the powers reserved to them, without restoring it again, they are amenable either by indictment, or by action, for injury done to the property of the commissioners. *Goldson v. Buck.*

15 E. R. 372

(o) *Sessions—Jurisdiction of.*

- 1 By *stat.* 10 and 11 W. 3. c. 8. the proprietors of navigation shares in the river *Tone*, are created a corporation with certain funds, directed to keep an account of their receipts and disbursements, which shall every year be examined, stated, corrected and allowed, by the Bishop of *Bath and Wells*, and the justices of the peace for the county of *Somerset*, or any five or more, at their first General Quarter Sessions after a certain day, at which time they are to direct a distribution of the surplus profits, if any: Held, that

the sessions in one year have no authority to revise or correct any errors in the accounts, upon which a balance was struck and allowed, at the sessions in any preceding year. *Rex v. Conservators of the River Tone.*

8 T. R. 286

- 2 If manifest injustice has been done by the allowance of the accounts in any former year, the only remedy is in Chancery.

8 T. R. 291

- 3 Where a person is *overcharged* in a poor-rate, the sessions may relieve him on appeal, and amend the rate, by lessening the sum assessed on him under *stat.* 17 G. 2. c. 38. *Rex v. Cheshunt (Inhab.)*

2 T. R. 623

(p) *Whale Fishery.*

- 1 The time for ships engaged in the southern whale fishery to be out on their voyage in order to gain their premiums under *stat.* 28 G. 3. c. 20.,

is fourteen *lunar* months from the time of their *clearing out*, without regard to the time of their actual sailing.

Lacon v. Hooper. 6 T. R. 224

(q) *Woods—burning of.*

- 1 An action on the case lies upon the *stat.* 6 G. 1. c. 16 s. 1. by the party grieved, to recover damages against the inhabitants of the adjoining township, for trees, coppice, and underwood, unlawfully and feloniously burnt by persons unknown; though the clause directs the party grieved to recover the damages *in the same manner and form* as given by the *stat.* 13 Ed. 1. s. 1. c. 46. “for dikes and hedges overthrown by persons in the night;” upon which the usual course of proceeding has been by the writ of *noctanter*. *Thornhill v. Township of Huddersfield.*

11 E. R. 349

STOCK-JOBGING.

- 1 If two persons jointly engage in a stock-jobbing transaction, and incur losses, and employ a broker to pay the differences, and one of them repay the broker, the whole sum, with the privity and consent of the other, he may recover a moiety from that other, notwithstanding the *stat.* 7 Geo. 2. c. 8. which avoids all stock-jobbing transactions. *Petrie v. Hannay.*

3 T. R. 418

And see *Child v. Morley.*

8 T. R. 610, *ante*, page 30.

- 2 The plaintiff being possessed of 3000*l.* 4 *per cent.* stock, empowered defendant to sell the same for his own benefit; in consideration of which defendant agreed to transfer at the next opening 3000*l.* 4 *per cent.* into the plaintiff's name: Held, that this was not a case prohibited by 7 G. 2. c. 8. but that on failure of the defendant's

engagement, the plaintiff might maintain an action against him to recover the value of that stock on the day appointed for the transfer. *Sanders v. Kentish.*

8 T. R. 162;

And see *Tate v. Wellings* 3 T. R. 531

- 3 Jobbing in *omnium* is within the *stat.* 7 G. 2. c. 8. *Brown v. Turner.*

7 T. R. 630

- 4 In an action on the Stock-jobbing Act, 7 G. 2. c. 8. s. 6. to recover damages against one who had refused to accept and paid for stock agreed to be sold to him, it is necessary to prove an actual transfer of the stock to some other person before the action brought; and proof alone of a contract to sell to such other person *before* the action brought, though followed up by an actual transfer *afterwards*, is not sufficient to maintain the action. *Heckscher v. Gregory.*

4 E. R. 607

STOPPAGE IN TRANSITU.

I. IN WHAT CASES, AND BY WHOM
GOODS MAY BE STOPPED IN
TRANSITU.

II. WHERE NOT.

III. TRANSITU—WHERE DETERMINED.

I. IN WHAT CASES, AND BY WHOM GOODS
MAY BE STOPPED IN TRANSITU.

N. B. *As to the right of stopping goods in transitu, see Fearon v. Bowers, and Burghall v. Howard.* 1 H. B. 364, 5, *notis.*

- 1 The consignor may stop goods *in transitu* before they get into the hands of the consignee, in case of the insolvency of the latter; but if the consignee assign the bills of lading to a third person for a valuable consideration, the right of the consignor as against such assignee is devested. *Lickburrow v. Mason.* 2 T. R. 63
- 2 This decision was reversed in the Exchequer Chamber, 1 H. B. 357, and being from thence carried to the House of Lords, the judgment of the Exchequer Chamber was there reversed, and a *venire de novo* awarded.

2 H. B. 211

5 T. R. 367

N. On this second trial a special verdict was found; and the Court, without discussing the question anew, declared that they retained their former opinion.

5 T. R. 683

And see 6 T. R. 131

N. B. *See an account of this case, and a very full note of Mr. Justice Buller's opinion delivered upon it in the House of Lords.* 6 E. R. 20—36, *n.*

- 3 If a factor, in consideration of goods being consigned to him, accept bills drawn by the consignor, and pay part of the freight, and become insolvent before the bills are due, and before the goods get into his *actual* possession, the consignor may stop them *in transitu*. *Kinloch v. Craig.*

3 T. R. 119—783

N. B. This decision was affirmed in *Dom. Proc.*

- 4 A trader here gives an order to his correspondent abroad to ship him cer-

tain goods, which the latter procures upon his own credit, without naming the trader here, and ships to him at the original price, charging only his commission: Held, that the correspondent abroad is so far a *vendor* as between him and the trader here, that on the bankruptcy of the latter he may stop the goods *in transitu* by procuring the bill of lading from the bankrupt's brother; and this, though the trader here had before his bankruptcy accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances proveable under his commission, amounting at most to part payment for the goods, which does not take away the vendor's right to stop *in transitu*. *Feise v. Wray.* 3 E. R. 93

- 5 A. living at N. in *Devonshire*, ordered goods of B. in *London*, who sent them by ship *via Exeter*, consigned to A., and advised him thereof; on their arrival at *Exeter* they were delivered to C. a wharfinger, who received them on A.'s account, and paid the freight and charges: after their arrival A. wrote to B. informing him that in consequence of his affairs being deranged he should not take the goods, and telling him that they were at *Exeter*; at this time A. had committed an act of bankruptcy, upon which he was afterwards declared a bankrupt; B. applies to C. for the goods, and tendered him the freight and charges due, upon which C. promised not to deliver them out of his custody, but afterwards did deliver them to the assignees of A., though indemnified by B.: Held, 1st, that B. had a right to stop the goods in the hands of C.; and, secondly, that he might maintain trover for them against C. *Mills v. Ball.* 2 B. & P. 457

- 6 A. agreed to buy some articles of plate of B. who was to get A.'s arms engraved on them, and to pay for the engraving: Held, that a delivery to the engraver for that purpose was not a delivery to A. so as to defeat B.'s right of stopping the goods *in transitu*, the price of the goods not being paid by A. *Owenson v. Morse.* 7 T. R. 64

- 7 A consignor's right in stopping goods *in transitu*, is not taken away by the

- consignee's having partly paid for the goods. *Hodgson v. Loy.* 7 T. R. 440
- 8 A delivery by the consignor of goods on board a ship chartered by the consignee is a delivery to him, and the consignor cannot afterwards stop them *in transitu*; but where the delivery was made on board such a ship in *Russia*, and by a law of that country, the owner of goods, in case of the bankruptcy of the vendee, may sue out process to retake his goods on board a ship, &c. and retain them till payment; and the owners hearing of the insolvency of the vendee, applied to the captain on board of whose ship the goods had been delivered, to sign the bill of lading to their order, which he complied with, without the necessity of suing out process: Held, that this was a substantial compliance with such law, and that the captain, on his arrival here, was bound to deliver the goods to the order of the vendors, and not to the assignees of the vendee, who had become bankrupt. *Ingdis v. Usherwood.* 1 E. R. 515
- 9 A trader in *England* charters a ship on certain conditions for a voyage to *Russia*, and to bring goods home from his correspondent there, who accordingly ships the goods on account and at the risk of the freighter, and sends him the invoices and bills of lading of the cargo: Held, that the delivery of the goods on board such chartered ship does not preclude the right of the consignor to stop the goods while *in transitu* on board the same to the vendee, in case of his insolvency in the meantime, before actual delivery, any more than if they had been delivered on board a *general* ship for the same purpose: And a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee: Held, that the consignor might maintain trover against the assignees. *Bohlingk v. Ingdis.* 3 E. R. 381
- 10 It is not necessary, in order to divest the consignor's right to stop *in transitu*, that the goods should have been taken by the hands of the consignee himself. *Ellis v. Hunt.* 3 T. R. 464
- 11 An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, cannot affect the right of the consignor to stop the goods *in transitu*. *Oppenheim v. Russell.* 3 B. & P. 42
- 12 *Semb.* that such a lien could not be established even by agreement between the carrier and the consignor. 3 B. & P. 42
- 13 Where goods were consigned on the joint account of the consignors and consignee, and a bill of lading was sent to deliver the goods to the consignee, or his assigns; who afterwards indorsed and delivered it to the defendants upon condition of their making an advance to him on it, which they failed to do, but claimed to retain it as a security for prior advances: Held, that such indorsement and delivery of the bill of lading did not divest the consignor's right to stop the goods *in transitu*, upon the insolvency of the consignee, who had not paid for them. *Newsom v. Thornton.* 6 E. R. 17
- 14 Where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and inclosed him an *invoice* of the goods laden on board, which were therein expressed to be *for account and risk* of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c. *he paying freight for the said goods according to charter-party*; and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo: Held, that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods *in transitu* in case of the insolvency of the other. And the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated: Held, that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. *Walley v. Montgomery.* 3 E. R. 585

15 The consignor of goods abroad, upon receipt of orders from a correspondent here, ships goods on account and at the risk of the consignee, and takes bills of lading from the captain, making the goods deliverable to the consignor's own order, and transmits one of such bills *undorsed*, with the invoice, to the consignee, inclosed in a letter, informing him that he had drawn upon him for the amount; which he doubted not would meet due honour, and close the account; and the consignor, by way of precaution, also sent another bill of lading, *indorsed*, to his own agent: Held, that upon the shipment, *on account and at the risk of the consignee*, the property in the goods vested in him, subject only to be divested by the consignor's stopping them while *in transitu*; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his *undorsed* bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper, and however answerable the captain might be to the shipper on that account. *Coxe v. Harden*. 4 E. R. 211

16 A trading licence from the Crown to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor-enemy's right to stop the goods *in transitu* after their arrival in port here, upon the intermediate insolvency of the vendees, after a part-payment only, (which was offered to be refunded,) and also to employ an agent here for that purpose: and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover. *Fenton v. Pearson*. 15 E. R. 419

II. WHERE NOT.

1 Where goods were consigned to A., and on his becoming a bankrupt his assignee went to the inn where they were arrived, and put his mark on them, but did not take them away, because they had been attached there

by a creditor of the bankrupt; the consignor could not afterwards stop them because they were not then *in transitu*. *Ellis v. Hunt and Dawes*.

3 T. R. 464

2 Where a consignee, to whom the bill of lading was indorsed in blank, assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards by an agreement between them they became partners in the goods, by which agreement it appeared that the consignor had not been paid for them: Held, that the assignee of the bill of lading could not maintain trover against the consignor who stopped the goods *in transitu* upon the insolvency of the consignee. *Salomons v. Nissen*. 2 T. R. 674

3 But in a subsequent case it was decided that the property of goods did pass by indorsement and delivery of the bill of lading by the consignee to another *bonâ fide* for a valuable consideration, and without collusion with the consignee; although the indorsee knew at the time that the consignor had not received money payment for his goods, but had taken the consignee's acceptances payable at a future day not then arrived; and that after such assignment of the bill of lading the consignor could not stop the goods *in transitu* upon the insolvency of the original consignee. *Cuming v. Brown*.

9 E. R. 506

4 One who has a lien on goods in his possession, if he afterwards deliver them to a ship carrier to be conveyed on account and at the risk of his principal though unknown to the carrier, cannot recover his lien by stopping the goods *in transitu*, and procuring them to be re-delivered to him by virtue of a bill of lading signed by the carrier in the course of his voyage. *Sweet v. Pym*.

1 E. R. 4

5 B. a trader in London ordered goods to be shipped to him by D. & Co. his correspondents at Dantzic, who were to draw for the amount on F. at Ham-burgh (who had agreed to accept the bills upon receiving commission on the amount, and the bills of lading and invoices were to be transmitted by D. & Co. from Dantzic to F. at Ham-burgh, who was to forward them to B. in London; and F. accordingly accepted the bills of exchange drawn

upon him; and on the receipt of the bills of lading, transmitted the same (which were made out to the order of the shippers, and not indorsed) to *B.* in *London*, who received them, together with the invoices and letter of advice, five days after the act of bankruptcy committed by him. *K.* also became bankrupt, and the bills of exchange drawn on him by *D. & Co.* were obliged to be taken up and paid by themselves: Held, 1st, that *F.* had no right to stop the goods *in transitu*, being no more than a surety for the price, and not vendor or consignor; 2ndly, that one who was general agent of *F.* in *London*, having obtained the bills of lading from the bankrupt, after his bankruptcy, upon an agreement, when the goods arrived, to dispose of them, and to apply the net proceeds to the discharge of such bills as had been drawn against the goods, had no authority to retain the proceeds against the assignees of *B.* the bankrupt, either in respect of *F.* or in respect of a stopping *in transitu* on behalf of *D. & Co.*, the shippers, who after his possession of them, and after trover commenced by *B.*'s assignees for the value, sent a letter to him approving of his having obtained possession of the bills of lading and the goods, for at any rate there was no adverse stopping *in transitu*, but the goods were obtained by agreement with the vendee after his bankruptcy, even if the defendant could be considered an agent for the shippers at the time by relation. *Siffken v. Wray.* 6 E. R. 371

6 A number of bales of bacon, then lying at a wharf, having been sold for an entire sum, to be paid for by a bill at two months, an order was given to the wharfinger to deliver them to the vendor; who went to the wharf, weighed the whole, and took away several bales, and then became bankrupt; whereupon the vendor, within ten days from the time of the sale, ordered the wharfinger not to deliver the remainder: Held, that the vendee had taken possession of the whole; and that the vendor had no right to stop what remained in the hands of the wharfinger; though by the custom of the trade the charges of warehousing were to be paid by the vendor fourteen days after the sale. *Hammond v. Anderson.* 1 N. R. 69

7 The defendants having sold a quantity

of timber, then lying at their own wharf, to *D.*, for bills payable at a future day; which timber was then marked by *D.*, and a small part of it was forwarded by the defendants to one place, and part to another; and then *D.*, before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered that it was *very well*; and then, in the presence of the defendants, the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the other two stages: Held, that the defendants, after such assent to the transfer, and such marking by the plaintiff, could not retain or stop any of the timber as *in transitu* upon the subsequent insolvency, before the day of payment, of *D.*, the original vendee, to whom payment had been made by the plaintiff; whatever question there might have been as between the original vendors and vendee. *Stoveld v. Hughes.*

14 E. R. 308

III. TRANSITU—WHERE DETERMINED.

1 *A.* at a foreign port, ships goods by the order and on the account of *B.*, to be paid for at a future day; and bills of lading are accordingly signed by the master of the ship. One of the bills is immediately transmitted to *B.*, who, before the arrival of the ship at the place of destination, sells the goods, and indorses the bill of lading to *C.* After the arrival of the ship, and a delivery of part of the goods to the agent of *C.*, *B.* becomes bankrupt, without having paid *A.* the price of the goods. By this delivery the *transitus* is at an end as to the whole of the goods. *Shubey v. Heyward.* 2 H. B. 504

2 Where *A.* and *B.*, traders, living in *London*, were in the course of ordering goods of the defendants, cotton manufacturers at *Manchester*, to be sent to *M.* and *Co.* at *Hull*, for the purpose of being afterwards sent to the correspondents of *A.* and *B.* at *Hamburg*; and on the 31st of *March* *A.* and *B.* sent orders to the defendants for certain goods to be sent to *M.* and *Co.* at *Hull*, to be shipped for *Hamburg* as usual: Held, that as between buyer and seller the right of the defendants to stop all *in transitu* was at an end when the goods came to the

- possession of *M. and Co.* at *Hull*; for they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods after their arrival at *Hull*, were to receive a new direction from the vendees. *Dixon v. Baldwin.* 5 E. R. 175
- 3 *A.* the general agent in *London* of *B. and Co.* a house at *Paris*, with power to export for them to such markets as he should think fit, purchased goods in the name of *B. and Co.* of *C.* at *Manchester*, and directed them to be sent to *D.* a packer in *London*. After their arrival, *A.* had some of the goods unpacked and sent away, and the remainder repacked. News then arrived of the failure of *B. and Co.*: Held, that the goods in *D.*'s hands were no longer *in transitu*, and that *C.* had no right to stop them. *Leeds v. Wright.* 3 B. & P. 320
- 4 Where a trader has no warehouse of his own, but uses that of his packer for receiving goods consigned to him, the *transitus* of such goods is at an end, upon the delivery of them to the packer. *Scott v. Pettit.* 3 B. & P. 469
- 5 *A.* of *Newcastle* shipped goods for *London* to order of *B.*; before their arrival *B.* wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this *A.* returned a general answer without making any mention of the goods, but immediately left *Newcastle* for *London*, and on his arrival applied at the wharf of *C.*, where the goods had in the mean time arrived (and where goods shipped for *B.* usually were landed and kept till sent for by him) tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused, unless upon payment of a general balance due from *B.* to *C.* for wharfrage: Held, that the contract as between *A.* and *B.* having been rescinded previous to the arrival of the goods, *C.* had no right to retain against *A.* for a general balance due to him from *B.* *Richardson v. Goss.* 3 B. & P. 119
- 6 *Semble*, that the goods were no longer *in transitu* when arrived at the wharf of *C.* where the goods of *A.* were usually landed and kept. 3 B. & P. 119

TAXES.

I. ON LAND. II. — PROPERTY. III. ASSESSED.

I. ON LAND.

- 1 The appointment of clerks to the commissioners under the Land Tax Act, 25 G. 3. c. 4. is at least for a year. *Rex v. The Commissioners of the Land Tax for St. Martin's (Westminster.)* 1 T. R. 149
- 2 Buildings of a college in one of the universities taken into and made part of the college between the passing of the first Land Tax Act and the Act which made that tax perpetual, are exempted from the land-tax. *All Souls' College v. Costar.* 3 B. & P. 635
- 3 But where a college, soon after the passing of the first Land Tax Act, purchased lands of a parish under a private Act of Parliament, which provided that the college should pay all taxes which the premises then were,

or should thereafter be subject to; it was held that the lands purchased were not exempted from the land-tax.

3 B. & P. 635

- 4 A house within the limits of an hospital, appropriated to an officer of the hospital for the time being, is not assessable to the land-tax. *Harrison v. Bulcock.* 1 H. B. 68
- 5 Houses built on land embanked from the *Thames* in pursuance of stat. 7 G. 3. c. 37. which vests those lands in the owners, free from taxes, are not liable to be assessed to the general land-tax imposed by 27 G. 3., though the latter is conceived in general terms, and is subsequent in point of time to the Act creating the exemption. The Land Tax Acts, though in form annual, being considered, in fact, as permanent. *Williams v. Pritchard.*

4 T. R. 2

And see 8 T. R. 473.

- 6 Under a covenant in a building lease by the tenant to pay all the taxes, except the land-tax, the landlord is only

to pay the *old land-tax*, and not the additional land-tax occasioned by the improvement of the estate. *Hyde v. Hill*. 3 T. R. 377

And see *Rex v. Scott*. 3 T. R. 602

II. PROPERTY.

1 A distinct covenant in a lease, whereby the tenant bound himself to pay the *property-tax*, and all other taxes imposed on the premises, or on the landlord in respect thereof, though void and illegal by the *stat.* 46 G. 3. c. 65. s. 115. will not avoid a separate covenant in the lease for payment of rent clear of all parliamentary taxes, &c. generally; for such general words will be understood of such taxes as the tenant might lawfully engage to defray. *Gaskell v. King*. 11 E. R. 165

2 Where the defendant, by indenture made since the passing of the 46 G. 3. c. 65., demised to *J. H.* certain premises, *reddendo* 40*l.* annually, clear of land-tax, *property-tax*, &c., and *J. H.* covenanted to pay the said yearly rent *in the manner the same was reserved to be paid as aforesaid*, and to pay the land-tax, *property-tax*, &c.: Held, that by s. 115., coupled with s. 195. of the said Act, so much of the *reddendum* and covenant as stipulated for payment of the rent clear of deduction on account of *property-tax* was void, but the residue was good, for payment of the rent, subject to such deduction; and therefore the plaintiff, who had paid a deposit as purchaser of the said rent, was not entitled, on the above ground of objection, to recover back his deposit from the defendant, who had engaged to make a good assignment of the said rent. *Fuller v. Abbott*. 4 Taunt. 105

3 A tenant is not entitled to deduct from the rent paid to his landlord more *property-tax* than is assessed on the premises under schedule A., although the *property-tax* assessed under both schedules, A. and B., does not amount to two shillings in the pound on the rent; and the assessment, not the collectors' receipt, is the criterion how much the tenant may deduct. *Gabell v. Shevell*. 5 Taunt. 81

4 A lease rendering rent clear of landlord's *property-tax* is good as a lease

rendering the same rent subject to a deduction thereof of the *property-tax*. *Tinckler v. Prentice*. 4 Taunt. 549

5 Where the tenant of premises under a lease, and at a rent payable half-yearly, agreed to pay all taxes, except the landlord's *property-tax*, which the landlord agreed to allow, and the tenant agreed to lay out 20*l.* in repairs, which the landlord also agreed to allow, but afterwards distrained for half-a-year's rent, and sold to the whole amount, without allowing either for repairs or *property-tax*, which he knew the tenant had paid to the collector: Held, that the tenant might recover, in respect of the *property-tax*, but not in respect of the repairs, in an action for money had and received against the landlord. *Graham v. Tate*. 1 M. & S. 609

6 Defendant having covenanted to pay plaintiff 300*l.* in 12 months, with interest, in the mean time it is no answer to an action of defendant for the 300*l.* and interest, to plead a covenant in the same indenture that the defendant should pay the *property-tax* in respect of the 300*l.*; for the plea does not shew that the covenant attached on the interest of that 300*l.*; and the covenants so exhibited appear to be independent; and, therefore, though the latter should be void (by 46 G. 3. c. 65. s. 115.) yet that will not avoid the other independent covenant for payment of the 300*l.* and interest. *Wigg v. Shuttleworth*. 13 E. R. 87

7 In debt for rent, the tenant may plead as to part, that he has paid landlord's *property-tax* to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax. *Tinckler v. Prentice*. 4 Taunt. 549

8 It is not enough to plead that the defendant was on the premises at a short time before sun-set on the rent-day, ready to pay, without averring that he was there long enough before sun-set to have counted the money. 4 Taunt. 549

III. ASSESSED.

See PAVING ACTS, *ante*, page 660.

POST-HORSE DUTY, *ante*, page 559.

1 If a constable-wick consist of several hamlets, and two collectors of the

- duties on houses, &c. are appointed for each hamlet, and the collector or collectors of any one hamlet fail in duly paying over the money collected, the particular hamlet only where the collector or collectors have failed, is liable to a re-assessment under 20 G. 2. c. 3. and not the whole constable-wick. *Barrs v. Digby.* 1 N. R. 281
- 2 The statute 7 G. 3. c. 37. exempting the owners of certain lands embanked from the river *Thames* from all taxes and assessments whatsoever, does not exempt the occupiers of houses built on such lands from the payment of the house and window-duties imposed by the statute 38 G. 3. c. 40. *Perchard v. Haywood.* 8 T. R. 468
- 3 Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all further or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant is bound to defray all increase of the old as well as any new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent. *Graham v. Wade.* 16 E. R. 29

TENANTS IN TAIL.

- 1 A conveyance by tenant in tail by lease and release, neither bars the issue in tail, nor works a discontinuance: but it passes a base fee, voidable by the issue in tail by entry. *Doe d. Neville v. Rivers.* 7 T. R. 276
- 2 Tenant in tail by lease and release, previous to her marriage conveyed to trustees to the use of herself till the marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, &c.; tenant in tail died before the husband, leaving a son: Held, that the husband was not entitled to a life-estate either under the settlement, or by the curtesy. 7 T. R. 276
- 3 A. and B. being tenants in tail under a devise, A. conveys his moiety to B. in fee, by lease and release, with a covenant to levy a fine; this creates a base fee in B., which estate was afterwards confirmed by the fine, though that was not levied till after the death of the releasee. *Doe d. Gregory v. Whichelo.* 8 T. R. 211
- 4 By settlement before marriage the husband's estate was conveyed to trustees, to the use of the husband for life sans waste, remainder to trustees to preserve contingent remainders, remainder to the use of the wife for life for her jointure, and in bar of dower, remainder to the first and other sons of the marriage in tail male, remainder to the first and other daughters in tail male, remainder to the heirs of the body of the husband and wife, remainder to the right heirs of the husband; the wife survived the husband and had no issue: Held, that she was tenant in tail after possibility, &c. that she was unimpeachable of waste, and was entitled to the property of the timber when cut by her. *Williams v. Williams.* 12 E. R. 209

TENDER.

I. FORM OF, AND HOW MADE.

II. HOW PLEADED.

III. EFFECT OF.

I. FORM OF, AND HOW MADE.

N. B. *See* AFFIDAVIT, I. *ante*, pages 25, 6.

PAYMENT OF MONEY INTO COURT, *ante*, page 502.

- 1 A tender of bank-notes is good, unless specially objected to on that account at the time. *Per Buller, J.* in the case of *Wright v. Read*.

3 T. R. 554

[*See statutes* 37 G. 3. c. 45. 91.; and 38 G. 3. c. 1.]

- 2 Bank-notes are not made a legal tender by the 37 G. 3. c. 45. *Grigby v. Oakes*. 2 B. & P. 526
- 3 Where defendant came into possession of goods wrongfully, no tender is necessary of freight, &c. paid by him in order to enable plaintiff to maintain his action. *Lempriere v. Pasley*. 2 T. R. 485
- 4 To make a legal tender, there must either be an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor: Therefore, where the defendant, on departing from home, left 10*l.* with his clerk for the plaintiff; of which the clerk informed the plaintiff when he called and demanded a larger sum; and the plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand; but the clerk did not offer the 10*l.*: this was held to be no tender. *Thomas v. Evans*. 10 E. R. 101
- 5 A tender by the agent of defendant, of the whole sum demanded by plaintiff, by pulling out his pocket-book, and offering, if he would go into a neighbouring public-house, to pay it, which the plaintiff refused to take, is good, although the agent is only authorized by the defendant to tender a sum short of the whole sum demanded, and offers the rest at his own risk. *Read v. Goldring*. 2 M. & S. 86
- 6 A creditor tells his clerk, previously authorized, to receive money, not to

receive a sum if offered him by a certain debtor, for that he had put it into the hands of his attorney, and the clerk, on tender made, refuses to receive the money, and assigns the reason: Held, that this is a good tender to the principal. It is no objection to a tender that the creditor had previously put the matter into his attorney's hands. *Moffat v. Parsons*.

5 Taunt. 307

S. C. 1 Marsh. 55

II. HOW PLEADED.

- 1 A defendant cannot plead *non assumpt* as to the whole, and a tender as to part. *Maclellan v. Howard*.

4 T. R. 194

- 2 A defendant in an action on a bond cannot plead *non est factum*, and a tender as to part. *Jenkins v. Edwards*.

5 T. R. 97

- 3 If *A. B.* and *C.* have a joint demand, and *C.* has a separate demand on *D.* and *D.* offers *A.* to pay him both the debts, which *A.* refuses without objecting to the form of the tender, on account of his being entitled only to the joint demand; *D.* may plead this tender in bar of an action on the joint demand, and should state it as a tender to *A. B.* and *C.* *Douglas v. Patrick*.

3 T. R. 683

- 4 It is no answer to a plea of tender before the exhibiting of the plaintiff's bill, that the plaintiff had, before such tender, retained an attorney and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied, before the tender, for such writ, which was afterwards sued out. *Briggs v. Calverley*.

8 T. R. 629

- 5 A plea of tender *after* the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff. *Hume v. Peploe*.

8 E. R. 168

6 A replication to a plea of tender, stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea. *Stratton v. Savignac*.
3 B. & P. 330

III. EFFECT OF.

1 If a writ be returnable in the first return of the Term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day,

the plaintiff is not entitled to the costs of a declaration, delivered *de bene esse*. *Partington v. Williams*.

2 N. R. 398

2 A tender admits the contract and facts stated in the declaration: therefore, where a count averred, that in consideration that plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.* and that the plaintiff did let the said tithes, and did permit the defendant to take them, a tender on all the counts, generally, precluded the defendant from shewing a legal interruption to his taking them, if any such interruption had subsisted. *Cox v. Brain*.

3 Taunt. 95

TIME—COMPUTATION OF.

1 Where computation of time is to be made from an act done, the day on which the act is done is to be included in the reckoning. *Castle v. Burditt*.

3 T. R. 623

2 Therefore, when the law requires that a month's notice of an action be given, the month begins with the day on which the notice is served.

3 T. R. 623

3 And where the statute 21 Jac. I. c. 19. s. 2. enacts that a trader, lying in prison two months (*i. e.* lunar months) after an arrest for debt shall be adjudged a bankrupt, that includes the day of the arrest. *Glassington v. Rawlins*.

3 E. R. 407

4 When the word *month* is used in a statute, without the addition of *calendar*, or any other words to shew that the legislature intended *calendar*, it is understood to mean a lunar month. *Lacon v. Hooper*.

6 T. R. 224

5 The word *month* may mean lunar or calendar month, according to the intention of the contracting parties: therefore, where upon a sale of land on the 24th of *January*, it was agreed

by the conditions of sale, that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof, to be returned by him at the end of two months from the said date, and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered within four months from said date, and the purchase to be completed on the 24th of *June*, making a period of precisely five calendar months from the date of the sale and conditions, the word *months* was held to mean calendar and not lunar months, by reference to the whole period fixed for the completion of the contract. The condition for delivery of the draft of the conveyance within three months, was not a condition precedent with respect to its delivery within the precise time. *Lang v. Gale*. 1 M. & S. 111

6 The first section of the Annuity Act, requiring the deeds to be enrolled within twenty days of the execution, &c. means twenty days, exclusive of the day of execution. *Ex-parte Falcon*.

5 T. R. 283

TITHES.

I. ACTION FOR—BY WHOM BROUGHT.

II. EXEMPTIONS FROM PAYMENT OF.

III. HOW SET OUT.

IV. HOW TAKEN AWAY.

V. COMPOSITIONS FOR—WHEN AND HOW DETERMINED.

VI. PLEADINGS AND EVIDENCE.

I. ACTION FOR—BY WHOM BROUGHT.

- 1 If *A.* execute a lease of tithes to *B.* on a day subsequent to their severance, but previous to their being carried away by the landholder, *B.* cannot maintain an action on 2 & 3 *Ed.* 6. c. 13. as the right to the tithe vested in *A.* immediately on the severance. *Wyburd v. Tuck.*

1 B. & P. 458

- 2 *Quare*, Whether if one only of two joint tenements execute an assignment of a lease of tithes, the person claiming under that lease can support an action for not setting them out?

1 B. & P. 458

II. EXEMPTIONS FROM PAYMENT OF.

- 1 By a grant of all tithes arising out of, or in respect of *farms, lands, &c.* the tithes arising out of, and in respect of rights of common appurtenant to such farms or lands will pass. *Lord Gwydir v. Foakes.*

7 T. R. 641

- 2 The rule of law for determining what is barren ground within *stat.* 2 and 3 *Ed.* 6. c. 13. is whether the land is of such a nature as to require an extraordinary expense in the manuring or tilling, to bring it into a proper state of cultivation, and not whether it is, or is not, in its nature so fertile as after being ploughed and sown to produce of itself, without manuring, a tillage or crop, worth more than the expense of ploughing, sowing, and reaping. *Warwick v. Collins.*

2 M. & S. 349

III. HOW SET OUT.

- 1 Corn being titheable of common right in the sheaf, it is not competent for the farmer, without a custom, after general notice to the parson that he

should begin to reap on a certain day, or as soon after as the weather would permit, (and in fact the reaping continued for about a fortnight) but before tithing to put all the sheaves when bound immediately into large shocks or riders, consisting of eight sheaves set up on their ends against each other, with two covering sheaves placed roof-wise on the top, for the purpose of protecting the whole against bad weather, from which shocks the 10th sheaves were afterwards drawn, without taking the rest of the shock to pieces, and the rest of the wheat shocks were removed from the ground in two hours, and the oat shocks in half an hour afterwards; for the parson has thereby no reasonable opportunity of comparing the 10th with the other 9 sheaves, as he is entitled to have; but the corn ought to be tithed in the sheaf, before it is made up into shocks or riders. *Shallcross v. Fowle.*

13 E. R. 261

- 2 Though by the general rule, a farmer may not at his pleasure tithe and carry part of a field of corn which has been cut, before *the whole be tithed*, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another time to take his tithe; which general rule, however, being levelled against fraud, vexation, and caprice, must, where these have no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish: And therefore, where a farmer cut the whole of a field lying in two parishes, and after cocking and tithing part in one, proceeded to cock and tithe part in the other, and the weather being catching, carried that part which was tithed, the day before the rest of the field; held, that this being done *bonâ fide*, was lawful. *Leathes v. Levinson.*

12 E. R. 239

3 In an action on the *stat.* 2 and 3 *Ed.* 6. c. 13. for not setting out the tithe of wheat, barley, oats, peas, and vetches; the jury found a custom throughout the parish for the parson to take the eleventh shock of wheat, and the eleventh cock of barley, &c.: Held, that there was a sufficient consideration for the custom as to the wheat, it appearing that the farmer had always been used to put the sheaves into shocks, and in case of bad weather to open them to dry, and therefore the custom was good: but as to the barley, &c. there was no sufficient consideration, it appearing that the farmer only put them into cocks without doing any thing farther, except that in case of wet weather, before the parson tithed them, he opened the cocks of barley and oats, and put them up again, which was in fact for his own benefit: the custom therefore as to the barley, oats, peas, and vetches, was held void. *Smyth v. Sambrook.* 1 M. & S. 66

4 Hops are by law titheable after they are gathered from the bind; and a custom to set out the tithes by the tenth row, or by the tenth hill, where the rows are unequal, leaving the binds uncut, and the poles standing, cannot be supported. *Knight v. Halsey.* 7 T. R. 86

[Affirmed in *Dom. Proc.* 2 B. & P. 172.]

5 At common law, grass is titheable in grass cocks, after having been tedded in the process of making it into hay. *Newman v. Morgan.* 10 E. R. 5

6 The common law mode of tithing hay is in the cocks into which the grass is first collected after cutting and tedding; although the parson cannot conveniently make his tithe into hay while the parishioner is making his nine parts, without either mixing the whole again, or committing a trespass by treading on the parishioner's hay. The common law mode of tithing wheat is in the sheaf and not in the shock; the parishioner must in all cases leave his nine parts in the field a reasonable time for the parson to compare his time with them. *Halliwel v. Trupps.* 2 Taunt. 55

7 The tithe of turnips drawn to feed cattle, held to be properly set out, by being thrown aside, as drawn, on a

ridge opposite for the parson, without being set out in heaps for him; the farmer not putting the nine parts into heaps for himself. *Blaney v. Whitaker.* 10 E. R. 12, n.

IV. HOW TAKEN AWAY.

1 A parson is not entitled to carry his tithes home by every road which the farmer himself uses for the occupation of his farm. *Cobb v. Selby.*

2 N. R. 466

2 *Semble*, that he may only use such road as the farmer does for the occupation of the close in which the tithes grew.

2 N. R. 466

3 Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden; which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten; a notice then given by the owner, to remove the tithed fruits and vegetables within two days, otherwise an action would be commenced against the parson, is sufficient notice of their having been set out, whereon to found an action, if they be not removed: And due notices having been given of setting out tithes of garden vegetables and field barley, on certain days between the 11th and 16th of September, a general notice on the 17th to the parson, to take away all the tithes of plaintiff's lands within two days, is sufficient whereon to found the like action. *Kemp v. Filewood.*

11 E. R. 358

V. COMPOSITIONS FOR—WHEN AND HOW DETERMINED.

1 If a composition for tithes is made by *A.* as proprietor, and he leases them to *B.* whose interest is afterwards put an end to by *A.* before any alteration is made in the composition, *A.* cannot determine it without six months' notice. *Wyburd v. Tuck.* 1 B. & P. 458

2 If the bargainee of tithes for one year underlet them to the several occupiers of the land, no notice to determine the underletting needs to be given by the bargainee of the same tithes for the following year. *Cox v. Brain.*

3 Taunt. 95

- 3 Compositions for tithes cease on the death of the incumbent with whom they were made, at least as to his successor; but if the successor continue to receive the next payment due after the death of his predecessor, he can only be accountable to the executors for such portion of it as the value of the tithes, if paid in kind, accruing due between the last composition received by the late incumbent and his death, would have amounted to; and not *pro rata*, according to the time which had run before his death from the last payment. *Williams v. Powell.* 10 E. R. 269
- 4 Where a composition for tithes had been long paid by the farmer, and two years before the action of debt brought on the *stat.* 2 and 3 *Ed.* 6. c. 13. for not setting out the tithes, the vicar, in a conversation with the farmer, demanded his *tithes vicarial*; on which the other tendered him 40s. (the annual composition), which the vicar refused to take, but assigned no reason for his refusal; this was held to be no evidence of a notice to determine the composition, which notice ought to be unequivocal; and held also that the farmer, not having denied the vicar's right to tithes in kind before the action brought, was not precluded from taking objection to the action at the trial, for want of a proper notice to determine the composition, analogous to a notice to quit land, by putting the vicar to the strict proof of his right to tithe in kind. *Fell v. Wilson.* 12 E. R. 83
- 5 A notice on the 8th to determine a composition for tithes from year to year, commencing on the 29th of September, is not a sufficient notice. *Hewit v. Adams.* (*In Dom. Proc.*) 12 E. R. 84, n.
- VI. PLEADINGS AND EVIDENCE.
- See *Blundell v. Howard*, 1 M. & S. 292. *Post, tit. WITNESS, Examination of.*
- 1 Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress of the tithes as *damage feasant*, or by action. *Williams v. Ladner.* 8 T. R. 72
- 2 In debt on statute 2 and 3 *Ed.* 6. c. 13. for not setting out tithes, where the declaration stated that they were, within forty years next before the statute, of *right yielded and payable*, and yielded and paid, evidence that the land had always been remembered to be in pasture, and had never within living memory paid any tithe, is not sufficient to defeat the action. *Mitchell v. Walker.* 5 T. R. 260
- 3 But where the declaration only stated that tithe had been yielded and paid forty years before the statute, and there was no evidence of its ever having been paid at all: Held, that the plaintiff could not recover. *Lord Mansfield v. Clarke.* 5 T. R. 264, n.
- 4 In debt for substruction of tithes of any particular article, the plaintiff, though he allege the tithe of that article to have been "granted, yielded, and paid, and of right due and payable," on the land in question 40 years next before the making of the *stat.* of *Ed.* 6. need not prove that the particular article was cultivated there at that time; but it lies on the defendant to prove that it was not. *Halliwel v. Trapps.* 2 N. R. 173
- 5 In an action on the *stat.* 2 and 3 *Ed.* 6. c. 13. for the treble value of tithe corn omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the eleventh instead of the tenth mow; for the validity, as well as existence of such a custom, is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for substruction of the tithe due to him. *Phillips v. Davies.* 8 E. R. 178
- 6 No evidence is sufficient to support a real composition, unless it have reference to a deed. *Knight v. Halsey.* (*in error.*) 2 B. & P. 206
- 7 Evidence, that the parishioners have treated with a proprietor for a composition, is not alone sufficient to establish his possession of tithes in an action on the statute 2 and 3 *Ed.* 6. c. 13. *Wyburd v. Tuck.* 1 B. & P. 458

- 8 The rector of *Bromfield* parish having from the year 1765, (as far back as living testimony could carry it) to 1799, received the tithes of a certain meadow called *the Demesne*, lying in a part of the township of *Kelsic*, in the parish of *Holme Cultram*, without interruption or claim from the rector of that parish (other parts of *Kelsick* lying in *Bromfield*) conveyed to the plaintiff in 1779, a messuage and lands in *Kelsic* in the parish of *Bromfield*; and also all tithes of corn arising within the township of *Kelsic* aforesaid, or within the town fields, territories, precincts, or titheable places thereof: Held, that this was evidence against the occupiers of the *Demesne* meadow, though lying in *Holme Cultram* parish, of a title to the tithes in the rector of *Bromfield* before the conveyance to the plaintiff, and that the words of the deed were sufficient to convey them. *Barnes v. Messenger*. 13 E. R. 251
- 9 In debt upon the *stat.* 2 & 3 Ed. 6. c. 13. for not setting out a tenth, as the tithe of hay, the plaintiff is entitled to recover upon his common law right, unless there be evidence of some certain good *modus* or customary payment in lieu of the common law tithe. And though the plaintiff gave in evidence a terrier of 1696, stating a custom to take the eleventh cock of hay in a certain advanced state of preparation, and though his own and the defendant's witnesses stated other varying modes of payment; yet the terrier not being conclusive, and the jury not

- finding the 11th or any other specific customary mode of tithing, the plaintiff is entitled to recover. *Blundell v. Mawdesley*. 15 E. R. 641
- 10 In ejectment against a lessee of tithes for holding over, after the expiration of a notice to quit, some evidence must be given to shew that he did not mean to quit the possession; as by his declaration to that effect, or even his silence when questioned about it; or, as, it seems, by shewing that the defendant, who claimed by assignment from the original lessee, had entered into the rule to defend as landlord. *Doe d. Brierty v. Palmer*. 16 E. R. 53
- 11 In an action on 2 & 3 Ed. 6. by the plaintiff, as owner of tithe-hay, against the defendant, as occupier of a close, for not setting out the tithe, copies of a bill and answer, in a suit by the vicar for tithe-hay against *S. L.*, then occupier of the close, and from whom defendant purchased, denying the vicar's right, and setting up a right in the ancestor of plaintiff, on which the vicar abandoned the suit, were holden evidence against the defendant. *Countess of Dartmouth v. Roberts*. 16 E. R. 334
- 12 In favour of uninterrupted enjoyment by the preception of tithe-hay by plaintiff and his ancestors, although an endowment of the vicarage in 1253 with the said tithe be shewn, it shall be presumed that the tithe came into lay-lands before the restraining statutes. 16 E. R. 334

TOLLS AND PORT DUTIES.

- I. ACTION FOR—WHEN MAINTAINABLE AND HOW BROUGHT.
- II. RIGHTS TO AND EXEMPTIONS FROM.
- (a) *On Goods sold in Markets.*
(b) *By Highway and Turnpike Acts.*
- III. PORT DUTIES.

- I. ACTION FOR—WHEN MAINTAINABLE AND HOW BROUGHT.
- 1 A general *indebitatus assumpsit* will lie for tolls. *Seward v. Baker*. 1 T. R. 616

- 2 The Court of C. P. on a trial at bar held, that the writ *de essendo quietum de thecolonio* is not merely prohibitory, but remedial, on which the parties may plead to issue, on a question of right. And that freemen of the city of *London* have a right to be exempt from the payment of all tolls and port duties throughout *England* (except the prisage of wines), in whatever place they reside, and though they have obtained their freedom by purchase. *London (Corp.) v. King's Lynn (Corp.)*. 1 H. B. 206

N. B. This judgment was reversed in the
X x 2

Court of King's Bench, that Court holding that an action would not lie on this writ, until the plaintiff's goods were distrained for toll. Lynn (Corp.) v. London (Corp.) in error.

4 T. R. 130

- 3 But this latter judgment was reversed in *Dom. Proc.* upon the ground, that though toll be merely claimed of the individual members of a corporation exempt from toll, an action will lie on this writ in the name of the corporation.

See 6 T. R. 778

1 B. & P. 487

- 4 The question as to the right of exemption claimed on behalf of *non-resident* freemen was not determined. It seems that they have not any such right. See *London (Corp.) v. Liverpool (Corp.)*

1 B. & P. 522, n.

- 5 A. agreed in writing to pay the rent of certain tolls which he had hired, "to the treasurer of the commissioners:" Held, that no action for the rent could be maintained in the name of the treasurer. *Pigot v. Thompson.*

3 B. & P. 147

- 6 Toll-gate keepers sued for acts done under statute 25 G. 3. c. 51. need not be sued in the county where the fact was committed, as they must be under statute 13 G. 3. c. 78. s. 81.

Basing v. Skelton. 5 T. R. 16

- 7 Where the trustees of a public turnpike Act were empowered to erect toll-houses and mortgage the tolls, and it was declared that there should be no priority among the creditors, it was determined that they have no power to mortgage the *toll-houses or gates*, and that if in fact they have made such a mortgage, and an ejectment is brought against them by the mortgagee, they are not estopped by their deed from insisting that the Act gave them no such power. *Fairtitle d. Mytton v. Gilbert.*

2 T. R. 169

- 8 The trustees under a Turnpike Act having demised to one of several mortgagees such proportion of the tolls arising from the road and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due: Held, that he might well maintain his action notwithstanding a clause in the Act that

all mortgagees should be creditors upon the tolls in equal degree. *Doe d. Banks v. Booth.*

2 B. & P. 219

- 9 A collector or reuter of turnpike tolls, though illegally appointed, without the forms prescribed by Act of parliament, may still recover upon a count for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate; no objection being made to the plaintiff's title by the trustees or creditors of the turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5l. inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the plaintiff's title to be accounted with for the tolls. *Peacock v. Harris.*

10 E. R. 104

- 10 Where it appeared in evidence upon an action of *indebitatus assumpsit* for toll that a corporation were entitled by a general grant of toll, explained by usage to be due for all commercial goods passing in and out of their city, on horses, or in carts, or waggons, (that is, at the rate of 1d. for every horse-load, and 2d. for every cart-load drawn by one horse, and 2d. more for each additional horse): Held, that any alteration of the carriage by which the goods were so conveyed, as by taking them in stage coaches, instead of carts or waggons, could not vary the right of toll in the proportion of 2d. for each horse drawing the coach, although the number of horses were estimated by the weight of passengers rather than of goods. *Carlisle (Mayor) v. Wilson.*

5 E. R. 2

II. RIGHTS TO AND EXEMPTIONS FROM.

(a) On Goods sold in Markets.

- 1 If the grantee of a market under letters patent from the Crown, suffer another to erect a market in his neighbourhood, and use it for the space of 23 years without interruption; he is by such use barred of his action on the case for disturbance of his market. *Holcroft v. Heel.*
- 1 B. & P. 400
- 2 *Quare*, Whether if no specific toll be granted, the grantee of a market be entitled to any toll: and whether in any case, he can support an action for an injury to his market? *Holcroft v. Heel.*
- 1 B. & P. 400
- 3 The seller of corn by sample in a

market is benefitted by the market as well as the seller of corn which is pitched there in bulk and sold; and if he refuses to pay the same toll which is paid by the seller of corn in bulk, an action on the case lies against him for the injury done to the market in selling by sample. The burgage tenants in *Tewkesbury* are not exempt from payment of toll in the market there. If the grantee of a royal franchise, as toll, grant an immunity thereout, and the franchise of toll afterwards become extinct by unity of possession in the Crown, the immunity does not thereby cease; and if the Crown re-grants the toll, the grantee must take it still subject to the immunity. *Bailiffs, &c. of Tewkesbury v. Bricknell.* 2 Taunt. 120

4 A prescription for toll in respect of goods sold by sample in a market, and afterwards brought into the city to be delivered, cannot be supported. *Hill v. Smith.* 4 Taunt. 520

5 A claim of toll-thorough cannot be supported, without shewing a beneficial consideration moving to the person of whom it is claimed. 4 Taunt. 520

6 *Quare*, whether toll of goods sold in a market can be due from the seller? 4 Taunt. 520

7 A claim of toll to be taken in specie for goods sold in a market, is supported by evidence of a right to toll for goods brought into the market, and there sold; without shewing any right to toll for goods sold in the market without being brought there. *Moseley, Bart. v. Pierson.* 4 T. R. 104

8 A sale of goods in a market in such a case implies that the goods are actually there. 4 T. R. 104

9 An action on the case by the owners of a market, who had a prescriptive right of toll on all corn brought into the market to be sold, and there sold; alleging that the defendant intending to deprive them of their toll fraudulently bought corn in the market by sample, knowing that the commodity was not there in bulk at the time of the sale, whereby the plaintiffs were prevented from taking their toll; is not sustained by evidence of the mere fact of such purchase by sample in the market, though with knowledge of the plaintiff's claim of toll, coupled with the fact of not paying the toll on demand afterwards when the corn

was delivered to the defendant in the same borough, but out of the market; for *non constat* that the corn would otherwise have been brought into the market, or that the defendant did any act to induce the owner of it not to bring it there in the first instance. Neither will the fact of such purchase by sample in the market, though coupled with the subsequent delivery out of the market, sustain a count for toll as for corn brought into the market and there sold. *The Bailiffs, &c. of Tewkesbury v. Diston.* 6 E. R. 438

10 Where the corporation of *Worcester* had for above forty years received toll upon corn sold in their market by sample, and afterwards brought within the city to be delivered to the buyer, and for about 60 years back, as far as living memory went, when corn pitched in the market-place on one market day was not then sold, it was usually put in store in the city, and only one bag brought into the next market for a sample, and when sold in that manner, toll used to be taken on the whole: this was held to be sufficient evidence to be left to the jury, of a prescriptive claim to take toll on corn sold in the market by sample, and afterwards brought into the city to be delivered to the buyer: though the witnesses spoke according to their recollection and belief, of the commencement of selling by sample in the market in the manner now practised between forty and fifty years ago. *Hill v. Smith.*

10 E. R. 476

(b) *By Highway and Turnpike Acts.*

See *Carlisle (Mayor) v. Wilson*, 5 E. R. 2, last page.

1 If a person claiming a toll for passing over an highway, can shew that the liberty of passing over the soil, and the taking of toll for such passage, are both immemorial, and that the soil and the tolls were, before the time of legal memory, in the same hands, though severed since, it will be presumed that the soil was originally granted to the public in consideration of the tolls; and such original grant is a good consideration to support the demand. *Lord Pelham v. Pickersgill.*

1 T. R. 660

2 In a Turnpike Act, imposing tolls on horses, &c. "cattle going to, or returning from pasture," and "horses

attending cattle returning from pasture," were exempted: It was held, that a horse ridden by the owner of the cattle at pasture, in order to fetch them from pasture, did not come within either of the exceptions. *Har-
rison v. Brough.* 6 T. R. 706

- 3 A Turnpike Act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or re-passing with the same carriage or horse, exempts the traveller from paying a second time in the day for the passage of the *same carriage*, though drawn by *different horses*, being the same in number. And another clause providing that in all cases of *carriages travelling for hire*, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages re-passing with a different traveller or passenger, does not extend to *stage-coaches*, the *carriage itself* not being there *hired* by the respective passengers, but only a conveyance by it: and therefore such stage-coaches are freed of toll under the former clause by one payment in the day, al-

though returning with different passengers and different horses, the horses being the same in number. *Williams v. Sangar.* 10 E. R. 66

- 4 The General Turnpike Act, 13 G. 3. c. 84. s. 34. exempts from toll, carriages passing on a turnpike road for a less distance than one hundred yards, whether they quit the road on the same side on which they entered it, or on the opposite side. *Major v. Oxenham.* 5 Taunt. 340

III. PORT DUTIES.

- 1 *British ships*, in passing by the *Eddy-stone* and other light-houses in the channel, sailing from foreign port to foreign port, and not touching at any place in *Great Britain and Ireland*, are not liable to pay the light-house duties to the Trinity House, under statutes 4 *Anne*, c. 20. and 8 *Anne*, c. 17. *Trinity House v. Sorsbie.* 3 T. R. 768

- 2 Upon an agreement to pay certain pilotage and port-charges for an entire voyage, though a part only of the cargo is delivered, there shall be no apportionment of the pilotage and port-charges, but the whole shall be paid. *Christy v. Row.* 1 Taunt. 300

TRESPASS.

I. BY WHOM, AND IN WHAT CASES MAINTAINABLE.

II. WHERE NOT.

III. PLEADINGS.

- (a) *Declaration.*
- (b) *General Issue, Plea of, and Evidence on.*
- (c) *Molliet manus imposuit.*
- (d) *Licence.*
- (e) *Justification.*
 - 1. *To Persons.*
 - 2. — *Real Property.*
 - 3. — *Personal Property.*
- (f) *Replication.*
- (g) *Traverse.*
- (h) *New Assignment.*

IV. EVIDENCE.

V. VERDICT AND DAMAGES.

I. BY WHOM AND IN WHAT CASES MAINTAINABLE.

N. B. *Where Trespass or Case is the proper remedy, see ACTION II. 6, ante, 8.*

- 1 To entitle a man to bring trespass, he must, *at the time* when the act was done which constitutes the trespass, either have the *actual possession* in him of the thing which is the object of the trespass, or else he must have a *constructive possession* in respect of the right being actually vested in him, as in the case of an estray or wreck before seizure by the lord. *Smith v. Milles.* 1 T. R. 480
- 2 An executor's right is derived from the will, the probate is only evidence of it; therefore he has a constructive possession from the testator's death. 1 T. R. 480
- 3 An action for false imprisonment has been held to lie against a superior offi-

cer where the imprisonment at first was legal, but was afterwards aggravated with many circumstances of cruelty, and was continued beyond necessary bounds. *Wall v. M'Namara*.

1 T. R. 536

- 4 So also where a captain of a man of war imprisoned the defendant three days for a supposed breach of duty, without hearing him, and then released him without bringing him to a court-martial. *Swinton v. Molloy*.

1 T. R. 537, n.

- 5 So also against a governor for maliciously suspending defendant from a civil office. *Sutherland v. Murray*.

1 T. R. 538, n.

- 6 If A., having been robbed, suspect B. to be guilty, and take him and deliver him into the charge of a constable present; B., if innocent, may maintain trespass against A. *Stonehouse v. Elliott*.

6 T. R. 315

- 7 After an acquittal of the defendant upon an indictment for a felonious assault upon the plaintiff by stabbing him, the plaintiff may maintain trespass to recover damages for the civil injury, if he be not shewn to have coluded in procuring such acquittal. *Crosby v. Leng*.

12 E. R. 409

- 8 Mere prior occupancy of land, however recent, gives a good title to the occupier, whereupon he may recover, as plaintiff, against all the world, except such as can prove an older and better title in themselves. *Catteris v. Cowper*.

4 Taunt. 547

- 9 One in possession of glebe land under a lease void by the statute 13 Eliz. c. 20, by reason of the rector's non-residence, may yet maintain trespass upon his possession against a wrong doer. *Graham v. Peat*.

1 E. R. 244

- 10 One who has contracted with the owner of a close for the purchase of a growing crop of grass there, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *quare clausum fregit* against any person entering the close and taking the grass, even with the assent of the owner. *Crosby v. Wadsworth*.

6 E. R. 602

- 11 Trespass lies for working an estray, although the original taking be admitted to be lawful. *Oxley v. Watts*.

1 T. R. 12

- 12 Trespass lies against a landlord, who on making a distress for rent turned the plaintiff's family out of possession, and kept the premises on which he had impounded the distress. *Ether-ton v. Poppellwell*.

1 E. R. 139

- 13 Where one, who entered under a warrant of distress for rent in arrear, continued in possession of the goods upon the premises for 15 days, during the last four of which he was removing the goods, which were afterwards sold under the distress: Held, that at any rate he was liable in trespass *quare clausum fregit* for continuing on the premises and disturbing the plaintiff in the possession of his house, after the time allowed by law. *Winterbourne v. Morgan*.

11 E. R. 395

- 14 If a sheriff continues in possession after the return day of the writ, that irregularity makes him a trespasser *ab initio*, but will not support the allegation of a new trespass committed by him after the acts which he justifies under the execution. *Aikenhead v. Blades*.

5 Taunt. 198

S. C. 1 Marsh. 17

- 15 Trespass lies against the searchers of leather (appointed by stat. 2 Jac. 1. c. 22.), for seizing leather sufficiently dried, in order to carry it before other officers called triers, though in their judgment it is insufficiently dried. *Warne v. Varley*.

6 T. R. 443

II. WHERE NOT.

- 1 If a magistrate's warrant be shewn by the constable who has the execution of it, to the person charged with an offence, and he thereupon, without compulsion, attend the constable to the magistrate, and after examination be dismissed, it seems this is not such an arrest as will support trespass and false imprisonment. *Arrowsmith v. Le Mesurier*.

2 N. R. 211

- 2 A sheriff or his officer in the exercise of their duty shall not be trespassers by relation, if the first taking were lawful. *Smith v. Milles*.

1 T. R. 480, 1

- 3 Trespass will not lie in this country for entering a house in Canada, because the cause of action is local. *Doulson v. Matthews*.

4 T. R. 503

- 4 A *feme covert*, though deserted by her husband, who had gone abroad, trading as a *feme sole*, cannot main-

tain trespass for breaking and entering *her* dwelling-house. *Boggatt v. Frier.* 11 E. R. 301

7 *A.* having let his house ready furnished to *B.* cannot maintain *trespass* against the sheriff for taking the furniture under an execution against *B.* though notice were given that the goods belonged to *A.*; because trespass is founded on a *tort* done to the possession, which was not in *A.*, at the time. *Ward v. Macauley.* 4 T. R. 489

8 Trespass does not lie against excise officers who enter into a person's house by virtue of a legal warrant to search for smuggled goods, although none such be found therein; but case lies for maliciously obtaining or executing the warrant. *Cooper v. Boot (in error.)* 1 T. R. 535, *n.*

9 If one of a ship's crew does a wilful act of injury to another ship, without any direction from or privity of the master, trespass cannot be maintained against the master, although he was on board at the time. *Bowcher v. Noitrom.* 1 Taunt. 568

10 If a ship be seized as forfeited under the Navigation Act, (12 Car. 2. c. 18.) by a governor of a foreign country belonging to *Great Britain*, the owner cannot maintain trespass against the party seizing, although the latter do not proceed to condemnation; for by the forfeiture the property is divested out of the owner. *Wilkins v. Despard.* 5 T. R. 112

III. PLEADINGS.

(a) *Declaration.*

See Brucegirdle v. Orford, 2 M. & S. 77, *post*, page 687.

1 Trespass for assault and false imprisonment may be laid *diversus diebus et vicibus.* *Burgess v. Freelove.*

2 B. & P. 425

2 But a declaration charging that the defendant on such a day, and on divers other days and times, &c. made an assault on the plaintiff, was held bad on special demurrer; as *one assault* cannot be laid on different days. *English v. Purser.* 6 E. R. 395

(b) *General Issue, Plea of and Evidence on.*

See Smith v. Milles, 1 T. R. 479, *post*, page 685.

1 In trespass the defendant may in all

cases give evidence of title under the general issue. *Dodd v. Kyffin.*

7 T. R. 354

Argent v. Durant. 8 T. R. 403

2 To trespass for breaking and entering, &c. and pulling down and taking away certain buildings, &c. the defendant as to the breaking and entering suffered judgment by default, and pleaded not guilty as to the rest: Held, that such plea was sustained by shewing that the building taken away, which was of wood, was erected by him as tenant of the premises on a foundation of brick, for the purpose of carrying on his trade, and that he still continued in possession of the premises at the time when, &c. though the term was then expired. *Penton v. Robart.* 2 E. R. 88

And see Bennett v. Allcott, infra.

3 A defendant, in trespass, cannot justify under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff. *Welch v. Nash.*

8 E. R. 394

(c) *Molliter manus imposuit.*

1 A plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is no answer to a charge against the defendant for striking the plaintiff repeated blows, and with great force and violence several times knocking her down. *Gregory & Ux. v. Hill.* 8 T. R. 299

(d) *Licence.*

1 Licence to enter the plaintiff's house, if pleaded, is a bar to the former action; but it cannot be given in evidence under the general issue. *Bennett v. Allcott.* 2 T. R. 166

2 To a declaration for several trespasses on the plaintiff's land, on divers days, &c. the plea alleged, that at the said several days, &c. the defendant committed the said several trespasses by licence of the plaintiff: and the latter replied that the defendant of his own wrong, and *without the cause* alleged, committed the said several trespasses, &c.: Held, that evidence of a licence which covered *some*, but *not all*, of the trespasses proved, within the period laid in the declaration, did not sustain

the justification upon the issue taken by the replication. *Barnes v. Hunt*. 11 E. R. 451

(c) Justification.

1. To Persons.

- 1 To trespass for an assault and battery, the defendant may plead that the plaintiff, with force and arms, and with a strong hand endeavoured forcibly to break and enter the plaintiff's close; whereupon the defendant "did then and there resist and oppose such entrance, and did then and there defend his possession as it was lawful for him to do;" and if any damage happened to plaintiff it was in the defence of the possession of the said close. *Weaver v. Bush*. 8 T. R. 78
- 2 A defendant in an action of trespass for false imprisonment, pleading a justification under *mesne process* sued out by him in a cause in which he was plaintiff, may state that the writ issued upon an affidavit to hold to bail, without setting forth the cause of action: for if a party be arrested maliciously and without any cause of action, his remedy is by an action for maliciously holding him to bail. *Belk v. Broadbenk*. 3 T. R. 183
- 3 Trespass for throwing water over the plaintiff's apartment and herself: it is no plea that the plaintiff was engaged in obstructing an antient window of the defendant's house, and that the defendant threw water over her to prevent it. *Simpson v. Morris*. 4 Taunt. 821
- 4 Action of false imprisonment: the defendants pleaded that before the time when, &c. certain persons unknown had forged receipts on certain forged dividend warrants, and received the money purporting to be due in respect thereof in bank-notes of the Bank of *England*, amongst which was a note for 100*l.*, which was afterwards exchanged there for other notes, and amongst them one for 10*l.*, the date and number of which was afterwards altered; that afterwards, and a little before the time when, &c. plaintiff was *suspiciously* possessed of the altered note, and did, in a *suspicious manner*, dispose of the same to one *A. B.*, and after, and before the time when, &c. in a *suspicious manner* departed and left *England* and went to *Scotland*, and there continued; whereupon defendants had reasonable cause to suspect, and did suspect, that plaintiff had forged the said receipts, whereupon defendants gently laid their hands on plaintiff, and carried to and detained him in a gaol in *Scotland*, in order that he might be conveyed, by a warrant to be issued by a justice of the County of *Middlesex*, to be dealt with according to law: Held, that this plea was too general on demurrer; for it is necessary to shew in pleading the causes of suspicion in certainty, in order that the Court may judge of their reasonableness, and using the term suspicious will not aid what is necessary to be averred. *Mure v. Kaye*. 4 Taunt. 34
- 5 *Quare*, Whether a defendant justifying an arrest in *Scotland*, as made on suspicion of a felony committed here, must shew that the law of *Scotland*, as well as the law of *England*, warranted such arrest; or, whether the defendant shewing by his plea an arrest made in *Scotland*, which if made in *England* would be warranted, it does not lie on the plaintiff suing in *England* to reply that by the law of *Scotland* the arrest was not warranted? 4 Taunt. 34
- 6 A plea justifying an arrest by a private person, on suspicion of felony, must shew the circumstances, from which the Court may judge, whether the suspicion were reasonable. 4 Taunt. 34
- 7 If, at a county Court held for the election of knights of the shire, a freeholder interrupt the proceedings, by making a great noise and disturbance, the sheriff may order him to be taken into custody, and carried before a justice of the peace: it is sufficient, in a plea of justification to an action for an assault and false imprisonment, brought against the sheriff under the above circumstances, to state, "that the plaintiff made a great noise and disturbance at the election, and then and there obstructed and molested the defendant in the execution of his duty," without stating that he *thereby* obstructed and molested him. *Spilsbury v. Micklethwaite*. 1 Taunt. 146
- 8 It is a justification to the bailiff against an action of false imprisonment, that he retook a prisoner before the return of the writ on *mesne process*, though

he had voluntarily permitted him to go at large after the first arrest. *Atkinson v. Matteson*. 2 T. R. 172

- 9 A sheriff's officer cannot justify an assault and false imprisonment of J. C. S. by shewing that a latitat issued against J. S. and averring that it issued against J. C. S. by the name of J. S., and that they are one and the same person; there being no averment that J. C. S. was known as well by the name of J. S. *Shadgett v. Clipson*. 8 E. R. 328

-And see *Cole v. Hindson*, 6 T. R. 234, post, page 684.

2. Real Property.

- 1 In trespass for breaking and entering the plaintiff's house, and expelling him therefrom, the breaking and entering are the gist of the action, and the expulsion is merely aggravation; therefore a justification as to the breaking and entering will cover the whole declaration. *Taylor v. Cole*. 3 T. R. 292

- 2 A private person may justify breaking and entering the house of another, and imprisoning his person, in order to prevent him from committing murder on his wife. *Hancock v. Baker*. 2 B. & P. 260

- 3 To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the plaintiff; (the outer door being shut and fastened,) and arresting him there, and taking him to the Tower of London, and imprisoning him there; it is a legal justification and bar to plead that a Parliament was held, which was sitting during the period of the trespasses complained of; that the plaintiff was a member of the House of Commons; and that the House having resolved, "that a certain letter, &c. in *Cobbett's Weekly Register*, was a libellous and scandalous paper, reflecting on the just rights and privileges of the House; and that the plaintiff, who had admitted that the said letter, &c. was printed by his authority, had been thereby guilty of a breach of the privileges of that House;" and having ordered that for his said offence he should be committed to the Tower, and that the Speaker should issue his warrant accordingly: the defendant,

as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest the plaintiff, and commit him to the custody of the Lieutenant of the Tower; and issued another warrant to the Lieutenant of the Tower, to receive and detain the plaintiff in custody during the pleasure of the House; by virtue of which first warrant the Serjeant at Arms went to the messuage of the plaintiff; where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose, and demand made of admission, he, by the assistance of the said soldiers, broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody, under the other warrant, by the Lieutenant of the Tower. *Burdett v. Abbott*. 14 E. R. 1

N. B. *The judgment in this case was affirmed in Cam. Scac. See the report.*

4 Taunt. 401

- 4 The Serjeant at Arms of the House of Commons, being charged with the execution of the Speaker's warrant for arresting and conveying to the Tower the plaintiff, a member of the House, for a breach of privilege, is not guilty of any excess of authority in the execution of such warrant, so as to make him a trespasser *ab initio*, if, upon the refusal of the plaintiff to submit to the arrest, and his shutting the outer door against the serjeant, who had demanded admission for the purpose, and declaring that the warrant was illegal, and that he would only submit to superior force; and a large mob having assembled before the plaintiff's house, and in the streets adjoining, so that the serjeant could not arrest and convey the plaintiff to the Tower, without danger to himself and his ordinary assistants, if at all, by the mere aid of the civil power; the serjeant thereupon called in aid a large military force; and after breaking into the plaintiff's house, placed a competent number of the military therein for the purpose of securing a safe and convenient passage to conduct the plaintiff out of the house into a carriage in waiting, and from thence conducted him with a large military

escort to the Tower, using at the same time every personal courtesy to his prisoner consistent with the due execution of his duty; which, however, will not admit of delay, (breeding hazard,) in the execution of such warrant *Burdett v. Coleman*. 14 E. R. 163

5 A justification, by bail above, for breaking and entering the house of *A.*, the outer door being open, in which the principal resides, in order to seek for him, for the purpose of rendering him, is good, without averring that the principal was in the house at the time. *Sheers v. Brooks*. 2 H. B. 120

6 And in such a plea an averment that the defendants "duly became bail and entered into a recognizance," is sufficient; without stating that the principal was delivered to their custody. 2 H. B. 120

7 In an action for breaking and entering the plaintiff's house, a sheriff's officer cannot justify having entered under a writ of *quare clausum fregit*, and continuing till he received a sum of money as and by way of surety for the plaintiff's appearance under that writ. *Moore v. Beaumont*. 6 T. R. 137

8 *Qu.*—If the officer can attach the defendant's goods or money under such a writ? 7 T. R. 137

9 *Semble*, that a sheriff's officer acting under civil process, may justify breaking the inner doors of the defendant's house, though he be not therein at the time. *Ratcliff v. Burton*. 3 B. & P. 223

10 But in such case he must first demand admittance. 3 B. & P. 223

11 In justifying the use of a crane in a public quay, it is sufficient to say, that "it is a public and open lawful quay," without claiming the right by immemorial usage; for the public have a right to use the cranes erected on public quays, on paying the customary compensation. *Bolt v. Stennett*. 8 T. R. 606

12 In trespass for breaking and entering the plaintiff's close and taking his goods, the defendant may justify under a sufficient legal process if he had it in fact at the time, though he declared then, that he entered for another cause. *Crowther v. Ramsbottom*. 7 T. R. 654

13 A person may justify a trespass in following a fox with hounds over the grounds of another, if he does no

more than is necessary to kill the fox, because they are noisome animals.

Gundry v. Feltham. 1 T. R. 334
(And see *Nicholas v. Badger*, 3 T. R. 259, n.)

14 *A.* has immemorially had for watering his lands, a channel through his own field, in a porous soil, through the banks of which channel, when filled, the water percolates and thence passes through the contiguous soil of *B.* below the surface, without producing visible injury. *B.* builds a new house in his land, below the level of his soil, in the current of the percolating water: *semble*, that *A.* cannot now justify filling his channel, if the percolating water thereby injures the house of *B.* *Per Lawrence, J. in the case of Cooper v. Barber*. 3 Taunt. 91

3. Personal Property.

1 In justifying a trespass under the process of a foreign Court, it seems that the plea should be formed in analogy to similar justifications under the process of our inferior Courts: but at any rate a plea which only states that the Court abroad was governed by foreign laws, that the property seized was within its jurisdiction, that certain legal proceedings were had, according to such foreign laws, against the property in question in such Court, having competent jurisdiction in that behalf, *et taliter processum*, &c. that the defendant was ordered by the said Court, having competent authority in that behalf, to seize the property, is bad; being too general; and not giving the plaintiff notice whether the defendant justified as an officer of the Court, or party to the cause: or of what nature the charge was, or by whom instituted, or what the order of seizure was, whether absolute or *quousque*, &c. *Collett v. Lord Keith*. 2 E. R. 260

2 A plea of justification by an officer (to trespass for taking the goods of *A. B.*) that he took them under a *distringas* against *C. B.* (meaning the said *A. B.*) to compel an appearance, cannot be supported; though it be averred that *A. B.* and *C. B.* are the same person, unless *A. B.* appeared in that action, and omitted to plead the misnomer in abatement: if he did appear in that action, and omitted to plead in abatement, he is concluded by it. *Cole v. Hindson*. 6 T. R. 234

3 In pleading the taking of a term under a *fi. fa.* it is sufficient to state that the party was possessed of a certain interest in the residue of a certain term of years. *Taylor v. Cole.*

3 T. R. 292

4 To an action of trespass, for killing the plaintiff's dog, defendant cannot justify the act, by stating that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close, for the preservation of the hares; such plea not even stating that it was necessary to kill the dog for the preservation of the hares; nor stating that it was the dog of an unqualified person. *Vere v. Lord Cawdor.* 11 E. R. 568

(f) Replication.

See *Dunstan v. Tresider*, 5 T. R. 2, next page; and see *New Assignment*, *ibid.*

1 In trespass for taking and driving the plaintiff's cattle, to which there was a justification, that the defendant was lawfully possessed of a certain close, and that he took the cattle there damage feasant; the plaintiff may specially reply title in another, by whose command he entered, &c. and it does not vitiate the replication that it unnecessarily proceeded farther to give colour to the defendant. *Taylor v. Eastwood.* 1 E. R. 212

2 In trespass for breaking and entering the plaintiff's house, and continuing therein, from, &c. till the commencement of the suit; the defendant, as to the continuing in the house for a part of the time, "to wit, for the space of two days," justifies as sheriff, under a *fi. fa.* issued against the goods of T. K. deceased, in the hands of the plaintiff's wife, as administratrix to be administered: and that having just grounds to believe that there were goods in the plaintiff's house liable to be seized, he entered to search for the same, and staid therein for the space of time in the declaration mentioned, the same being a reasonable time in that behalf; the replication alleges that the two days mentioned in the plea were an unreasonable length of time for the defendant's searching for the goods, and then new assigns: Held, on special demurrer, 1st, that the replication was bad, in having tendered an immaterial issue, and also as being double: 2dly, that the defendant was

justified in entering the plaintiff's house by his belief that the goods were there: though that belief was not justified by the event. *Cook v. Birt.*

1 Marsh. 333

3 If to an action of trespass for pulling down and carrying away a gate, the defendant plead a right of way, and that the gate being wrongfully erected across the same, he took it down and deposited it in a convenient place for the use of the plaintiff, to which the plaintiff replies a subsequent conversion; proof that the defendant put the gate upon his own premises, from whence the plaintiff might have taken it if he had pleased, will not sustain the replication. *Houghton v. Butler.*

4 T. R. 364

4 If an officer under process, justify taking away goods and converting them to his own use, which is unwarrantable, but qualifies it after by saying he took them for the purpose of attaching the plaintiff, according to the exigency of the writ, he throws it on the plaintiff to shew the excess in his replication. *Moore v. Taylor.* 5 Taunt. 69

(g) Traverse.

1 To an action of trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right; it was held that the defendant ought to take issue on the traverse, and not to traverse the prescriptive right claimed by the plaintiff; for that the first traverse was a material one, and would put in issue the true question in dispute between the parties. *Orford (Corp.) v. Richardson.*

4 T. R. 437

2 But on error in the Exchequer Chamber, it was determined, that the plaintiff's traverse of the general right was bad; and that the defendant therefore might well pass it by in the rejoinder, and traverse the prescriptive right of the plaintiff, stated in the replication. *Richardson v. Orford (Corp.)*

In *Cam. Seac.*

2 H. R. 182

3 If to trespass in the common, called A. the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. *Morewood v. Wood.*

4 T. R. 157

4 Plea to trespass that an ancient messuage and 12 acres of land were immemorially parcel, and a customary tenement of the manor of *A.*; and that there is a custom in the manor "that from the time whereof, &c. the customary tenant of the said customary tenement for all the time aforesaid has had right of common, &c." A replication *traversing the custom* does not admit the *antiquity of the messuage*: but the plaintiff may prove that it was built within 20 years, and not upon the scite of an ancient house. *Dunstan v. Tresider.* 5 T. R. 2

5 In trespass *quare clausum fregit*, if the defendant plead soil and freehold in another, by whose command he justifies the trespass, such command may be traversed by the plaintiff. *Chambers v. Donaldson.* 11 E. R. 65
And see *Cary v. Holt*, 11 E. R. 70, n.

(h) *New Assignment.*

1 If the plaintiff mean to insist on an expulsion, as making the defendant a trespasser *ab initio*, he should new assign it. *Taylor v. Cole.* 3 T. R. 292;—
(Affirmed in *Com. Scac.*) 1 H. B. 555

2 Where a declaration for false imprisonment against *A.* and *B.* contained two counts, to both of which the defendants pleaded not guilty, and justified the first under mesne process, *A.* as the plaintiff in that action, and *B.* as the bailiff; and the plaintiff by a new assignment, admitting the arrest to be lawful, replied that *B.*, with the consent of *A.*, voluntarily released him, and that they afterwards imprisoned him for the time mentioned in the first count; the plaintiff having failed in proving the new assignment, by not shewing the consent of *A.*, shall not be permitted to prove the same trespass against *B.* under the other count. *Atkinson v. Mutton.* 2 T. R. 172

3 Where the plaintiff complains of a single act of trespass in each count, each of which is justified by the defendant in his several pleas, the plaintiff cannot in his replication take issue upon the facts of such justification, and also newly assign either the same or different matters; such replication and new assignment being double. *Chewley v. Barnes.* 10 E. R. 73

4 And the objection is sufficiently pointed at, by assigning as special cause of demurrer, that each plea containing a distinct justification to the

single act of trespass alleged in breaking and entering the plaintiff's close in the first count, &c. the plaintiff had by his replications and new assignment attempted to put in issue several distinct acts of trespass in breaking and entering the same close, &c.

10 E. R. 73

5 In trespass for an assault and false imprisonment, the defendant having justified the assault and imprisonment under a writ sued out by him as attorney for *J. M.* against the plaintiff, indorsed for bail for 100*l.*, which was delivered to the sheriff, who, by virtue thereof, arrested and detained the plaintiff; if the plaintiff, (instead of traversing the plea as he ought to do, if the arrest were irregularly made by the sheriff's officer, without a sufficient warrant from the sheriff,) new assign that the trespass complained of was upon another and different occasion than that stated in the plea; and after the supposed arrest therein mentioned; the defendant, on proof of the fact as before stated, is entitled to a verdict. *Oakley v. Davis.* 16 E. R. 82

6 The second count in trespass, (being a general one) does not always avoid the necessity of a new assignment: it is added in order to avoid the locality. But there cannot be a new assignment except where there is a general plea: and if the case be such that, on a special plea, the plaintiff may be driven to a new assignment, he may give the matter in evidence under the second count on not guilty. *Smith v. Milles.* 1 T. R. 479

7 Where the plaintiff had lands abutting on one side of a public highway called *Shepherd's Lane*, (which is *prima facie* evidence that the nearest half of the lane was his soil and freehold), he may declare generally for a trespass in his close called *Shepherd's Lane*; and the defendant must plead soil and freehold in another, in order to drive the plaintiff to new assign the trespass complained of in the part of the lane which was his exclusive property. *Stevens v. Whistler.*

11 E. R. 51

And see *Pratt v. Groome*, 15 E. R. 235

8 Upon a plea of *liberum tenementum*, the defendant has the choice to what parcels he will apply his plea, and if the plaintiff insists upon a trespass in other parcels he must newly assign. *Hawke v. Bacon.* 2 Taunt. 156

IV. EVIDENCE.

- 1 In trespass for an assault and false imprisonment, which the defendant justified as Serjeant at Arms of the House of Commons, acting under the Speaker's warrant for arresting the plaintiff, a member of the House, for a breach of privilege; wherein the issue was upon an alleged excess of authority in the officer executing the warrant by using such military force as was improper, excessive, and unnecessary for the purpose, and breaking into the plaintiff's house after demand of entrance and refusal; evidence of acts of violence by the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his house, appearing to be connected with the same purpose as actuated those about the plaintiff's house, was admitted to shew the danger and difficulty of executing the warrant by force against the plaintiff in his own house, without the aid and protection of the military. *Burdett v. Colman.* 14 E. R. 183
- 2 Plea to trespass that an ancient messuage and 12 acres of land were immemorially parcel and a customary tenement of the manor of A.: and that there is a custom in the manor, "that from time whereof, &c. the customary tenant of the said customary tenement, for all the time aforesaid has had right of common," &c.; replication, traversing the custom: on these pleadings the plaintiff may prove that the messuage was built within 20 years and not upon the scite of an ancient house. *Dunstan v. Tresider.* 5 T. R. 2
- 3 In an action of trespass against the sheriff for a wrongful act of the bailiff, it is not enough, in order to affect the sheriff, to prove that he is a general bailiff and had given a bond of indemnity to the sheriff as such, and to prove a copy of the warrant under which he entered and seized the plaintiff's goods; but the privity between the bailiff and the sheriff must be established in the particular transaction on the best evidence, by proving the original warrant of execution from the sheriff to the bailiff, or at least by proving notice to produce it, so that in case of its not being produced, secondary evidence of its contents may be let in. *Drake v. Sykes, (Bart.)* 7 T. R. 113
- 4 A verdict against one defendant in trespass upon an issue of a justification

of a public right of way, negating such right, is evidence in trespass for breaking and entering the same close against another defendant, who justified under the same right. And the latter cannot shew that such verdict was entered upon that particular plea by mistake of the officer, there having been no evidence given on either side in respect of that issue on the former trial; the record being conclusive as to the fact of such a finding, though not as to the truth of it between other parties. *Read v. Jackson.* 1 E. R. 355

- 5 A sheriff justifying in trespass, under a writ of *feri facias*, need not shew its return: the distinction being in this respect between a justification under mesne process, and under process in execution; at least where in the latter case no ulterior process is necessary to complete the justification. *Cheasley v. Barnes.* 10 E. R. 73

V. VERDICT AND DAMAGES.

- 1 If a declaration in trespass contain two counts, and the defendant plead to one, and suffer judgment by default on another, and on trial of the first the plaintiff only prove one act of trespass which is covered by the second count, he is not entitled to a verdict on the first count. *Lec Comptere v. Hicks.* 7 T. R. 727
- 2 In trespass *quare clausum fregit*, if the defendant plead the general issue, and also a special justification that the *locus in quo* was part of a certain common field, which was then allotted to him by the lect jury of the manor: and the plaintiff reply and new assign to the special plea, after setting out the abutments of the closes trespassed upon, that the closes newly assigned are different from the defendant's allotment; if in fact they be the same, the defendant is entitled to a verdict on the issue upon the new assignment. *Pratt v. Groome.* 15 E. R. 235
- 3 *Qu.*—Whether, in an action of trespass for assaulting and beating the plaintiff's niece, *per quod servitium amisit*, the jury can take into their consideration the injury sustained by the niece herself, in having been deflowered. *Edmonson v. Machell.* 2 T. R. 4
- 4 In trespass for assault and battery and not guilty pleaded, the jury are not at liberty to take into consideration the circumstances of the assault and battery with a view to reduce the verdict

below the amount of the damage actually sustained, if those circumstances could have been pleaded. *Watson v. Christie.* 2 B. & P. 224

And see *Oakley v. Davis*, 16 E. R. 82, ante, page 685.

- 5 Where the defendant justified, in trespass, under a custom which was bad in law, and the issue on it was found for him, the Court set aside the verdict on that issue, and entered a verdict for the plaintiff with nominal damages. *Selby v. Robinson.* 2 T. R. 758
- 6 Under certain circumstances, the Court will stay the proceedings in an action of trespass for seizing goods, on the defendant's restoring the goods, or paying the full value of them, with the costs of the action. *Pickering v. Truste.* 7 T. R. 53

7 Trespass for breaking and entering plaintiff's dwelling-house may be well laid to have been done under a false charge and assertion that plaintiff had stolen property in her house, per quod she was injured in her credit, &c. for that is laid only as matter of aggravation: and the jury may give damages for the trespass as it is aggravated by such false charge. *Bracegirdle v. Orford.* 2 M. & S. 77

8 In trespass for breaking and entering the plaintiff's closes, and sporting there, under circumstances of aggravation, the jury gave 500*l.* damages: the Court of C. P. refused to reduce them, though the plaintiff had sustained no actual pecuniary damage. *Merest v. Harvey.* 1 Marsh. 139

TROVER.

I. FOR WHAT, AND BY AND AGAINST WHOM MAINTAINABLE.

II. WHERE NOT MAINTAINABLE.

III. CONVERSION—WHAT SHALL BE.

IV. EVIDENCE.

I. FOR WHAT, AND BY AND AGAINST WHOM MAINTAINABLE.

See ante, STOPPAGE IN TRANSITU.

VENDOR AND PURCHASER, post.

- 1 Trover must be founded in the property of the plaintiff. *Pyne v. Dor.* 1 T. R. 56
- 2 And he must have the right of possession as well as of property. *Gordon v. Hayper.* 7 T. R. 9
- 3 Possession under a general bailment is a sufficient title for a plaintiff in trover. *Sutton v. Buck.* 2 Taunt. 302
- 4 Trover lies upon a contract to carry and deliver goods, if they continue in the possession of the defendant. *Dewall v. Moron.* 1 Taunt. 391
- 5 Trover lies for an unstamped agreement if it can, upon payment of a penalty and stamp duty, be stamped and rendered available. *Scott v. Jones.* 4 Taunt. 865
- 6 Upon contract for the sale of an estate, the title and abstract to be made at the vendor's expense, the purchaser is entitled to the custody of the abstract until either the purchase is finally rescinded by consent or declared impracticable in a Court of equity; and meanwhile may maintain trover for it if delivered to the vendor for a special

purpose and not returned. When the contract is rescinded the abstract becomes the property of the vendor; if the sale is completed it is the property of the vendee; but it seems that an opinion arisen thereon, is the property of the vendee. *Roberts v. Wyatt.* 2 Taunt. 268

7 *A.* having agreed to purchase of *B.* the remainder of a term, the latter delivered to him the lease in order to get an assignment made out: *A.* then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on because *B.*'s undertenant had removed some fixtures: Held, that *B.* might insist on *A.* accepting the assignment, and after demand and refusal of the lease might maintain trover for it. *Parry v. Frame.* 2 B. & P. 451

8 Where by agreement, dated 1656, between the lord and certain tenants, of customary tenements within a manor, the tenants covenanted that they, their heirs or assigns, would not cut down, sell, or dispose of any wood standing or growing, or hereafter to stand or grow, without the licence of the lord, and the lord covenanted to set out yearly, upon request of the tenants, sufficient for the repairing of their houses, &c. and other necessary uses in and about the said tenements, and that in case any of the tenants, their heirs or assigns, should plant any wood upon the said

- tenements, it should be lawful for them to cut down, use, and dispose of all or any such wood for repairing their houses, &c. or for any other their necessary uses, without disturbance of the lord: Held, that defendant, who was tenant of one of the customary tenements comprised in the above agreement, was not entitled without licence of the lord to cut down and sell wood which had been planted on the tenement by a tenant since the agreement, and that having so done, the lord might maintain trover against her for the wood. *Bluckett, Bart. v. Lowes.* 2 M. & S. 494
- 9 *A.* sells an estate to *B.* who pays part of the purchase-money, and the title-deeds are deposited with *C.* to be delivered up to *B.* when he pays the residue; *A.* gets possession of them again, and pledges them to *D.* for a valuable consideration: Held, that *B.* on tendering the remainder of the purchase-money, is entitled to recover the deeds from *D.* *Hooper v. Ramsbottom.* 1 Marsh. 414
- 10 A plaintiff who is entitled to the temporary possession of a chattel, and delivers it back to the owner for an especial purpose, may after that purpose is satisfied, and during his temporary right, maintain trover for it against the owner. *Roberts v. Wyatt.* 2 Taunt. 268
- 11 Where a person has his election either to bring trover or an action for money had and received, he may maintain the former notwithstanding the bankruptcy of the debtor after the cause of action accrued, and though the bankruptcy would be a bar to the latter. *Parker v. Norton.* 6 T. R. 695
- 12 If *A.* indorse a bill, drawn in his favour and accepted, to *B.* in order that he may raise money for *A.* by negotiating it, and *B.* gives it to *C.*, who puts it into the hands of *D.* without consideration, two years after the bill is due, *A.* may recover back the bill from *D.* in trover. *Goggerley v. Cuthbert.* 2 N. R. 170
- 13 Trover lies by the assignees of a bankrupt against a sheriff, for taking the goods of the bankrupt in execution after an act of bankruptcy, though before the issuing of the commission, where he sells them after the issuing of the commission, &c. and has notice from the provisional assignee not to sell. *Smith v. Milles.* 1 T. R. 475
- 14 An uncertificated bankrupt may maintain trover for goods acquired by him since his bankruptcy, as against all the world but his assignees. *Webb v. Fox.* 7 T. R. 391
- 15 Where defendant came into possession of goods wrongfully, no tender is necessary for the amount of freight, &c. paid by him to enable the plaintiff to maintain his action of trover. *Lempriere v. Pasley.* 2 T. R. 485
- 16 Where the owner of goods on board a vessel directed the captain not to land them on the wharf, against which the vessel was moored, which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger's having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf: Held, that the owner upon demand and denial might maintain trover against the captain, unless the latter could establish the wharfinger's right. *Syeds v. Hay.* 4 T. R. 260
- 17 *A.* of *Liverpool* wishing to draw upon the banking-house of *B.* in *London* to a large amount, agreed among other securities given, to consign goods to a mercantile house in *London*, consisting of the same partners as the banking-house, though under the firm of *B.* and *C.*; accordingly he remitted the invoice of a cargo and the bill of lading indorsed in blank to *B.* and *C.*, but the cargo was prevented from leaving *Liverpool* by an embargo; *A.* then became bankrupt, being considerably indebted to *B.*, and the cargo was remitted to *A.*'s assignees by the captain: Held, that *B.* and *C.* might maintain trover for it against the captain. *Haille v. Smith* (in *Cam. Seac.*) 1 B. & P. 563
- 18 Possession of a ship under a transfer, void for non-compliance with the Register Acts, is a sufficient title in trover against a stranger, for parts of the ship being wrecked. *Sutton v. Buck.* 2 Taunt. 302
- 19 The plaintiff bought and paid for a ship stranded on the *English* coast, but the transfer was not regular; he tried to save her, but she went to pieces; the defendant possessed himself of parts of the wreck which drifted on his farm: Held, that the plaintiff's possession enabled him to recover for them in trover. 2 Taunt. 302
- 20 A calico-printer is entitled, after

having discharged his head colourman, to the book in which that servant has entered the processes for mixing colours during his service, although many of the processes were the invention of the head colourman himself.

Makepeace v. Jackson. 4 Taunt. 779

20 If goods be obtained from *A.* by fraud, and pawned to *B.* without notice, and *A.* prosecute the offender to conviction, and get possession of his goods, *B.* may maintain trover for them; for this is distinguishable from the case of felony, where the owner's right of restitution is given by positive statute. See *stat. 21 H. 8. c. 11*

Parker v. Patrick. 5 T. R. 175

But see *Horwood v. Smith.* 2 T. R. 750

II. WHERE NOT MAINTAINABLE.

1 An action of trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and was severed from the estate. *Pyne v. Dor.* 1 T. R. 55

2 Certain lands, together with the woods, &c. were conveyed under a marriage settlement to *A.* and *B.* their heirs and assigns, during the life of *S. W.* in trust, to pay the rents and profits, as the said *S. W.* should appoint, during her life; and after her decease, to the use of such child or children of the marriage, and in such shares as the said *S. W.* should appoint; and for want of appointment to the use of the children equally, &c. and the heirs of their bodies, with cross remainders; and in default of such issue, to the use of the right heirs of *S. W.* for ever: Held, that *A.* and *B.* could not maintain trover against the defendant, a stranger, for certain trees which had been cut down by the order of the husband of *S. W.*, and carried away by the defendant. *Blaker v. Ancombe.*

1 N. R. 25

3 Where a purchaser of a small part of an estate takes a covenant from the vendor to produce the title-deeds whenever it shall be necessary, and the deeds afterwards come into the vendee's possession on his taking a mortgage of the other part of the estate, and he then assigns a mortgage to a third person, not mentioning the deeds, such third person cannot maintain trover against him for the deeds. *Yea v. Field.*

2 T. R. 708

4 Trover does not lie by an incoming tenant to recover the value of the away-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year after the expiration of an old lease, which reserved to him the right after the end of the term at *Lady-day* "to fence in and preserve all such hard corn as should be sown on the premises the winter seedness preceding, so as the same exceeded not 29 acres, and was summer fallowed and well manured, &c. and at harvest to reap and carry away the same:" for neither is trover the proper action to try a question as to the right to the land, nor does the proper remedy for any mismanagement of the land during the former term appertain to the incoming tenant, but to the landlord: And, however the incoming tenant might maintain an action against the off-going tenant for a breach of the custom of husbandry in the place, in not leaving one-third of the away-going crop of wheat sown upon a clover-brush; yet the custom of the country could have no place where the off-going tenant held under a lease expressly making a different provision in respect of the away-going crop, or where he continued to hold over after the expiration of such a lease without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms. *Doraston v. Green.* 16 E. R. 71

5 Where furniture, which had been leased with a house, was wrongfully taken in execution by the sheriff, it was ruled that the landlord could not maintain trover pending the lease. *Gordon v. Harper.*

7 T. R. 9

6 One tenant in common of a chattel cannot maintain trover for it against his companion, unless the latter have so disposed of it, as to render it impossible that the plaintiff should ever take and use it. *Fennings v. Grenville.*

1 Taunt. 241

7 If a person contracts with another for a chattel which is not in existence at the time of the contract, though he pays him the whole value in advance, and the other proceeds to execute the order, the buyer acquires no property in the chattel till it is finished and delivered to him; and therefore trover cannot be maintained for it. *Mucklow v. Mungies.*

1 Taunt. 318

- 8 If a thing (*e. g.* a lease) be deposited by one, with the authority of another, and received by the bailee, on account of both, one alone cannot demand it of the bailee without the authority of the other, so as to maintain trover on the bailee's refusal to deliver it. *May v. Harvey.* 13 E. R. 197
- 9 Trover will not lie for goods *irregularly sold* under a distress; the statute 11 G. 2. c. 19. s. 19. having declared that the party selling should not be deemed a trespasser *ab initio*; and having given an action on the case to the party grieved by such sale. *Wallace v. King.* 1 H. B. 13
- 10 But, if a party pay money in order to redeem his goods from a wrongful distress for rent, he may maintain trover against the wrong-doer. *Shipwick v. Blanchard.* 6 T. R. 298
- 11 A member of an amicable society, intrusted with a box containing the fund, and bound by bond to keep it safely, cannot maintain trover against another member and a third person, who take it from him. *Holliday v. Cansell.* 1 T. R. 658
- 12 Where the consignee of goods, (to whom the bill of lading was indorsed in blank,) assigned it over as a security for acceptances given by the assignee not amounting to the value of the goods, and afterwards they became partners in the goods by an agreement between them that the profits and loss should be equally divided, but the first was to stand guarantie to the other for solidity of the factors by whom the goods were to be sold; and it appeared by the agreement that the consignor had not been paid for the goods; the assignee of the bill of lading cannot maintain trover against the consignor, if he stop the goods *in transitu* on the insolvency of the consignee. *Salomons v. Nissen.* 2 T. R. 674
- 13 *A.* entrusted *B.* with goods to sell in *India*, agreeing to take back from *B.* what he should not be able to sell, and allowing him what he should obtain beyond a certain price, with liberty to sell them for what he could get, if he could not obtain that price; *B.* not being able to sell the goods in *India* himself, left them with an agent to be disposed of by him, directing the agent to remit the money to himself in *England*: Held, that *A.* could not maintain trover against *B.* for the goods. *Bromley v. Corwell.* 2 B. & P. 438
- 14 Where goods were pawned to a broker for a certain sum, and usurious interest agreed to be paid thereupon, the pawner of the goods cannot maintain an action of trover for them in order to get rid of the usurious contract, without first tendering the money which had been actually advanced, and legal interest. *Fitzroy v. Gwillim.* 1 T. R. 153
- 15 The owner of goods stolen, prosecuting the felon to conviction, cannot recover the value of them in trover from the person who purchased them in market-overt, and sold them again before conviction, notwithstanding the owner gave him notice of the robbery while they were in his possession. *Horwood v. Smith.* 2 T. R. 750
- 16 For, in order to maintain trover, the plaintiff must prove that the goods were his property, and that *while they were so* they came into the defendant's possession, who converted them to his use. 2 T. R. 756
- 17 But he has a right to restitution of the goods in specie. And perhaps would be entitled to recover damages in trover against any person who is fixed with the goods after conviction, and refuses to deliver them. 2 T. R. 755
- And see *Parker v. Patrick.* 5 T. R. 175 last page.
- ### III. CONVERSION—WHAT SHALL BE.
- 1 The conversion of a chattel by a tenant in common to its general and profitable application, though it change the form of the substance, is not such a destruction of the subject-matter, as to prevent the plaintiff from taking and using it in its altered state: therefore, it creates no right of action. *Fennings v. Grenville.* 1 Taunt. 241
- 2 *Semble*, that a sale of the whole of a ship by one who is only a part-owner, in exclusion of the right of another who is tenant in common with him, is not equivalent to the *destruction* of the subject-matter mediately or immediately, so as to enable his co-tenant to maintain trover against him, for it. *Heath v. Hubbard.* 4 E. R. 110
- 3 But if the subject-matter be actually destroyed by one tenant in common, trover will lie against him by his co-

tenant: And where it appeared that one tenant in common forcibly took a ship out of another's possession, and secreted it from him, so that he knew not where it was carried, and changed the name of it, and it afterwards got into a third person's hands, who sent it on a foreign voyage where it was lost, it was left to the jury, by *King, C. J.* whether under the circumstances, the destruction was not by the defendant's (the tenant in common's) means: and the jury finding in the affirmative, the Court, on motion for a new trial, approved of the Chief Justice's direction, and refused to set aside the verdict. *Barnardiston v. Chapman.*

4 E. R. 121, n.

4 A sale of a ship (which was afterwards lost at sea), made by the defendant, who claimed under a defective conveyance from a trader before his bankruptcy, is a sufficient conversion to enable the assignees of the bankrupt to maintain trover, without shewing a demand and refusal. *Bloxam v. Hubbard.*

5 E. R. 407

5 *J. F.* advised the plaintiffs that he had remitted to them 1969 dollars, consigned to *Laycock*. *Laycock* received 4700 dollars, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of *England*, where they were deposited for safe custody, on a sale of them to the Bank: Held, 1st, That the letter was a sufficient appropriation of the dollars to the plaintiffs. 2dly, That the plaintiffs and defendant were not joint-tenants or tenants in common of the dollars. 3dly, That although no specific dollars had been severed for the plaintiff, yet, as the defendant had converted all the plaintiff's and all his own, trover would lie for the plaintiff's share. 4thly, That although the dollars remained in the same unaltered custody, yet the delivery, by the defendant, of the bill of

lading, which was the symbol of them, and the receipt of the value, was a conversion. *Jackson v. Anderson.*

4 Taunt. 24

6 A banker after notice, discounts a bill of exchange drawn on a customer, and by the acceptance, made payable at his bank, after notice that it has been lost by the holder, and afterwards debits his customer with the amount of the bill, writes a discharge on it, and delivers it up to the customer as the banker's voucher of his account: Held, that the banker is thereby guilty of a conversion, and the loser of the bill may recover in trover without a previous demand of the bill. *Lovell v. Martin.*

4 Taunt. 799

IV. EVIDENCE.

See *Nix v. Cutting*, 4 Taunt. 18. *post*, tit. WITNESS.

1 A trader on the eve of bankruptcy makes a collusive sale of his goods to *A.*: the assignees cannot maintain trover for them against *A.* without proving a demand and refusal. *Nixon v. Jenkins.*

2 H. B. 135

2 In trover against several defendants, all cannot be found guilty on the same count, without proof of a joint conversion by all; therefore where plaintiff brought trover for goods against *A.* and *B.* bankrupts, and *C.* and *D.* their assignees, and proved that the bankrupts, before the bankruptcy, received and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods, and refused to deliver them to the plaintiff on demand, and the jury found all the defendants guilty, there being only one count in the declaration: Held, that the evidence did not warrant such finding. *Nicoll v. Glennie.*

1 M. & S. 588

TRUST AND TRUSTEES.

See *Nunn v. Wilsmore*, 8 T. R. 521, ante, page 246.

Wykham v. Wykham, 11 E. R. 458, ante, page 562.

- 1 Possession of the *cestui que trust*, is not adverse to the title of trustees. *Smith d. Dennison v. King*.

16 E. R. 287

- 2 A clause in a marriage settlement, "that the trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or persons so to be accountable should actually receive," does not bind the trustees generally as a *covenant*, but is a clause of indemnity to take away that responsibility which each would otherwise be subject to for the acts of the others; and only leaves each of them accountable for what he actually receives, as for a single contract debt. *Bartlett v. Hodgson*.

1 T. R. 42

- 3 If a person jointly interested with an infant in a lease, obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it to himself only. *Ex-parte Grace*.

1 B. & P. 376

- 4 *A.* tenant for life, remainder to his son *B.* in tail, *reversion to himself in fee*, agreed with *B.* in order to relieve themselves from their debts, to bar the entail: and in 1773 they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust to sell the *N.* estates and pay the debts, &c. and as to the *L.* estate (the only one in question), in trust that the trustees should, *with the consent of A.* and his wife, and of *B.* or the survivor, *sell the inheritance* in fee, and apply the purchase-money on the trusts after-mentioned: with a *proviso* that the *rents, issues, and profits*, should, *until sale of the inheritance*, be received by such person and for such uses as they would have been if the deed had not been made and no fines

levied: And as to the money arising from the sale of the *L.* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee, to be settled, subject to certain charges, on *A.* for life, *remainder to B. in fee*: Held,

1st. That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.* &c. and that, notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the *rents, &c.* as contradistinguished from the legal estate of the *inheritance*, which was left in the trustees. And that this was not a mere *power of sale* in the trustees tacked to the legal estate of the owner.

2dly, That though *A.* who survived his wife and *B.* continued in possession of the *L.* estate down to 1705, when he sold it, and died some time after; and though, after the sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A.*'s life-time, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust: For a court of law will never presume a reconveyance by trustees, where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.* the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase-money of the *L.* estate: Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has

declared in favour of the equitable title of the party for whom such presumption is required: Nor was there any evidence to support a presump-

tion that *A.* had purchased a new estate of the trustees.

Keane d. Byron (Lord) v. Deardon.
8 E. R. 248

TURNPIKE.

See HIGHWAYS, *ante*, page 358.

TOLLS, *ante*, page 677.

- 1 The trustees of a public Turnpike Act who were empowered to erect toll-houses and mortgage the *tolls*, and it was declared that there should be no priority among the creditors, were held to have no power to mortgage the *toll-houses* or *gates*. *Fairtitle v. Gilbert.* 2 T. R. 169
- 2 Under a Turnpike Act, the trustees had power to turn roads through private grounds, making satisfaction to the owners; and if they could not agree, they were enabled, on giving notice to the owners, to summon a jury to ascertain the damage, and to order such sum so ascertained, to be paid to the owners: an inquisition of the jury and an order of the trustees under the above Act were quashed, because it did not appear on the face of the proceedings that *any notice* had been given to the owners of the land. *Rex v. Bagshaw.* 7 T. R. 363
- 3 If trustees under a Turnpike Act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs unless there be a special provision in the Act to that effect. *Rex v. The Commissioners of the Llandillo District, &c.* 2 T. R. 232
- 4 What is meant by a road is the surface over which the subjects have a right to pass, and not the fences on each side. 2 T. R. 234
- 5 The owners of the land are bound to repair the fences on each side, unless otherwise provided by the Act. 2 T. R. 232
- 6 The General Turnpike Act 13 G. 3. c. 84. s. 13. having given a penalty, to be recovered by information before justices of the peace, or by action, for using a greater number of horses than is thereby allowed for the draft of

waggons, &c. on the road; and the 19th section having provided, that if it appear on oath to the satisfaction of any justice of the peace or court of justice, that the carriage could not be drawn with the ordinary number of horses, by reason of deep snow or ice, then such justice of peace or court may *stop all proceedings* before them respectively: Held, that such application for a stay of proceedings must be made to the Court above in which the action was brought, and that the defence is not available at *nisi prius*. *Robinson v. Pocock.*

11 E. R. 484

- 7 Under the *stat.* 13 G. 3. c. 84. s. 33. the Court of King's Bench may apportion the fine for non-repair of a road between the parish and the trustees of a turnpike, though the indictment were originally preferred at the assizes, and afterwards removed thither by *certiorari*. *Rex v. Upper Papworth (Inhab.)* 2 E. R. 413

- 8 The 13 G. 3. c. 84. (General Turnpike Act), which prohibits persons from gaining a settlement by renting the tolls of turnpike roads, does not extend to the tolls of a bridge, which bridge does not appear to be part of the turnpike road. *Rex v. Bubwith (Inhab.)* 1 M. & S. 514

- 9 By a Turnpike Act, trustees are appointed with authority to cut drains in lands adjoining the roads, making reasonable satisfaction to the owner thereof: By the same Act it is provided that all actions, for any thing done in pursuance of the Act, shall be brought within six months after the doing the thing complained of. A drain is cut, by an order signed by a competent number of trustees, and according to the plan of the surveyor, in land adjoining the plaintiff's, by which the latter is overflowed. An action is brought against one of the trustees only, more than six months after the act done,

and the first injury sustained, but within six months after a subsequent injury accrued: Held, 1st, that the action, if it could have been supported at all, was well brought against the defendant only: but 2dly, that the trustees, having acted to the best of their skill, and with the best advice, were not answerable for that which had

accrued. *Semble*, that the limitation of the action is to be reckoned, not from the time of doing the act, but of sustaining the injury.—2u. Whether this be confined to the first injury sustained, or whether an action might not be brought within six months after any subsequent injury? *Sutton v. Clarke*. 1 Marsh. 429

USE AND OCCUPATION.

See SIMONY, *ante*, page 645.

And see *Kirtland v. Pounsett*. 1 Taunt. 570, *post*, page 700.

- 1 Debt for use and occupation is not a local action, nor does it depend on the *stat.* 11 G. 2. c. 19. *Egler v. Marsden*. 5 Taunt. 25
- 2 Debt will lie for use and occupation generally, without setting forth the particulars of the demise. *Wilkins v. Wingate*. 6 T. R. 62
- 3 Or stating the place where the premises lie. *King v. Fraser*. 6 E. R. 348
- 4 An action for use and occupation may be brought in the County Court of *Middlesex*. *Parker v. Vaughan*. 2 B. & P. 29
- 5 An action for use and occupation may be maintained by a grantee of an annuity, after a recovery in ejectment against a tenant who was in possession under a demise from year to year, for all rent in his hands at the time of notice by the grantee, and down to the day of the demise in the ejectment, but not afterwards. *Birch v. Wright*. 1 T. R. 378
- 6 An action for use and occupation is maintainable without attornment upon the *stat.* 4 and 5 Ann. c. 16. ss. 9. and 10. by the trustees of one whose title the tenant (defendant) had notice of before he paid over his rent to his original landlord; though the tenant had no notice of the legal title being in the plaintiffs on the record. *Lumley v. Hodgson*. 16 E. R. 99
- 7 If A. agree to let lands to B. who permits C. to occupy them, A. may recover the rent in an action against B. for use and occupation. *Bull v. Sibbs*. 8 T. R. 327
- 8 If a purchaser takes possession of premises under a contract of sale, which,

on account of a defect in the vendor's title, fails to be completed; the vendor cannot afterwards recover rent for the period of the purchaser's possession upon an implied contract for use and occupation. *Kirtland v. Pounsett*. 2 Taunt. 145

- 9 *Assumpsit* for use and occupation lies against a lessee from year to year, upon his agreement to pay rent during the tenancy; notwithstanding his bankruptcy and the occupation of the premises by his assignees during part of the time for which the rent accrued. *Boot v. Wilson*. 8 E. R. 311
- 10 The landlord of a house demised under a written agreement, may recover against his tenant in an action for use and occupation, the rent accruing after the premises are burnt down, and no longer inhabited by the tenant. *Baker v. Holpzaftl*. 4 Taunt. 45
- 11 A tenant from year to year of a house at a yearly rent becomes a bankrupt in the middle of the year, and his assignees enter and keep possession for the remainder of the year: The lessor cannot maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their *special instance and request* for the bankrupt to occupy, during the time that elapsed before his bankruptcy. *Naish v. Tatlock*. 2 H. B. 319
- 12 In an action for use and occupation of a lodging, it being shewn that the lodging was let with the knowledge of plaintiff for the purpose of prostitution, the action was held not to be maintainable. *Crisp v. Churchill*. *Girarday v. Richardson*. 1 B. & P. 340, 1, *notis*.

USURY.

I. HOW CONSTITUTED, AND WHAT CONTRACTS ARE USURIOUS.

II. WHAT NOT.

III. SECURITIES—WHERE VOID.

IV. PLEADINGS.

V. EVIDENCE.

I. HOW CONSTITUTED, AND WHAT CONTRACTS ARE USURIOUS.

- 1 To constitute usury there must either be a direct loan, and a taking of more than legal interest for the forbearance of payment; or there must be some device for the purpose of concealing or evading the appearance of a loan and forbearance, when in truth it was such. *Barclay v. Walmesley*.

4 E. R. 57

And see *Mathews v. Griffiths*.

1 B. & P. 153, n.

- 2 Before a party can entitle himself by a civil action to relief from an usurious contract, he must tender all the money really advanced. *Fitzroy v. Gwillim*.

1 T. R. 153

- 3 The defendant being indebted to the plaintiffs, his bankers, in nearly 30,000*l.*, about 21,000*l.* of which was secured by bonds, (a considerable part of which was advanced by them when stocks were below 50*l.*) agreed with them that they should place 25,000*l.* to his credit in account; for which he was to purchase 50,000*l.* stock (then at 51½) in their names, and account to them for the dividends upon such stock as from the last dividend day: after which agreement, the plaintiffs, acting upon the basis of it, (though the defendant never purchased the stock so agreed upon) entered in their books the sum of 25,000*l.* to the credit of the defendant, and continued to honour his drafts from time to time; crediting him also with other sums actually paid by him; and wrote off the amount of his bonds to his credit, and delivered them up to him: Held, that this agreement to repay the new credit of 25,000*l.* by the purchase of stock as at 50*l.*, when in fact it was

more at the time of the agreement made, though it had been less when a considerable part of the money was actually advanced upon his general credit, was usurious and void: but that nevertheless the sum of 25,000*l.* credited under that agreement by the plaintiffs to the defendant in his banking account, was to be reckoned against them upon balancing the account of debtor and creditor between them. *Boldero v. Jackson*. 11 E. R. 612

- 4 An agreement on discounting a bill of exchange, that the plaintiff should take in part-payment another bill which had time to run as cash, although the full discount was taken, is usurious.

Parr v. Eliason.

1 E. R. 92

- 5 A. lent B. 500*l.* and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed B. gave A. 50*l.* and paid interest at the rate of 5 per cent. on the 500*l.* for five years, at the end of which time an action was brought against A. for usury: Held, that the action was not barred by lapse of time, for that the loan was substantially for no more than 450*l.*, and consequently the interest at the rate of 5 per cent. on the 500*l.* received within the last year was usurious. *Scurry v. Freeman*.

2 B. & P. 381

- 6 The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5000*l.* at three years, which the grantee discounted in the following manner: he took 4083*l.* 6*s.* 8*d.* as the amount of the purchase-money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 750*l.* as interest for three years upon 5000*l.* Held, that the transaction was usurious. *Marsh v. Martindale*.

3 B. & P. 154

- 7 The statute 14 G. 3. c. 79. relates solely to securities on land in Ireland and the colonies; and therefore, where A. contracted with B. for the sale of an estate in the West-Indies, and it was agreed that part of the purchase-money should remain secured by the bond of B. and C., and that bond was afterwards cancelled, and another ex-

executed in England by B. and D. reserving 6*l.* *per cent.* interest (in the same manner as the former one); such contract was held to be usurious. *Dewar v. Span.* 3 T. R. 425

- 8 Upon a contract to forbear 600*l.* for a year, reserving interest at the rate of 5*l.* *per cent.* for which a premium was paid in the first instance, the usury is complete upon the lender's receiving any part of the growing interest within the year. *Wade v. Wilson.* 1 E. R. 195

II. WHAT NOT.

- 1 A memorandum indorsed on a bond, which was conditioned for the payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5*l.* *per cent.* "that at the end of each year the year's interest due was to be added to the principal, and then the 20*l.* received in the course of the year was to be deducted, and the balance to remain as principal," was held not to be usurious. *Le Grange v. Hamilton.* 4 T. R. 613

Affirmed in *Cam. Scac.* 2 H. B. 144

- 2 The loan of money produced by the sale of stock, on an agreement that the borrower shall replace this stock on a certain day, or *repay the money* on a subsequent day, with such interest in the mean time as the stock itself would have produced, is not usurious, though the interest exceed 5*l.* *per cent.*, unless the transaction be colourable, and mere device to obtain more than legal interest. *Tate v. Wellings.* 3 T. R. 531

And see *Sanders v. Kentish.* 8 T. R. 162

- 3 The defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.* for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of Nov. 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th of Nov. 1804, takes a bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l.* 16*s.* 7*d.* stock, with such interest as the same would have produced, as such stock, in the mean time: Held, that this was neither usurious, nor within the prohibition

of the Stock-jobbing Act, 7 G. 2. c. 8. *Maddock v. Rumball.* 8 E. R. 304

- 4 An indenture, assigning to the plaintiff a contract for the purchase of timber, upon certain trusts for securing to themselves out of the proceeds the repayment of the purchase-money advanced by them, and also of a certain balance before due to them, together with interest thereon at 5*l.* *per cent.* up to the time of payment, and also the further sum of 200*l.* as and for a reasonable profit and compensation for the trouble they would be at in the business, and also all costs, charges, damages, and expenses which they might be put to on account of the premises, is not usurious upon the face of it; for the 200*l.* allowed for trouble, is not necessarily to be intended as a colourable reservation of further interest beyond the legal interest, but as a compensation for trouble not comprehended within the words, costs, charges, damages, and expenses; neither is it so excessive as to be intended as usurious on that account. *Palmer v. Baker.* 1 M. & S. 56

- 5 Where it appeared to be the usage of country bankers in discounting bills of exchange to receive, over and above the common interest of 5*l.* *per cent.* for the time the bills had to run, the further sum of 5*s.* *per cent.* on the gross sum for commission; such charge was held to be legal. *Winch v. Fenn.* 2 T. R. 52, *n.*

- 6 A. being a banker in the country, discounts bills of exchange at four months for B. and takes the whole interest for the time they have to run: B. on being asked how he will have the money, directs part to be carried to his account, part to be paid in cash, and part by bills in London, some at three, some at seven, and some at thirty days' sight; and held not to be an usurious transaction, since the surplus of interest taken by A. might be referable to the expenses of rent-charge. *Hammett v. Yea, Bart.* 1 B. & P. 144

Secus, if such mode of remittance had been made a term of the loan. 1 B. & P. 144

- 7 The acceptor of a bill of exchange, dated 4th of July, and due 7th of September, taking a premium of 6*d.* in the pound from the indorsee and holder for pay-

ment of the bill on the 20th of August before it was due, is not guilty of usury; there being no loan or forbearance. *Barclay v. Walsley*. 4 E. R. 55

- 8 If a promissory note be given for repayment of a sum lent with usurious interest, and the note when due be taken up and another note substituted for it, the offence of usury is not thereby committed, nor is the penalty incurred, until the latter note be paid. *Maddock v. Hammett*. 7 T. R. 184

III. SECURITIES—WHERE VOID.

- 1 If the borrower of money give a bond for the principal and interest at five per cent. and covenant at the same time also to pay to the lender a certain portion of the profits of a trade carried on by him in partnership with another person, this is an usurious contract, and the obligee cannot recover on the bond; for though he was to gain by the profits, he was not to stand to the losses of the trade. *Morse v. Wilson*. 4 T. R. 353

- 2 A bill of exchange payable to *A.* or order, which was legal in its inception, was by him indorsed to *B.* for an usurious consideration, who passed it to a third person for a valuable consideration, without notice of the usury, by whom it was paid to *B.*'s assignees after his bankruptcy, in satisfaction of a debt owing to the bankrupt's estate: Held, that the indorsement of *A.* to *B.* on an usurious account, did not avoid the bill in the hands of an innocent holder, by virtue of the statute of usury, and that *B.*'s assignees, being clothed with the rights of such innocent indorsee, were entitled to hold the bill against *A.* though as between *A.* and *B.* the security was void. *Parr v. Eliason*. 1 E. R. 92

- 3 A broker agrees with the defendants to get their bills discounted, and that he shall retain out of the money so raised, the exorbitant brokerage of 10s. per cent. but the broker was not to advance the money himself, nor was his name on the bills: Held, that a bill accepted by the defendant, and negotiated by the broker upon these terms, could not be avoided in the hands of an innocent indorsee, as for an usurious consideration within the stat. 12 Anne, c. 16. *Dagnall v. Wigley*. 11 E. R. 43

- 4 *A.* being indebted to *B.* for different usurious loans, applies to *B.* for a further advance, which *B.* agrees to make, at the legal rate of interest, provided *A.*'s father will give security for it, and also for part of the previous debt. *A.*'s father consents and accepts three bills, the two first of which exactly cover the amount of the legal debt. The first is paid when due; in an action on the second: Held, that the acceptances, having been given partly as a security for an illegal debt, were all tainted with the illegality, and were therefore void. *Harrison v. Hannel*. 1 Marsh. 349

- 5 If *A.* for an usurious consideration give his promissory note to *B.*, who transfers it to *C.* for a valuable consideration, without notice of the usury, and afterwards *A.* gives a bond to *C.* for the amount, the bond is valid. *Cuthbert v. Haley*. 8 T. R. 390

- 6 But if *A.* had given *B.* his bond in consideration of such note, the bond would have been void. 8 T. R. 390

- 7 A *bonâ fide* debt is not destroyed by being mingled with an usurious contract relating to it. *Gray v. Fowler*. 1 H. B. 462

- 8 After usurious securities given for a loan have been destroyed by mutual consent, a promise by the borrower to repay the principal and legal interest is binding. *Burnes v. Hedley*. 2 Taunt. 184

- 9 The Court of C. P. set aside a warrant of attorney and judgment given to secure a loan which was sworn to be usurious, in order to bring the question of usury before a jury; but refused to order a bill of exchange to be delivered up which had been given to procure the defendant's release out of execution on the judgment. *Edmonson v. Popkin*. 1 B. & P. 270

- 10 Where usurious securities have been acted on, and the money partly paid by the borrower, the Court of C. P. will not set aside a judgment and execution but upon the terms of the defendant repaying the principal and legal interest. *Hindle v. O'Brien*. 1 Taunt. 413

IV. PLEADINGS.

N. B. As to laying the *Venue*, see *Scurry v. Freeman*, 2 B. & P. 381, post, tit. *VENUE*.

And see AMENDMENT, ante, pages 43, 4.

- 1 A general plea of usury held ill on special demurrer. *Hill v. Montagu.* 2 M. & S. 377
- 2 If *A.* be indebted to *B.*, and *B.* to *C.* and *C.* agree for an usurious consideration to accept *A.* for his debtor instead of *B.*; this may be laid to be for an usurious loan of so much from *C.* to *A.* *Wade v. Wilson.* 1 E. R. 195
- 3 The contract may be laid as for a forbearance to *A.* alone, who was the real debtor, although *B.* had joined with him in the security given to the lender. 1 E. R. 195
- 4 If more than legal interest be taken for forbearance on a note given to *A.* by *B.* as a collateral security for money lent to *C.*, such money is well described to be forbearance of money lent by the defendant to *B.* *Manners v. Postan.* 3 B. & P. 343
- 5 If a person discounts a bill, and pays for it the amount of the contents, deducting only legal interest, and on a subsequent day receives usurious interest under pretence of becoming guarantee for the acceptor, it is competent to declare on the sum first paid as the sum forborne: And it may be laid as forborne to the person who receives the money and indorses the bill to him, even supposing that that person, if sued on the bill, might recover over against the guarantee. *Lee v. Cass.* 1 Taunt. 511
- 6 The defendants discounted for *B.* a bill post-dated 16 days, and gave in lieu thereof, not money, but a bill

drawn by *B.* and accepted by *A.* for *B.*'s accommodation, which the defendants then held, having before discounted it for *B.*, and which then had seven days to run. Within those seven days *B.* gave up that bill to *A.* who destroyed it. The defendants having allowed no rebate on this bill, held, that in an action for usury this might be averred as a loan of the amount of the bill discounted, lent on the day when the bill given in lieu could have been enforced by the defendants. *Hutchinson v. Piper.*

4 Taunt. 810

V. EVIDENCE.

See post, tit. WITNESS.

- 1 The borrower of money, having paid it, may prove the whole case. *Smith v. Prager.* 7 T. R. 60
- 2 In an action on the statute of usury in discounting a bill of exchange, it was proved that one *B.* demanded payment of the acceptor, and commenced an action against him, and afterwards received the amount of the bill, and the costs of those proceedings on producing the bill, and gave a receipt as attorney for the present defendants; this without further evidence of *B.* being the agent of the defendant, and without the production of the proceedings against the acceptor, was held good *prima facie* evidence to be left to a jury of the defendant having received the usurious interest. *Owen v. Barrow.* 1 N. R. 101

VARIANCE.

- I. BETWEEN PLEADINGS AND PROCESS.
- II. ——— PLEADINGS AND EVIDENCE.
 - (a) *In Place.*
 - (b) — *Circumstances.*
- III. ——— PLEADINGS AND RECORD.
- IV. IN INDICTMENTS.

I. BETWEEN PLEADINGS AND PROCESS.

N. B. *See PRACTICE, ante, III. (a) 571. II. (b) 578.*

- 1 In an action of debt on a simple contract the declaration is good, though it specify *a less sum* in the several counts than is demanded in the recital of the writ; and yet assigns as a breach

the non-payment of the sum demanded in the writ. *McQuillin v. Cox.* 1 H. B. 249

- 2 And in such an action the plaintiff may prove and recover a less sum than is stated to be due. 1 H. B. 249

- 3 A variance between the writ and count (the *ac etiam* being in *case on promises*, but the declaration *in debt*) is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.* *Lockwood v. Hill.* 1 H. B. 310

- 4 In an action on a bail-bond, the special original being returnable *coram domino rege ubicunque tunc fuerit in Angliâ*, the omission of the word *ubi-*

cunque was held not fatal, for the writ is to compel appearance before the King in his court, and not in person, and therefore it could not, as was objected, be to compel appearance out of England. *Shuttleworth v. Pilkington*.

1 T. R. 240, n.

- 5 Where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word "*if*" in such precept, viz. "and *if* the said election so made," &c. is not a fatal variance, but is to be rejected as surplusage. *King v. Pipplet*.

1 T. R. 235

- 6 In an action for an amercement in a court leet, if the declaration state the court to have been holden before the steward of the manor, but the evidence prove it to have been holden before the deputy steward, it is a fatal variance. *Wyvill v. Shepherd*.

1 H. B. 162

- S. P. Where the declaration stated that the defendant was summoned to serve on the jury of the court-leet and court-baron, but the summons was to serve on the jury of the court-leet only. *Grey v. Wheatly*.

1 H. B. 163, n.

- 7 Where the declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence: The charge made was for assaulting and striking, the warrant produced recited the charge to be for assaulting and beating: Held, that this was no material variance. *Byne v. Moore*.

5 Taunt. 187

- 8 In an action by the bailiff of Westminster against the defendant, in the nature of an escape, the declaration stated a *latitat* against Donner and J. Doe, with an *ac etiam* against Donner for 30l. The writ produced in evidence was against Donner and two others, and not against J. Doe. Lord Mansfield held this to be good, it being a sufficient writ to warrant the arrest. *Hendray v. Spencer*.

1 T. R. 238, n.

- 9 In an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiff's goods under a writ of *feri facias*, by which they were sold much under value, where, in stating the substance of the writ, the count alleged that the sheriff was com-

manded to levy 80s. awarded to J. C. for his damages sustained by occasion of the detaining the debt; that is proved by the writ, which stated that the 80s. were awarded to J. C. for his damages sustained as well by reason of detaining the debt as for his costs, &c. for costs are in legal sense included in the word *damages*. *Phillips v. Bacon*.

9 E. R. 198

- 10 In an action for bribery, the declaration stated the precept to be directed to the mayor only; but the precept proved was directed to the mayor and burgesses; which was held to prove the declaration. *Cuning v. Sibley*.

1 T. R. 239, n.

- 11 So where the precept declared on was to the bailiffs and jurats, and that proved was directed to the bailiff (in the singular number) and jurats. *Warr v. Harbin*.

2 H. B. 113

- 12 In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment; the return of the writ on which the debtor was arrested being laid to be in the 25th year of the reign, &c. and the writ itself appearing to be returnable in the 24th year, this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a *videlicet*. *Green v. Remmett*.

1 T. R. 656

- 13 The record in an action for false imprisonment set forth a few of the first words in a bill of Middlesex, and then added an &c. The &c. was held by Lee, Ch. J. to be no variance from the bill of Middlesex, when read at the trial. *Wilson v. Maxson*.

1 T. R. 237, n.

- 14 If the writ be, that the defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the Court of C. P. will discharge the defendant on entering a common appearance. *Kerr v. Sheriff*.

2 B. & P. 358

- 15 The Court refused to set aside the proceedings for irregularity for a variance between the original writ and declaration. *Spalding v. Mure*.

6 T. R. 363

- 16 The Court will not, on motion, permit a defendant to take advantage of a variance between the sum mentioned

in the *ac etiam* part of the *latitat*, and the declaration. *Turing v. Jones*.

5 T. R. 402

17 Though they will when the variance is in the nature of the action; as where the plaintiff sues out a writ *quare clausum fregit*, and declares in trover.

5 T. R. 402

18 So when the objection is to the plaintiff's right of suing, as if he sue out a writ in his own name, and declare as executor.

5 T. R. 402

S. P. Douglas v. Irlam.

8 T. R. 416

19 The Court of C. P. refused to set aside proceedings for irregularity, where the *clausum fregit* was against two, and the declaration against one.

Spencer v. Scott.

1 B. & P. 19

20 The distinction is, that in process *not bailable*, if the writ be joint and the declaration several, it is regular.—*Secus*, in bailable process.

Loveridge v. Botham.

1 B. & P. 49

And see *Lewen v. Smith*, 4 E. R. 589, *ante*, page 571.

21 But if process be sued out in the name of one plaintiff, and the declaration delivered in the name of two, it is bad.

Rogers v. Jenkins.

1 B. & P. 383

II. BETWEEN PLEADINGS AND EVIDENCE.

(a) In Place.

1 Declaration by a sailor for wages, and the average price of a negro slave for a certain voyage (to wit) "*from the port of London to the coast of Africa, and from thence to the West-Indies*:" in the articles it was called a voyage "*from the port of London to the coast of Africa, from thence to the West-Indies or America, and afterwards to London in Great Britain, or to her delivering port in Europe*:" Held, that the variance was fatal, notwithstanding the *scilicet*, and although the voyage was in fact put an end to in the *West-Indies*; and that the contract for the price of a slave, not being included in the articles pursuant to 2 G. 2. c. 36. was void. *White v. Wilson*.

2 B. & P. 116

2 In *assumpsit* for use and occupation, it is not necessary to state in what parish the premises are situate, and if the parish is described by a wrong name it is immaterial, at least if it be described by a name generally known, and which could not therefore mislead the defendant, *Kirland v. Pounsett*, 1 Taunt. 570

3 A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the *Cellar-beer* field, instead of the *Aller-beer* field, held fatal; being considered as part of the description of the deed declared on; though the plaintiff waved going for damages on the breach of that covenant. *Pitt v. Green*.

9 E. R. 188

4 Proof that defendant's boat ran down the plaintiff's in the Half-way Reach in the *Thames* will support an allegation that the boat was run down in the *Thames*, near the Half-way Reach, in an action on the case for negligence; because the place is not material: *Secus*, if the place be material; as where a justification is local. *Drewry v. Twiss*.

4 T. R. 558

5 Where an action on the case was brought upon an agreement that the defendant would procure the plaintiff a booth at the horse-race on *Barnet* common; and the declaration alleged *Barnet* common to be in *Middlesex*, whereas it was in *Hertford*, yet held to be surplusage, because it was immaterial to the agreement whether *Barnet* common lay in *Middlesex* or *Hertford*. *Frith v. Gray* 4 T. R. 601, *n*.

6 Evidence of a house situate in the parish of *M*. will support an averment of a house "at *S*," *S* being extra-parochial, and both places usually going by the name of *S*. *Burbidge v. Jakes*.

1 B. & P. 225

7 An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature: and if the declaration, after describing the house as situate in a certain street called *A*. street, in the parish of *O*. *A*. (there being no such parish), afterwards state the nuisance to be erected and placed in the parish aforesaid, it will be ascribed to *venue*, and not to local description; and therefore the place is not material to be proved as laid. *Jefferies v. Duncombe*.

11 E. R. 226

8 If in an action on the case for a nuisance in erecting a weir, it be described in the declaration to be at *H*. and be proved to be at a lower part of the same water called *T*., the variance is fatal. *Shaw v. Wrigley*. 2 E. R. 500

And see *Mersey and Irwell Navigation v. Douglas*. 2 E. R. 497

- 9 In case, an averment that the plaintiff's close at the time of the injury was, and still was, in the occupation of *J. V. and H. V.*, is sufficiently proved, if at the time of the injury it was in their occupation, though the tenant be since changed before action brought. *Vowles v. Miller*. 3 Taunt. 137

- 10 In ejectment the premises being laid to be in *Farnham*, and proved to be in *Farnham Royal*, is not a fatal variance unless it be shewn that there be two *Farnhams*. *Doe d. Tollet v. Salter*. 13 E. R. 9

- 11 In an action for non-residence, the parish was styled in the declaration *St. Ethelburg*; the real name appeared in evidence to be *St. Ethelburga*: Held, a fatal variance. *Wilson, q. t. v. Gilbert*. 2 B. & P. 281

And see *Wilson v. Van Mildert*.

2 B. & P. 394, *ante*, page 506

(b) In Circumstances.

See ASSUMPSIT, VI. *ante*, 73.

- 1 In cases upon contracts it is necessary to set out the contract truly; and a difference in any part is fatal, because the contract is entire. *King v. Pippett*. 1 T. R. 240

- 2 The whole of the contract must be proved which is set out. *Gwinnet v. Phillips*. 3 T. R. 646

The same of records.

- 3 Where the contract declared upon was, that the defendant should deliver to the plaintiff all his tallow at 4s. per stone; and the contract proved was, that the defendant should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person; this was held a fatal variance. *Churchill v. Wilkins*. 1 T. R. 447

- 4 But where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken: As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu,

&c. which should be worth 80l. and be a young horse; and then alleged a breach in both those respects: Held sufficient, though the proof were not only of a promise that the second horse should be worth 80l. (which it was not) and be a young horse, but also of a warranty that it was sound, and had never been in harness. *Miles v. Sheward*. 8 E. R. 7

- 5 Proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff for 31l. 10s., and at the same time agreed that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14l. 14s., and that the difference only should be paid to the defendant, will support a count charging only, that in consideration that the plaintiff would buy of the defendant a horse for 31l. 10s. the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the 31l. 10s. *Hands v. Burton*. 9 E. R. 349

- 6 Evidence of an agreement to deliver goods to the defendant is a variance from a count on an agreement to deliver them to another person. *Leery v. Goodson*. 4 T. R. 687

- 7 An agreement declared on to sell oats at so much per bushel must be taken to mean the *Winchester* bushel, and will not be proved by evidence of an agreement to sell by some other bushel. *Hockin v. Cooke*. 4 T. R. 314

- 8 A. agrees to buy, and B. to sell, a quantity of "St. Petersburg clean hemp," at a certain price, through the medium of a broker, who acts as agent for both parties: The broker delivers a bought note to A., in which, by mistake, he inserts "Riga Rhine hemp," instead of "St. Petersburg clean hemp;" and there delivers a sale note to B. stated correctly, according to the original contract: Held, that the variance between the two notes was fatal, and therefore, that B. could not recover in an action against A. for not completing the contract. *Thornton v. Kempster*. 1 Marsh. 355

- 9 In a declaration on an agreement for a wager, this indorsement on the agreement; "N. B. To start, P. P., in 15 days from this date," was not noticed; the omission was held to be immaterial.

rial; "P. P." being considered merely insensible letters. *Whaley v. Pajot*.

2 B. & P. 51

10 Upon an allegation of a loan of lawful money of *Great Britain*, it is no variance that the loan is proved to have been of foreign coin, as pagodas. *Harrington v. Macmorris*.

5 Taunt. 228

S. C.

1 Marsh. 33

11 Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them and by a fourth partner who is now dead. *Spalding v. Mure*.

6 T. R. 363

12 Declaration for 52*l.* 10*s.* for run-money, evidence, a note for 52*l.* 10*s.* for run-money, with an additional stipulation written after signature of the note, for a pint of rum *per day*; and held no variance. *Baptiste v. Cobbold*.

1 B. & P. 7

13 If a bill drawn by *John Crouch* be declared upon as drawn by *John Couch*, the variance is fatal. *Whitwell v. Bennett*.

3 B. & P. 559

14 Plaintiff declared against defendant as acceptor of a bill of exchange, payable to certain persons using the firm of Messrs. *McBrair, Watson, and Co.*; defendant pleaded that the said Messrs. *McBrair, Watson, and Co.* had accepted satisfaction; plaintiff replied that the said persons so as aforesaid using the firm of Messrs. *McBrair and Co.* (leaving out the name of *Watson*) did not accept satisfaction, and concluded to the country. *Semb.* that this variance could only be taken advantage of on special demurrer. *Bell v. Da Costa*.

2 B. & P. 446

15 In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take advantage of the *misnomer* of his companions upon the general issue on the ground of a variance between the contract declared upon and that proved. *Gordon v. Austin*.

4 T. R. 611

16 In an action on a policy of insurance the declaration stated that *after* the making of the policy the ship sailed; the evidence was that she sailed *before*: Held, that the variance was immaterial. *Peppin v. Solomons*.

5 T. R. 496

And see *Matthie v. Potts*. 3 B. & P. 23, *ante*, page 433.

17 A corrupt agreement for the forbear-

ance of money *till one or the other of two days*, at the option of the borrower, must be pleaded according to the fact in the *alternative*; and if it be stated as an absolute forbearance *till one of those days*, the evidence will not support the plea. *Tate v. Willings*.

3 T. R. 531

18 In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff alleged in his declaration that the defendant undertook to deliver, &c. in consideration of the hire to be paid *by the plaintiff*, and proved that the hire was to be paid by the *consignee*, it was held not to be a variance, the consignor being liable by law. *Moore v. Wilson*.

1 T. R. 659

19 The defendant's tenancy of land in *F.* at a certain rent was alleged as the consideration for his promise to manage it in a husband-like manner: The land for which the rent was reserved was in *F.* and *C.*: This was held to be a fatal variance, in stating the consideration of the promise. *Pool v. Court*.

4 Taunt. 700

20 Plaintiff covenanted to build two houses for 500*l.* by a certain day, and averred in an action of covenant for the money, that the houses were built in the time: evidence that the time had been enlarged by *parol* agreement, and the houses finished within the enlarged time, will not support the declaration. *Littler v. Holland*.

3 T. R. 590

21 If the plaintiff shew on his declaration on debt on bond against two that the bond is executed by three, it is good matter of plea in abatement, or in arrest of judgment, but is no ground of nonsuit on the plea of *non est factum*. *South v. Tanner*.

2 Taunt. 254

22 To an action of debt on bond, the defendant prayed *oyer* of the condition which was for the payment of 100*l.* by instalments, till the said sum of 100*l.* be paid, and then pleaded *non est factum*: The word *hundred* had been omitted in the second place where it occurs in the condition, and was afterwards inserted without the defendant's knowledge: Held, that though this alteration did not avoid the instrument, yet it made such a variance between the *oyer* and the con-

dition, as precluded the plaintiff from recovering. *Waugh v. Bussell*.

1 Marsh. 214

23 An averment in a declaration on *stat.* 11 G. 2. c. 19. s. 3. to recover double the value of goods removed in order to prevent a distress, that 57l. was *due for rent* before the goods were removed, need not be precisely proved as laid with respect to the sum. *Gwinnet v. Phillips*.

3 T. R. 643

24 The rule is, that if a plaintiff allege any thing which forms *a constituent part of his title*, he must set it out correctly: but here it was immaterial to state what the rent was, and therefore it need not be proved.

3 T. R. 645

25 In an action for the penalty of the statute 12 Anne, c. 16., the declaration stated a specific sum of money to have been lent (in which the usury consisted); but the evidence was, that the loan was part in money and part in goods, (*i. e.* gold) of a known definite value, which the party receiving the loan *agreed to take as cash*: This was good evidence to support the declaration. *Barbe, q. t. v. Parker*.

1 H. B. 283

26 Under a count for usury in discounting two bills of exchange in the possession of *B.*, one of which is described as drawn by *B.* on a certain person, to wit, *John K.*, it is a fatal variance if the bill produced appears to be drawn on *Abraham K. Hutchinson v. Piper*.

4 Taunt. 810

27 In an action against the sheriff for taking goods without levying a year's rent, the plaintiff undertaking to set forth the particulars of the demise, (which was unnecessary), and not proving them as laid, must be nonsuited. *Bristow v. Wright*.

1 T. R. 236, n.

28 By statute 28 Eliz. c. 4. sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, or chattels;" a declaration on this Act, in reciting the statute, stated it thus, "body, lands, goods, *and* chattels;" and this was held to be a fatal variance in arrest of judgment. *King v. Marsack*.

6 T. R. 771

29 On a justification by the lord of a manor, under a custom that the lord should have the best beast on the tenant's death, the custom proved was

that the lord should have the best beast *or good*, and the whole Court of C. P. held the variance fatal. *Adderley v. Hart*.

1 B. & P. 394, n.

30 An avowry for an increased rent on a demise for every acre of the land which should be converted into tillage, is supported (under 11 G. 2. c. 19.) by the evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted *during a part of the term*, *e. g.* for the last three years. *Roulson v. Clarke*.

2 H. B. 563

31 Evidence that the homage have been accustomed to assess a certain sum of money *as a heriot* upon alienation, and that such assessment has always been made with reference to the best chattel of the tenant, will not support an avowry for *a heriot in kind* upon alienation. *Parkin v. Radcliffe*.

1 B. & P. 393

32 If defendant in replevin avows on a contract for 110l. rent, and prove a demise at 15s. an acre, amounting to 111l., it is a fatal variance. *Brown v. Sayce*.

4 Taunt. 320

33 An allegation in a plea that "*A.* by his writing sold the aftermath of land to *B.*" was not proved by evidence that (under a statute enabling *A.* to sell by writing) at an auction held for the purpose of selling it, *B.* was the purchaser: that *B.* gave a promissory note for the sum, and that *B.*'s name was written (by *A.*'s agent) in the printed catalogue as the buyer. *Symonds v. Ball*.

8 T. R. 151

III. PLEADINGS AND RECORD.

1 An averment in a declaration, of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicet*. *Pope v. Foster*.

4 T. R. 590

2 In an action on a judgment, if the declaration state the judgment to have been recovered in a Term different from that which appears on the record, it is a failure of record. *Rastall v. Stratton*.

1 H. B. 49

3 It is also a variance if the declaration states the judgment against *one* defendant only, when it was against more than one.

1 H. B. 49

4 An allegation in a declaration, with a *prouit patet*, &c. that the plaintiffs by the judgment of the Court recovered against the bail, is not proved by the production of the recognizance of bail, and the *scire facias* roll, which latter concluded in the common form; "Therefore it is considered that the plaintiffs have their execution thereupon against the bail: for this is an award of execution; or at most a judgment of execution, and not a judgment to recover. *Phillipson v. Mangles*.

11 E. R. 516

5 In an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal as laid in the declaration, so that it appears to have been before the action brought: and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material; the day not being laid in the declaration as part of the description of such record of acquittal. *Purcell v. Macnamara*.

9 E. R. 157

And see *Reed v. Taylor*.

4 Taunt. 616

Woodford v. Ashley. 11 E. R. 508, ante, pages 14, 15.

6 In an action for maliciously arresting and holding the plaintiff to bail, in which the declaration in setting out the judgment by default in the former action stated, that, "it was thereupon considered that the then plaintiffs should take nothing by their said writ, but that they and their pledges to prosecute should be in mercy, &c.;" it is no material variance if the record produced in evidence have not the words "and their pledges to prosecute," but only have an "&c.;" for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit. *Judge v. Morgan*.

13 E. R. 547

7 Trespass *quare clausum fregit*, justification under a *distringas* in a plea of trespass at the suit of *J. S.* against defendant; replication, that before the *distringas* issued against defendant he appeared to answer *J. S.* in the plea of trespass in the said plea mentioned to the said writ sued out by *J. S.* for that purpose, to wit, a *clausum fregit* issued out of *C. B. prout patet*, &c.

defendant rejoined *nul tiel record*: Held, that the record of appearance to a *clausum fregit* issued out of chancery did not support the replication, and that the words which followed the *scilicet* being material could not be rejected. *Myers v. Kent*.

2 N. R. 463

IV. IN INDICTMENTS.

1 An indictment for an assault had these words, "whereby his life was greatly despaired of;" an indictment for perjury committed on that trial, setting forth the former indictment, omitted the word "*despaired*," which was supplied by the Court. *Rex v. May*.

1 T. R. 237, n.

2 Undertook for understood, in an indictment for perjury: Held, an immaterial variance. *Rex v. Beach*.

1 T. R. 237, n.

3 An indictment for perjury stated the bill in Chancery to be directed to *Robert*, Lord *Henley*, &c. whereas it was to *Sir Robert Henley*, Knt. &c. and the objection was over-ruled. *Rex v. Lookup*.

1 T. R. 240, n.

4 An indictment for perjury in a cause, alleging that the cause was tried at the assizes before *E. W.*, one of the Judges, &c. before whom the perjury of the defendant was assigned, is proved in substance by the *nisi prius* record, which stated in the usual form that the cause was tried before the then two judges of assize, one of whom was *E. W.* *Rex v. Alford*.

14 E. R. 218, n.

5 The great seal of Great Britain has been destroyed, and a new great seal of the United Kingdom of Great Britain and Ireland, is in use since the union with Ireland, to seal such matters as before is sued under the great seal of Great Britain, where a statute made before that union directs an instrument to issue under the great seal of Great Britain, it now properly issues under the great seal of the United Kingdom, and if it be alleged in pleading in an indictment that an instrument issued under the great seal of Great Britain, and evidence be given of an instrument issuing under the great seal of the United Kingdom: this is no variance. *Rex v. Bullock*.

1 Taunt. 71

VENDOR AND PURCHASER.

I. SALE OF LANDS.

II. SALE OF GOODS.

(a) *Where valid.*

(b) *Delivery under, when complete.*

(c) *Rights and liabilities of Purchaser.*

I. SALE OF LANDS.

1 A purchaser is not compellable to accept a title to premises, formerly subject to an incumbrance, the discharge of which is shewn only by presumption. A leasehold was sold, subject to a ground-rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption: Held, that the purchaser was not bound to accept the title. *Barnwell v. Harris.*

1 Taunt. 430

2 The title of a purchaser for a valuable consideration cannot be defeated by a prior voluntary settlement of which he had no notice; though he purchased of one who had obtained a conveyance by fraud, but of which fraud he the purchaser was ignorant. *Doe d. Bothell v. Martyn.*

1 N. R. 332

3 It is a sufficient objection to a title that a person under whom the vendors claim, held, during his seisin of the estate a newly created office under the Crown, (that of commissioner of Dutch property,) in which he was directed by statute, to pay the surplus (after certain charges answered) of the proceeds of certain sales into the Bank of England, there to remain subject to such orders as the King in Council should give thereon, and that his accounts with the Crown were yet unliquidated. *Wilde v. Fort.*

4 Taunt. 334

4 Where it was an objection to a title, that it was doubtful whether the wife of a party to a deed thirty years old was barred by that deed of her dower, it was not answered by proving at

the trial that she was then dead, such proof not having been before given.

4 Taunt. 334

5 Notice of an incumbrance to a conveyancer, who peruses a title on behalf of one party, is not notice to another purchaser on whose behalf the same conveyancer afterwards prepares a conveyance. *Per Heath, J.*

4 Taunt. 373

II. SALE OF GOODS.

(a) *Where valid.*

1 A sale of goods made on a Sunday, which is not made in the exercise of the ordinary calling of the vendor, or his agent, is not void at common law, or by the *stat. 29 Car. 2. c. 7. Drury v. Defontaine.*

1 Taunt. 131

(b) *Delivery under, when complete.*

See tit. STOPPAGE IN TRANSITU.

TROVER, *ante.*

1 A. agrees to sell goods to B. who pays earnest; the goods are packed in cloths furnished by B. and deposited in a building belonging to A. until B. shall send for them; but A. declares at the same time, that they shall not be carried away, until he is paid: A. cannot maintain an action for goods sold and delivered; this not being a delivery to B. *Goodall v. Skelton.*

2 H. B. 316

2 Under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much *per cwt.* by bill at two months; which starch was in papers, but the exact weight not then ascertained, but was to be ascertained afterwards; and 14 days were to be allowed for the delivery; and the vendor gave a note to the vendee, addressed to the warehouse-keeper, directing him to weigh and deliver to the vendee all his starch: Held, that under this contract the absolute property in the goods did not vest in the vendee before the weighing, which was to precede the delivery, and to ascertain the price; and that part of the starch having been weighed and delivered to the vendee by his direction, the vendor

- might, notwithstanding such part delivery upon the bankruptcy of the vendee, retain the remainder, which still continued unweighed in the warehouse, in the name and at the expense of the vendor. *Hanson v. Meyer.* 6 E. R. 614
- 3 Turpentine in casks, being sold by auction at so much *per cwt.*, and each lot except the last two, (which were sold at uncertain weights,) was to be taken at the weight at which it was marked: out of the last two lots the other casks in the other lots were to be filled up before they were delivered to the purchasers: a deposit was paid for what was purchased, and the remainder was to be paid within 30 days on delivery of the goods: the buyers had the option of keeping the goods in the warehouse for these 30 days rent free: the buyers employed their agent, who filled up some of the casks out of the last two lots, but before he could fill up the rest a fire consumed the whole in the warehouses within the 30 days: Held, that the property passed to the buyers in all the casks which were filled up, but that the property in the casks not filled up remained with the seller at whose risk they continued. *Rugg v. Minett.* 11 E. R. 210
- 4 A. having 40 tons of oil in one cistern sold 10 tons to B. and received the price; and B. sold the same to C. and took his acceptance at four months, and gave him a written order for delivery on A., who indorsed his acceptance thereof on the order; but no other delivery of the 10 tons was made to C.; yet the Court held that this was a complete sale and delivery by B. to C. and that therefore B. could not countermand the delivery in fact; nor were the goods *in transitu* so as to be stopped by B. *Whitehouse v. Frost.* 12 E. R. 614
- 5 Where a sale-note for the purchase of 50 tons of Greenland oil was delivered by the seller's broker to the purchasers to be paid for by their acceptance payable at a future day; and they afterwards received from the sellers an order on their wharfingers for the delivery of the 50 out of 90 tons of their oil; yet as the custom of the trade was for the casks to be searched by the seller's cooper, and for a broker on behalf of both parties to ascertain the foot-dirt and water in each (for which allowance was to be made), and then the casks were to be filled up by the seller's cooper, at their expense; all which was to precede the delivery to the buyers: Held, that the sale was not complete to pass the property; but that the sellers on the insolvency and subsequent bankruptcy of the buyers, before such acts done and delivery made, might countermand it. *Wallace v. Breeds.* 13 E. R. 522
- 6 The defendants contracted to sell to K. 50 hogsheads of sugar, called double loaves, at 100s. *per cwt.* to be delivered free on board a British ship: K. sold to the plaintiff by the same description, and the defendants assented to the re-sale, the sugar not having been delivered or weighed: Held, that the plaintiff could not recover for it in trover against the defendants, the first vendors. *Austin v. Craven.* 4 Taunt. 644
- 7 By a bargain and sale of 20 tons of oil out of a merchant's stock, consisting of several large quantities of oil, in divers cisterns, in divers places, no property passes: there must be a separation of the part sold from the rest of the stock. *White v. Wilks.* 5 Taunt. 176
S. C. 1 Marsh. 2
- 8 Where plaintiff sold 10 out of 18 tons of flax then lying in mats at defendant's wharf, at so much *per ton*, to be paid for by the vendee's acceptance at three months, and gave the vendee an order on defendants, the wharfingers, to deliver 10 tons to vendee, or order, which defendants entered in their books; but the quantity to be delivered was to be ascertained by the wharfingers weighing it, the mats being of unequal quantities, so that a fraction of a mat might be required, and an allowance for tare and draft was to be made by the weight: Held, that the sale was not complete to pass the property, those acts not having been done by the wharfingers, nor any delivery made, and that plaintiffs, upon the insolvency of the vendee, might countermand the delivery. *Busk v. Davis.* 2 M. & S. 397
- 9 A. having a quantity of hemp in the hands of B., sells part of it to C. at a certain price, payable by C.'s acceptance at a stated time, 14 days allowed for delivery; and gives to C.

an order upon *B.* to weigh and deliver the hemp so sold to *C.* or bearer, before the 14 days had expired, *A.* gives *B.* notice not to deliver the hemp to *C.*, the hemp not having been weighed off, and no bill of exchange having been given in payment for it: Held, that the sale of it to *C.* was incomplete: and that *B.* was liable for it in an action of trover by *A.* *Shepley v. Davis.* 1 Marsh. 252

- 10 *Quare*, Whether a delivery of household goods was complete, the upholsterer still having a servant in the vendee's house, where the goods were, and the vendee not having yet taken any actual possession? *Hunt v. Stevens.*

3 Taunt. 113

(c) Rights and Liabilities of Purchasers.

- 1 A contract of sale may be rescinded by the consent of the vendor and vendee before the rights of other persons are concerned. *Smith v. Field.*

5 T. R. 402

- 2 But where the vendee wished to return the goods, and the vendor instituted an attachment to attach the goods in the hands of a packer, as the property of the vendee, it was considered as an election by the vendor not to rescind the contract; and the vendee having since become a bankrupt, it was held that the vendor could not recover the goods from the packer in trover.

5 T. R. 402

- 3 *A.* in London received an order from *B.* living in Bristol to send him goods by any conveyance to Bristol, informing *B.* when he sent them that he might know when to expect them; *A.* sent the goods to a wharf from whence a Bristol vessel sailed, and informed *B.* that the goods would come by the ship *C.*; some time afterwards the goods were sent by another ship; *B.* enquired for the goods on the arrival of the ship *C.* at Bristol, but made no farther enquiry, and *A.* did not know, till after he had required payment for the goods, that they were sent by another ship, which he then communicated to *B.*: Held, that *B.* was liable for the price of the goods. *Cooke v. Ludlow.*

2 N. R. 118

And see CARRIERS. I. ante, 175.

- 4 A tradesman at one port receiving an order to forward goods to a person at another port by a common sea-carrier,

does not sufficiently perform the order by depositing the goods at the receiving-house of such carrier, with directions to be forwarded to their place of destination, if the goods, being much above the value of 5*l.*, to which the carrier's liability was notoriously limited, be not specifically entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty, to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it; and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods against the person from whom he received the order. *Clarke v. Hutchins.* 14 E. R. 475

- 5 Under a contract to purchase 300 tons of *Campeachy* logwood, at 35*l.* per ton, &c. to be of real merchantable quality; and such as might be determined to be otherwise by impartial judges, to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price; though it appeared at the time that a part, which was afterwards ascertained to be 16 out of the 300 tons, was of a different and inferior description. *Graham v. Jackson.*

14 E. R. 498

- 6 A factor selling a parcel of prize manufactured tobacco, consigned to him from his correspondent at *Guernsey*, of which a regular entry was made on importation, but without having entered himself with the excise officer as a dealer in tobacco, nor having any licence as such, may yet maintain an action against the vendee for the value of the goods sold and delivered; and this, though the tobacco were sent to the defendant without a permit, at his desire; there being no fraud upon the revenue, but at most a breach of revenue regulations protected by penalties: even if such factor could, upon this single and accidental instance, be considered as a dealer in tobacco within the meaning of the *stat.* 29 G. 3. c. 68. s. 70. which requires every person, who shall deal in tobacco, first to

- take out a licence, under a penalty. *Johnson v. Hudson.* 11 E. R. 180
- 7 A person who sells goods, knowing that the purchaser intends to apply them in an illegal trade, is nevertheless entitled to recover the price, if he yields no other aid to the illegal transaction than selling the goods, and obtaining permits for their delivery to the agent of the purchaser. *Hodgson v. Temple.* 5 Taunt. 181
S. C. 1 Marsh. 5
And see SMUGGLING, *ante*, page 649.
- 8 A material alteration in a sale-note by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, annuls the instrument, so as to preclude the seller from recovering upon the contract: evidenced by the instrument so altered by him. *Powell v. Divett.* 15 E. R. 29
- 9 Where a broker sold on *Saturday* certain goods of the defendant to the plaintiff for a stipulated price, subject to the plaintiff's approval of the quality upon the *Monday* following, and sent the bought note to the plaintiff on the *Saturday*, marked with the words "Quality to be approved on *Monday*;" but did not send the sold note to the defendant then, because he had met and informed him of the

- contract on the same day; but the plaintiff not having signified his disapproval of the contract on the *Monday*, the broker sent the sold note to the defendant on the *Friday*, with the words "quality to be approved on *Monday*," struck out; which note the defendant returned within twenty-four hours, which by the custom of the trade signified his disaffirmance of the contract, as far as in him lay: yet, held, that at any rate the defendant could no longer disaffirm it after the *Monday*, when the plaintiff, not having signified his disapproval, was also bound by it. *Humphries v. Carvalho.* 16 E. R. 45
- 10 If goods be sold at two months' credit, to be paid for by a bill at twelve months, and the goods be not paid for after the expiration of the fourteen months, the vendor may recover in an action for goods sold and delivered. *Brooke v. White.* 1 N. R. 330
- 11 Upon a sale of goods at six or nine months' credit, the purchaser, by not paying at the end of six months, makes his election to take credit for the nine months, and there is no debt to support a commission of bankrupt till the nine months are expired. *Price v. Nixon.* 5 Taunt. 338

VENUE.

I. WHERE LAID, AND HOW PLEADED.

II. HOW CHANGED OR RETAINED.

I. WHERE LAID AND HOW PLEADED.

See tit. VARIANCE, *ante*, page 700.

- 1 In an action on 1. 2. P. & M. c. 12. for driving a distress out of the hundred into another county, the venue may be of either county. *Pope v. Davis.* 2 Taunt. 252
- 2 A. by deed executed in *London*, for securing the repayment of money lent to B. is appointed receiver of B.'s rents in *Middlesex*, with a pretended salary which enables him to retain usurious interest: he accordingly receives the rents in *Middlesex*, but settles the account in *London*, and there pays the balance on which the usu-

rious interest is allowed; the offence is completed in *London*, and the venue in a *qui tam* action for the penalty is properly laid there. *Scott v. Brest.*

2 T. R. 238

- 3 It seems it might be laid in either, for where there are two facts which are necessary to constitute one offence, and they take place in two different counties, the plaintiff may *ex necessitate* lay the venue in either.

2 T. R. 241

- 4 If a draft be given for usurious interest, and a receipt be taken for it in the county of A. and the draft be afterwards exchanged for money in the county of B. the usury is committed in the county of B. and the venue must be laid there. *Scurry v. Freeman.* 2 B. & P. 381

- 5 The offence of selling coals of a different description from those contracted for, upon the statute 3 G. 2. c. 26. s. 4. is complete in the county where the coals are *delivered*, and not where they were *contracted* for, the contract not being for any specific parcel of coals, but for a certain quantity of a certain description: But *the not justly measuring* such coals is a local omission of a local Act, required by the 13th section of the Act to be performed at the place where the coals are kept for sale, at which place the bushel of Queen *Anne* is required to be kept and used for the purpose of measuring the coals into sacks of a certain description, in which they are to be carried to the buyer; and therefore, the offence is local, and must be laid in the county where the coals were put into the sacks without having been so *justly measured*. *Butterfield v. Windle*. 4 E. R. 385
- 6 A *scire facias* upon a recognizance of bail taken in open court in the King's Bench is properly suable in *Middlesex*, where the record is; though all the previous proceedings which commenced by original were in *London*. And *semble*, that it could not be sued elsewhere than in *Middlesex*. *Coxetur v. Burke*. 5 E. R. 461
- 7 Where there are several facts material to the plaintiff's action arising in different counties, he may bring his action of *covenant* in either. *The Mayor of London v. Cole*. 7 T. R. 583
- 8 In case, the plaintiff's cause of action arises so entirely, as to retain the venue in the county where the injury is sustained. *Williams v. Land*. 4 Taunt. 729
- 9 It is not necessary to give a local description to a nuisance in an action on the case for diverting the water of a navigation: and therefore, if it be doubtful whether the place where such navigation is stated to lie, be laid in the declaration as a venue or a local description, it will be referred merely to venue, and need not be proved to be at such place; but it is sufficient if it be at any other place within the county. *Mersey and Irwell Navigation v. Douglas*. 2 E. R. 497
- 10 The action upon the case for a nuisance is local in its nature, and the nuisance must be proved to have been committed in the county where the

venue is laid: If no place and county is alleged where the nuisance is committed, the county in the margin shall be intended. *Warren v. Webbe*.

1 Taunt. 379

But see *Jeffries v. Duncombe*.

11 E. R. 226

- 11 In an action on the case for damaging the plaintiff's wharfs the declaration stated the wharf to be situate near the river *Thames*, to wit, 'at *Kingston*, in the parish of *St. Saviour, Southwark*, in the county of *Surrey*;' though there was no such place as *Kingston* in that parish: Held, that this allegation was to be referred to the venue, and not to the local situation of the wharf; and, therefore, it was not necessary to prove it to be so situated. *Hamer v. Raymond*. 1 Marsh. 363

- 12 The venue in the margin may assist but cannot hurt the plaintiff. *Mellor v. Barber*. 3 T. R. 387

- 13 Where a request to the defendant to do an act is necessary to be alleged in order to give the plaintiff his cause of action; and it is alleged, but without a particular venue (there being a general venue laid in the preceding part of the declaration;) such omission cannot be taken advantage of in arrest of judgment since the *stat. 4 Anne, c. 16. s. 1.* being mere matter of form, available only upon special demurrer; and this, though judgment passed by default on which a writ of inquiry was executed. *Bowdell v. Parsons*. 10 E. R. 359

- 14 In a plea in abatement, that another person ought to have been sued with the defendant, it is not necessary to lay a venue. *Neale v. De Garay*. 7 T. R. 243

- 15 And if it be pleaded that such other person is alive, to wit, in *Spain*, it will be considered as pleaded without any venue. 7 T. R. 243

II. HOW CHANGED OR RETAINED.

- 1 All affidavits for changing the venue in any action shall be drawn up "upon reading the declaration." *Reg. Gen. K. B. T. 49 G. 3. 11 E. R. 273*
- 2 Defendant having put off a trial at the assizes on the absence of a witness, the Court refused to let the plaintiff change the venue to *Middlesex*. *Pearce v. Porkington*. 2 N. R. 58
- 3 In debt on bond, the Court, upon the application of the defendant, will

- change the *venue* to the place where his defence arises, and the plaintiff's as well as the defendant's witnesses reside. *Foster v. Taylor*. 1 T. R. 781
- N. B. But see several instances where similar applications were refused, when the defendant's witnesses only resided in the county. 1 T. R. 782, n.
- 4 The *venue*, in an action for a libel, written in one county and sent into another, cannot be changed into the county where written; for the defendant cannot swear that the cause of action arose wholly in that county. *Pinkney v. Collins*. 1 T. R. 571
And see *Clissold v. Clissold*. 1 T. R. 647
- 5 But the Court will change the *venue*, in an action for a libel, into a county in which it was both written and published. *Freeman v. Norris*. 3 T. R. 306
- 6 So if written in *England* and sent by letter out of the kingdom, it may be changed (from *London* where it was laid) to the county where written. *Metcalf v. Markham*. 3 T. R. 652
- 7 In covenant upon a lease, a view being proper to be had, the *venue* was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the *venue* was laid. *Hodinott v. Cor*. 8 T. R. 268
- 8 In an action on a promissory note, the Court of C. P. will not change the *venue* from *London* to the county where it was made, on the defendant's stating that all his witnesses live there; but if his affidavit shew the number of his witnesses, and that a serious inconvenience would arise from bringing them up, they will. *Evans v. Weaver*. 1 B. & P. 20
- 9 Nor will they change the *venue* in an action on an award, though the declaration contain the common counts; nor oblige the plaintiff to undertake to give evidence on the count upon the award. *Whitburn v. Staines*. 2 B. & P. 355
- 10 In an action on a deed, that Court will not change the *venue* to the county where it was executed on the ground of the witnesses residing there; when from the pleadings it appears not to be necessary to produce many witnesses from that county, unless a question be raised of which a fair trial cannot be expected there. *Watt v. Daniel*. 1 B. & P. 425
- 11 In an action for infringing a patent, the plaintiff cannot change the *venue* from *Middlesex* to any other county. *Cameron v. Gray*. 6 T. R. 363
- 12 Where the cause of action substantially arises in another county than that in which the *venue* is laid by the plaintiff, and the convenience and justice of the case require the trial to be had there, where all the witnesses reside, at a great distance from the county where the *venue* is laid; the Court, on the application of the defendant, will change the *venue*, on his agreeing to admit a particular fact which in point of form exists in the original county. *Holmes v. Wainwright*. 3 E. R. 329
- 13 Upon moving to change the *venue* into a county palatine, it is necessary to undertake not to assign error upon the want of an original. *Cove v. Heaton*. 1 Taunt. 120
- 14 It is matter of favour to change the *venue* to a county palatine: And where the design is to oppress the plaintiff, the Court of C. P. will not grant the indulgence. *Gibson v. Macbride*. 1 Taunt. 432
- 15 The Court of C. P. will not permit one only of several defendants to remove the *venue* to a county palatine, because it has in that case no authority to bind the other defendants to the terms of not assigning error on the want of an original. *Braddely v. Rippon*. 5 Taunt. 87
- 16 Rule absolute in the first instance of changing the *venue* from an *English* to a *Welsh* county on the usual affidavit. *Hopkins v. Lloyd*. 6 E. R. 355
Hughes v. Hughes. 6 E. R. 355
- 17 The defendant cannot change the *venue* after an order for time to plead, on the terms of pleading issuably and taking short notice of trial for the first sittings in *London* or *Middlesex*. *Shipley v. Cooper*. 7 T. R. 698
- 18 But merely taking out a summons for time to plead, if defendant do not accept the terms, is no waiver of the right to change the *venue*. *Wilson v. Harris*. 2 B. & P. 320
- 19 After plea pleaded, the *venue* cannot be changed. *Talmash v. Penner*. 3 B. & P. 12
- 20 But if the defendant plead pending a rule *nisi* for changing the *venue*, the Court of C. P. will, notwithstanding, allow him to change the *venue*. 3 B. & P. 12

- 21 So, if pending a rule for changing the *venue*, the defendant plead in the action, and notice of trial be served, that Court will still allow the *venue* to be changed; and, in such case, no costs are payable. *Moses v. Stephenson*. 1 Taunt. 58
- 22 An affidavit to change the *venue* from *A.* to *B.* must state that the cause of action arose in *B.*, and not in *A.*, or elsewhere out of *B.* *Allen v. Griffiths*. 3 T. R. 495
- 23 On motion to change the *venue*, the affidavit must state explicitly that the cause of action did not arise in the county from which the *venue* is sought to be changed. *Adams v. Arenell*. 1 Marsh. 243
- 24 The Court of C. P. will change the *venue* in a penal action, on the usual affidavit, as well as in any other action. *Wynne v. Bellman*. 1 Marsh. 326
- 25 An application to change the *venue* from *A.* to *B.* in an action for goods sold and delivered, upon an affidavit that the cause of action arose at *B.* and not elsewhere, may be successfully answered by an affidavit that the goods were sold at *C.* *Collins v. Jacobs*. 3 B. & P. 579
- 26 The Court of C. P. discharged a rule for changing the *venue* upon an affidavit of the plaintiff, that the cause of action arose principally in *Ireland*. *Hope v. Bennet*. 2 N. R. 397
- 27 Where the cause of action arose partly in *Derbyshire* and partly in *Ireland*, the Court refused to change the *venue* from *London* to *Derby*, on an affidavit that the cause of action arose in *D.* and *I.* and not in *London* or elsewhere than in *D.* and *I.* *Walker v. Wright*. 4 E. R. 495
- 28 The Court of C. P. will not discharge a rule for changing the *venue* from *A.* to *B.*, upon an affidavit shewing that the cause of action arose partly in *A.* and partly in *B.*; and that all the witnesses reside in *A.*; the plaintiff must undertake to give material evidence in *A.* *Henshaw v. Rutley*. 1 N. R. 110
- 29 If the *venue* be changed from *A.* to *B.* on the usual affidavit that the cause of action arose wholly in *B.* when in fact part of the cause arose in another county, the Court will order the *venue* to be brought back to *A.* *Cailland v. Champion*. 7 T. R. 205
- 30 Though the *venue* be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid, without the usual undertaking to give material evidence in that county. *Price (Bart.) v. Woodburn*. 6 E. R. 433
- 31 The *venue* may be changed in an action for criminal conversation on the usual affidavit, that the whole cause of action, if any, arose in the county to which it is changed; for the whole cause of action is the trespass on the plaintiff's wife; and the *venue* can only be brought back by the plaintiff's undertaking to give material evidence in the original county. *Guard v. Hodge*. 10 E. R. 32
- 32 The undertaking of the plaintiff upon the usual rule for bringing back the *venue* to *Middlesex*, is satisfied by the production of the commission of bankruptcy tested at *Westminster*. *Kensington's Assignees v. Chantler*. 2 M. & S. 37
- 33 If the plaintiff retains the *venue* upon the usual undertaking to give material evidence within the county, yet if the plea and issue joined be such as to render that evidence irrelevant, the performance of the undertaking is dispensed with. *Soulshy v. Lee*. 3 Taunt. 86
- 34 Thus, if the local evidence be the trading of a bankrupt, or a petitioning creditor's debt within a county, yet if the defendant do not give notice of his intention to dispute the commission under 49 G. 3. c. 121. s. 14., so that the mere production of the commission and proceedings under it proves the trading and petitioning creditor's debt, it seems that the undertaking needs not to be further complied with. 3 Taunt. 86
- 35 The plaintiff falsifying the defendant's affidavit to change the *venue*, the *venue* was retained, though the plaintiff could not undertake to give material evidence in *London*, where he had laid it; either *venue* being inconvenient to one or other of the parties. *Dick v. Norrish*. 3 Taunt. 464
- 36 An affidavit of the plaintiff, that the cause of action arose where the *venue* is laid, is not sufficient cause for him to shew against the changing the *venue*: But he must also undertake to give material evidence in that place. *French v. Coppinger*. 1 H. B. 216

37 The plaintiff shewed the defendant's affidavit, made for the purpose of changing the *venue*, to be untrue; and the cause of action arising in more counties than that in which the *venue* was laid, the Court of C. P. retained the *venue*, upon the plaintiff's undertaking, in the alternative, to give material evidence in some one of the counties where the cause of action arose. *Hunt v. Bridgeford.* 1 Taunt. 259

38 The undertaking to give material evidence, made to retain the *venue*, does not apply to collateral issues, but is confined to the matters stated in the declaration. *Cockerell v. Chamberlayne.* 1 Taunt. 518

39 It is no answer to an application to change the *venue* from *London* to *Essex* on the usual affidavit in an action commenced by assignees, that the commission was issued and the bankruptcy declared in *Middlesex*, and the assignees chosen in *London*; but in such case the plaintiffs can only retain

their *venue* by undertaking to give material evidence where it is laid. *Clarke v. Reed.* 1 N. R. 310

40 Where a rule to change the *venue* in an action of *assumpsit* from *A.* to *B.* has been discharged on the plaintiff's undertaking to give evidence of some matter in issue arising in *A.*, the undertaking is complied with by proving a rule of Court in *A.*, that the defendant shall be at liberty to pay money into Court; though that rule was obtained after the discharge of the rule for changing the *venue*; for the payment of money into Court is an admission of the cause of action. *Watkins v. Towers.* 2 T. R. 275

41 Such an undertaking of a plaintiff may be supported by proof of the cause of action being in a foreign country. *Gerard v. De Robeck.* 1 H. B. 280

42 If the cause of action can be proved partly to arise in a foreign country the plaintiff may safely give the requisite undertaking to retain the *venue*. *McClure v. McKeand.* 2 Taunt. 197

VISITOR.

VISITATORIAL POWER.

1 *Quare*, Whether, in case a dean and chapter neglect or refuse to appoint a canon residentiary in proper time, the bishop, by virtue of his general visitatorial power, may appoint *pro tempore* till such election be had? *Chichester (Bishop) v. Harward.* 1 T. R. 650

2 There is no lapse to the bishop in the case of a canonry. 1 T. R. 650

3 In the case of a private eleemosynary lay foundation, if no special visitor be appointed by the founder, the right of visitation in default of his heirs devolves upon the King, to be exercised by his great seal. *Rex v. St. Catherine's Hall, Cambridge.* 4 T. R. 233

4 If a visitor of a college has heard and decided on an appeal, the Court of King's Bench have no authority to examine the legality of the judgment. *Rex v. Ely (Bishop).* 5 T. R. 475
(And see *Rex v. Lincoln (Bishop).*)

2 T. R. 338, n.)

5 The visitor need not hear *parol* evidence on such an appeal; it is suffi-

cient if he receive the grounds of the appeal, and the answer to it in writing.

5 T. R. 477

6 *E. F.* who had been a fellow of *Peterhouse, Cambridge*, and had vacated his fellowship by taking a college living, but had continued his name on the college boards, is not entitled to any preference in the election of a master, as being a member of the *domus* or foundation, under these words: "*In cujus vero electione hoc imprimis observari volumus, ut ipsius domus atque sociorum ejusdem semper ratio habeatur, ut hi, si qui inter eos ad hoc munus obcundum inveniatur idonei, ceteris præferantur: sin hujusmodi in domo nulli extiterint, tum aliundè assumantur.*"

Rex v. The Bishop of Ely. 2 T. R. 290

7 The fellows having returned two persons to the Bishop of *Ely* as general visitor, for him to choose one, according to the directions of the statutes, to which return the bishop is directed to give *plenam fidem* and to appoint one of them *quem magis utilem intellexerit, et præficiat domui et scholaribus, absque morâ in magistrum, ne domui et*

scholaribus dispendium ali quod inferat longa mora; and one of the persons returned being a fellow of the college, and the other a member of a different college, omitting *E. F.*, who was the third candidate; the bishop cannot on that account declare the election made by the fellows to be null, and appoint another than one of the two returned to him to be master, as claiming by lapse under a provision in the statutes, which declared that, in default of appointment by the fellows within a certain time, the bishop should nominate to the mastership. 2 T. R. 290

8 And therefore the Court in such case, on the bishop's refusal, granted a *mandamus* to him to appoint one of the two persons presented to him by the fellows. 2 T. R. 290

9 In general the Court of King's Bench will not interfere in the case of a visitor, or review any determination made by him in that capacity; but this was held not to be a case within the bishop's general visitatorial power; his right being restrained to the selection of one of the two persons presented to him by the fellows, who were the judges of their fitness. 2 T. R. 334, 5

10 Nor could the appointment of the bishop be said to have been done by virtue of his visitatorial power in this instance, even supposing the case to have been within his general jurisdiction, because he did not cite or hear the parties; and it is a judicial act; and unless there be a general visitation of the college, there must be an appeal to the visitor, and he should proceed on that. 2 T. R. 336

11 Where by the statutes of a college the right of appointment to the mastership devolves on a person named, who is also a general visitor, on neglect of the fellows to elect, such nominee has not that right as visitor, but by the special appointment of the founder. 2 T. R. 338

12 Then as this was not a visitatorial act, the propriety of the election and the bishop's conduct cannot be inquired into by himself as visitor, because that would be to determine on his own right, for he claims an interest and asserts a right, and a visitor cannot be a judge in his own cause, unless that power be expressly given to him; and in all these cases the

power of deciding the question, and construing the statutes, devolves on the courts of law. 2 T. R. 338, 9

13 Where by the constitution of *Exeter College, Oxford*, the bishop of *Exeter* was appointed general visitor, to visit by himself or his commissary once in five years, *ex officio*, unless oftener required by the college; and it was provided that he might deprive the rector or expel the scholars, with this qualification, *si tamen ad deprivationem rectoris, aut expulsionem scholaris alicujus, per episcopum aut ejus commissarium agatur*, then if he cannot make out his innocence he shall be removed without further appeal, *dum tamen ad ejus expulsionem*, there shall be the consent of the seven senior fellows; and then if the rector be removed by the bishop's commissary *etiam consentientibus* four of the senior fellows, he may appeal to the bishop; if the bishop deprive the rector without the consent of the four senior fellows, such deprivation is good notwithstanding; for being general visitor he has the power of deprivation necessarily incident to his office, and it can only be abridged by express words, of which there are none here, for the words *si tamen &c. dum tamen ad ejus expulsionem, &c.* relate to the fellows and not to the rector; though the words *etiam consentientibus, &c.* do qualify the commissary's power, but not the bishop's. *Per Holt J. in the case of Philips v. Bury.* 2 T. R. 346

14 But if the consent of the four senior fellows had been necessary to the deprivation of the rector, it would not have been sufficient for the bishop, having first suspended some of the senior fellows, to have obtained the consent of the rest: for the suspension made no vacancy of their offices, but was only an impediment to their enjoying any benefit from them. 2 T. R. 351

15 Under this constitution of the college the visitor can only visit once in five years, unless called upon oftener by the college: and if he come uncalled within the five years, his visitation would be void, and any sentence he might give, a mere nullity, as *coram non judice.* 2 T. R. 348

16 But if a member of the college, expelled by the rector and fellows, ap-

peal to the bishop as visitor, and the bishop appoint a particular commissary to examine the matter, this is not such a visitation as precludes the bishop from visiting again within five years *ex officio*; for, as visitor, he has a constant standing authority at all times to hear and redress the grievances of the particular members.

2 T. R. 346, 348

17 So where the bishop appointed a visitation to be held in the chapel on the 16th *June*, and the rector and fellows refused to open the doors on the day appointed, but protested in the area, and the visitor called over all their names, and swore a person to prove the summons, and went away without doing any more; and afterwards he appointed another visitation in the hall on the 24th *July* following, and called over the names, and registered the act of 16th *June*, notwithstanding a protest against all the proceedings, this visitation is good, and what passed on the 16th *June* was no visitation.

2 T. R. 348, 9, 357

18 The visitatorial power is an appointment of law, and is not of ecclesiastical origin: where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incorporated, there the law raises a visitatorial power in the founder and his heirs, unless the founder hath appointed some other person.

2 T. R. 352, 3

19 And there is no difference in respect of the visitatorial power between a college and an hospital, where the latter is not governed by trustees; both are eleemosynary, and a college imports a corporation.

2 T. R. 353

20 Spiritual corporations are visited by the ordinary: If he is visitor as ordinary, an appeal lies to his superior; if as patron, no appeal lies.

2 T. R. 353

21 Where a visitor has power to deprive, his sentence is not examinable either as to the cause or the truth of the fact in a court of law; so that if a deprivation be pleaded, there is no occasion to shew the cause, nor is it traversable even in a visitation.

2 T. R. 346, 351

22 Though the statutes of the college enumerate several offences for which the rector shall be deprived, and contumacy is not one of them, yet that doth not tend to abridge the visitor's power of deprivation incident to his office during a visitation, but he may equally deprive for contumacy.

2 T. R. 358

23 Where the founder of an hospital directed, that if in making up the accounts of the wardens triennially going out of office, any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct and amove the master for certain causes, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt: and the founder also delegated to the dean and chapter of *York* power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: the Court held, that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by *stat. 43 Eliz. c. 4.*; and consequently that a commission of charitable uses issued out of the Court of Chancery under that Act was valid. *Kirkby Ravensworth Hospital's Case.*

8 E. R. 221

WAGER.

VOID OR ILLEGAL.

See ASSUMPSIT, V. (d) ante, page 70.

GAMING, ante, page 352.

- 1 In general a wager is legal, if it be not an incitement to a breach of the peace or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy. 3 T. R. 693
- 2 Mr. Justice *Buller* was strongly inclined to think, that the *stat.* 14 G. 3. c. 48. made all wagers void wherein the parties had no interest. *Atherford v. Beard.* 2 T. R. 616
- 3 A wager that *A.* had purchased a wagon of *B.* is not void at common law, nor prohibited by *stat.* 14 G. 3. c. 48. and an action may be maintained upon it. *Good v. Elliott.* 3 T. R. 693
- 4 A wager, by which the defendant received from the plaintiff 100 guineas on the 31st of May 1802, in consideration of paying the plaintiff a guinea a day as long as *Napoleon Buonaparte* (then first consul of the French republic) should live; which bet arose out of a conversation upon the probability of his coming to a violent death by assassination or otherwise, is void on the grounds of immorality and impolicy. *Gilbert v. Sykes.* 16 E. R. 150
- 5 A wagering contract for 50 guineas, that the plaintiff would not marry within six years, is *prima facie* in restraint of marriage, and therefore void; no circumstances appearing to shew that such restraint was prudent and proper in the particular instance. *Hartley v. Rice.* 10 E. R. 22
- 6 A wager on a horse-race for less than 50*l.* cannot be recovered in an action; the *stat.* 13 G. 2. c. 19. s. 2. having prohibited such races. *Johnson v. Bam.* 4 T. R. 1
- 7 Nor a wager, though for more than 50*l.*, that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time. *Ximenes v. Jaques.* 6 T. R. 499
- 8 Nor a like wager, that a single horse should go from *A.* to *B.*, on the high road, sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by statutes 16 Car. 1. c. 7. s. 2. and 9 Anne, c. 14. and not legalized by 13 G. 2. c. 19. or 18 G. 2. c. 34. which latter statutes relate to *bond fide* horse-racing only. *Whaley v. Pajot.* 2 B. & P. 51
- 9 No action will lie on a wager respecting the mode of playing an illegal game; and if such a cause be set down for trial, the judge at *nisi prius* is justified in ordering it to be struck out of the paper. *Brown v. Leeson.* 2 H. B. 43
- 10 A wager between two voters with respect to the event of an election of a member to serve in parliament laid before the poll began, is illegal. *Allen v. Hearn.* 1 T. R. 56
- 11 *Quere*, Whether a wager, that war would be declared against France within three months, is void? *Foster v. Thackery.* 1 T. R. 57, n.
- 12 A wager upon the event of a cause in the House of Lords or the Courts of Justice, is void, if laid with a lord of parliament or judge. *Per Lord Mansfield.* 1 T. R. 60
- 13 The Court will not try an action upon a wager on an abstract question of law or judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest. *Henkin v. Guerres.* 12 E. R. 247
- 14 A wager respecting the amount of any branch of the public revenue is illegal; because it leads to an improper discussion, and is contrary to sound policy. *Atherfold v. Beard.* 2 T. R. 610
- 15 And after verdict for the plaintiff in an action brought on such a wager, the Court will arrest the judgment. 2 T. R. 610
- 16 For the same reasons an action will not lie on a promissory note given in payment of a wager on the amount of the hop duties. *Shirley v. Sankey.* 2 B. & P. 130

WARRANT OF ATTORNEY.

I. HOW EXECUTED.

II. JUDGMENT ON—HOW ENTERED UP;
AND HEREIN OF SUGGESTION OF
BREACHES.

I. HOW EXECUTED.

- 1 It is not necessary that a warrant of attorney should be read over to the party giving it (notwithstanding an old rule of Court in C. P.) *Taylor v. Parkinson.* 2 H. B. 383
- 2 When a defendant in custody executes a warrant of attorney to confess a judgment, there must be an attorney present on his part; the presence of the plaintiff's attorney is insufficient, though the defendant consent to his acting as his attorney also. *Hutson v. Hutson.* 7 T. R. 7
- 3 But when a defendant is *in execution*, his attorney need not be present. *Birch v. Sharland.* 1 T. R. 715
S. P. Crompton v. Steward. 7 T. R. 19
- 4 Or if he be in custody at the suit of a third person, and not of the plaintiff. *Smith v. Burlton.* 1 E. R. 241
See Parkinson v. Caines. 3 T. R. 616, ante, page 592.
- 5 If a prisoner on mesne process gives a warrant of attorney, the rule that his attorney must be present is not dispensed with, though two other sureties not in custody join in the warrant. *Valentine v. Gulland.* 2 Taunt. 49
- 6 A warrant of attorney to confess judgment, executed by a prisoner in custody on criminal process, is good, though he have no attorney present. *Charlton v. Fletcher.* 4 T. R. 433
- 7 If a defendant in custody, being about to execute a warrant of attorney to confess judgment, is informed that it must be done in the presence of an attorney on his part, and thereupon produces a person as such, in whose presence he executes the warrant of attorney: the Court of C.P. will not set aside the proceedings thereon, because the person so produced by the defendant was not an attorney. *Jeyes v. Booth.* 1 B. & P. 97
- 8 A warrant of attorney confessed by a defendant in custody is good, if an attorney on his behalf is present, though he is a total stranger to the defendant, and is introduced by the plaintiff's attorney, who refused to remain on the spot a sufficient time for the defendant to procure the attendance of his own attorney, who lived in a distant part of the town. *Osborne v. Davis.* 4 Taunt. 797
- 9 A warrant of attorney needs not be by deed, nor does it require an attesting witness. *Kinnersley v. Massen.* 5 Taunt. 264
- 10 The rule of Court *M. 42 G. 3.* does not require the consideration of a judgment to be indorsed on the warrant of attorney. *Barber v. Barber.* 3 Taunt. 465
- 11 If a warrant of attorney be given to confess judgment absolutely for a certain sum, although it be understood between the parties that it is given only to indemnify the plaintiff against his suretyship for a smaller sum, that is not such a defeazance as needs to be indorsed on the warrant of attorney, and the plaintiff needs not to defer execution till the contingency happens. 3 Taunt. 465
- 12 If the attorney employed to prepare a warrant of attorney to confess judgment, which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, which is required by the rule of Court of *M. 42 G. 3.*, the security is not thereby avoided against the innocent party; but the attorney is guilty of a breach of duty imposed on him by the Court, and answerable for it on motion. *Shaw v. Evans.* 14 E. R. 576
- 13 It is not sufficient that the defeazance of a warrant of attorney shews the amount of the sum secured by the judgment; it must also notice all collateral securities by which it is secured. *Morell v. Dubost.* 3 Taunt. 235

41 If the attesting witness cannot be found to make affidavit of the execution of a warrant of attorney, the attesting witness must be accounted for by affidavit, before the Court of C. P. will admit secondary evidence. *Waring v. Bowles.* 4 Taunt. 132

II. JUDGMENT ON—HOW ENTERED UP;
AND HEREIN OF SUGGESTION OF
BREACHES.

- 1 No judgment can be signed upon any warrant authorising any attorney to confess judgment without such warrant being delivered to, and filed by the clerk of the dockets; who is to file the same in the order in which they are received. *Reg. Gen. K. B. M. 42 G. 3. 2 E. R. 136. C. P. M. 43 G. 3.* 3 B. & P. 310
- 2 Every attorney who shall prepare any warrant of attorney to confess any judgment which is to be subject to any defeasance, must cause such defeasance to be written on the same paper or parchment on which the warrant of attorney is written, or cause a memorandum in writing to be made on such warrant, containing the substance, and effect of such defeasance. *Reg. Gen. K. B. 2 E. R. 136. Reg. Gen. C. P. 3 B. & P. 310*
- 3 A warrant of attorney to enter up judgment having been given to one (not naming his executors and administrators) who died in vacation, the Court refused to enter up judgment thereon in the succeeding Term on the prayer of his executrix. *Cowie v. Alloway.* 8 T. R. 257
- 4 If a plaintiff enter up judgment in debt on a *mutuatus*, on a warrant of attorney to enter up judgment *in debt on bond*, the Court will set it aside as irregular. *Paris v. Wilkinson.* 8 T. R. 153
- 5 Judgment on a warrant of attorney entered in *Easter vacation* against a defendant who died in *Easter Term*, is good; but execution cannot be sued out upon it until it be reversed against his representative by *scire facias*. *Heapy v. Paris.* 6 T. R. 368
- 6 Where judgment has not been entered within a year and a day, on a warrant of attorney given with a *post obit bond*, and the obligee does not apply

to the Court of C. P. for leave to enter it, till after the death of the person on whose death it is payable, they will not grant leave, without a rule to shew cause. *Laushing v. Waller.*

- 7 The Court of C. P. refused to allow judgment to be entered on an old warrant of attorney, it appearing by the plaintiff's affidavit that she was resident in an enemy's country. *De Luneville v. Phillips.* 2 N. R. 97
- 8 If A. acknowledge that an old warrant of attorney given by him, "was to enable B., if necessary, to enter up judgment upon it," a Judge may well make an order for entering up the judgment without an affidavit of the subscribing witness. *Laing v. Raine.* 2 B. & P. 85
- 9 Where defendants gave a warrant of attorney to secure a sum certain to be paid half-yearly by instalments, with interest on specified days, and that the plaintiff should be at liberty to enter up judgment thereon immediately, but no execution to be issued till default made in payment of the said sum, with interest as aforesaid, by instalments, and in the manner hereinbefore mentioned: Held, that the plaintiff might take out execution for the whole on default in payment of the first instalment. *Leve-ridge v. Forty.* 1 M. & S. 703
See PRISONER, ante, page 592.
- 10 A joint warrant of attorney, given to enter judgment upon a joint and several bond, will not authorize the entering up judgment against the survivor only. *Gee v. Lane.* 15 E. R. 592
- 11 A warrant of attorney to confess a judgment to three, and one dies, the Court will permit judgment to be entered by the survivors. *Fendall v. May (Bart.)* 2 M. & S. 76
- 12 No suggestion is necessary on a judgment by warrant of attorney. *Kinnorsley v. Mussen.* 5 Taunt. 264
- 13 Where judgment is entered on a warrant of attorney, though a bond also is given, it is not necessary under 8 & 9 W. 3. c. 11. to suggest breaches. *Austerbury v. Morgan.* 2 Taunt. 195
- 14 No suggestion is necessary under 8 & 9 W. 3. c. 11., upon a warrant of attorney conditioned for payment by instalments. *Cox v. Rodbard.* 3 Taunt. 74

WARRANTY.

N. B. For a joint or several Warranty, see *Weal v. King*. 12 E. R. 452 ante, page 7.

1 Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore if there be a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased), such seller is not answerable, though the goods turned out to be unmerchantable. *Parkinson v. Lee*. 2 E. R. 314

2 Where a horse has been sold, warranted sound, which it can be clearly proved was unsound at the time of the sale, the seller is liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness. *Fielder v. Starlin*. 1 H. B. 17

3 But where on the sale of a horse there is an express warranty by the seller, that the horse is sound, free from vice, &c. coupled with an undertaking on the part of the seller to take the horse again, and pay back the money, if on trial he shall be found to have any of the defects mentioned in the warranty, the buyer must in such case return the horse as soon as he discovers any of those defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller. *Adam v. Richards*. 2 H. B. 573

4 In such case trial means a reasonable trial. 2 H. B. 573

5 Upon a warranty of a horse as sound, the vendor, in a subsequent conversation, promised if the horse were unsound (which he denied) he would

take it again, and return the money; though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain *assumpsit* to recover back the price, for such promise did not discharge the original warranty. *Payne v. Whale*. 7 E. R. 274

6 If a horse sold at a public auction be warranted sound, and six years old, and it be one of the conditions of sale that it shall be deemed sound unless returned in two days, this condition applies only to the warranty of soundness. *Buchanan v. Parnshaw*. 2 T. R. 745

7 Therefore, where a horse sold with such a warranty was discovered to be twelve years old ten days after the sale, and was then offered to the seller who refused to take him, it was holden that an action might be maintained by the buyer against the seller on the warranty, and his right to recover, is not affected by his having sold the horse after offering him to the defendant. 2 T. R. 745

8 In an action on the case in tort for a breach of a warranty of goods, the *scienter* need not be charged, nor, if charged, need it be proved. *Williamson v. Allison*. 2 E. R. 446

9 In an action on a warranty of a horse, the plaintiff must positively prove that the horse was unsound. *Eaves v. Dixon*. 2 Taunt. 343

And see *Lewis v. Cosgrave*.

2 Taunt. 2, ante, page 159

10 Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him: If the horse is not returned, the measure of damages is the difference between his real value and the price given: If the horse is not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep. *Caswell v. Coare*. 1 Taunt. 566

WASTE.

- 1 An action on the case does not lie for permissive waste only. *Gibson v. Wells*.
1 N. R. 290
- 2 One of two tenants in common cannot maintain an action on the case in nature of waste, against the other tenant in common, (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of a proper age and growth, for being cut; but he will be entitled to recover a moiety of the value in another form of action. *Martin v. Knowllys*.
8 T. R. 145
- 3 *Secus*, if the trees be not fit to cut.
8 T. R. 145
- 4 Case for permissive waste in buildings does not lie against a tenant by lease, who has not covenanted to repair. *Herne v. Bombow*.
4 Taunt. 764
- 5 There is a distinction to be taken between waste and destruction, in conformity to the practice of the Court of Chancery. *Pyne v. Dor*.
1 T. R. 56
- 6 Tenant for life without impeachment of waste has an absolute property in trees as soon as they are cut down.
1 T. R. 55
- 7 The clause "without impeachment of waste," will not warrant a tenant for life in unleading a house and pulling down the tiles. *Vane v. Lord Barnard*.
1 T. R. 55, n.
- 8 The Court of Chancery have also prevented a tenant for life without impeachment of waste from cutting down an avenue leading to a house, but not all ornamental timber. 1 T. R. 55, n.
And see *Packington's Case*. 3 Atk. 215, where a Court of equity protected trees which were either an ornament or a shelter to a house.
1 T. R. 55, n.
N. B. In *Charlton v. Charlton*, mentioned by Lord Hardwicke, in 3 Atk. 216, Lord Chief Justice King prevented a tenant for life without impeachment of waste from felling trees in a park.
1 T. R. 55, n.
- 9 If trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright v. Vivian*.
8 E. R. 19
- 10 The purchaser of lands, having brought an ejectment against the tenant from year to year, the parties enter into an agreement that judgment shall be signed for the plaintiff, with a stay of execution till a given period: The tenant cannot in the interval remove buildings, &c. (ex. gr. a wooden stable moveable on blocks or rollers), for the premises which he had himself erected during his term, and before the action was brought. *Fitzherbert v. Shaw*.
1 H. B. 258
- 11 Salt pans, necessary to the use of salt works, and without which they would be of no value, are the property of the *heir*, and not of the *executor*; though they might be removed without injuring the buildings. *Lawton v. Salmon*.
1 H. B. 259, n.
- 12 A tenant in agriculture, who erected at his own expense, and for the more necessary and convenient occupation of his farm, a beast-house, carpenter's shop, cart-house, pump-house, and fold-yard wall, which buildings were of brick and mortar, and tiled, and let into the ground, cannot remove the same, though during his term, and though he thereby left the premises in the same state as when he entered. There appears to be a distinction between annexations to the freehold of that nature for the purposes of trade, and those made for the purposes of agriculture and better enjoying the immediate profits of the land in favour of the tenant's right to remove the former; that is, where the super-incumbent building is erected as a mere accessory to a personal chattel, as an engine: but where it is accessory to the realty, it can in no case be removed. *Elves v. Maw*.
3 E. R. 38
N. B. In this case all the prior decisions on the subject of Waste are collected.
And see *Williams v. Williams*.
12 E. R. 209, ante, page 669

13 In an action of waste, on the statute of *Gloucester*, against tenant for years for converting three closes of meadow into garden ground, if the jury give only one farthing damages for each close, the Court of C. P. will permit the

defendant to enter up judgment for himself. *The Keepers and Governors, &c. of Harrow School v. Alderton.*

2 B. & P. 86

And see *Pindar v. Wadsworth.*

2 E. R. 155

WATERCOURSE.

See *tit. RIVERS, ante, page 618*

1 The owner of land through which a river runs, cannot, by enlarging a channel of certain dimensions, through which the water had been used to flow before any appropriation of it by another, divert more of it to the prejudice of any other land-owner lower down the river, who had at any time before such enlargement appropriated to himself the surplus water which did not escape by the former channel.

Bealey v. Shaw. 6 E. R. 208

2 Where one declared in case for obstructing a watercourse, upon his possession of a mill with the appurtenances and that by reason of such his possession he had a right to the use of water running in a certain tunnel to the mill; such

allegation is not supported by proof that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose for a certain consideration, but of which no conveyance was made by the defendant to the plaintiff; and he had since refused assent: because the plaintiff had not the water by reason of the possession of the mill, &c. but by parol licence or contract, which could not pass the title to the land, and as a licence was revocable and revoked. *Fentiman v. Smith.* 4 E. R. 107

N. B. The venue is local, but a local description of the nuisance is unnecessary. *Mersey & Irwell Navigation v. Douglas.* 2 E. R. 497

WAY.

I. ACTION FOR DISTURBANCE OF.

II. RIGHT OF.

(a) *By Grant.*

(b) — *Prescription.*

(c) *Of Necessity.*

I. ACTION FOR DISTURBANCE OF.

1 One who has a grant of an occupation way may declare in case, against the owner of the land over which the way leads, for obstructing it, although it be proved that the public in general had used the way without denial for the last twelve years.

Allen v. Ormond. 8 E. R. 4

2 A servant put into the occupation of a cottage, with less wages on that account, does not occupy it as a tenant, but the master may properly declare on it as his own occupation in an action on the case for a disturbance of a right of way over the defendant's close to such cottage, and it matters not that the cottage was divided

into two parts, one of which only was in the occupation of such servant, the other being occupied by a tenant paying rent. *Bertie v. Beaumont.*

16 E. R. 33

II. RIGHT OF.

(a) *By Grant.*

And See *GRANT, ante, page 353.*

HIGHWAYS, ante, page 358.

1 Under the grant of a free and convenient way for the purpose of carrying coals (among other things), the grantee has a right to lay a framed waggon-way. *Senhouse v. Christian.*

1 T. R. 560

2 Under a grant of a way from A to B, in, through, and along a particular way, the grantee is not justified in making a transverse road across the same.

1 T. R. 560

3 A. granted to B., his heirs and assigns, occupiers of certain houses abutting on a piece of land about 11 feet wide, which divided those houses from a house then belonging to A., the right

of using the said piece of land as a foot or carriage way; and gave him "all other liberties, powers, and authorities, incident or appurtenant, needful or necessary, to the use, occupation, or enjoyment of the said road, way, or passage:" Held, that under these words B. had a right to put down a flag-stone in this piece of land in front of a door opened by him out of his house into this piece of land. *Gerrard v. Cooke*.

2 N. R. 109

- 4 A. granted to B. land of unequal width, described as abutting on a road on his own soil. It abutted in the broadest part on the road, but in the narrowest part a narrow strip of the grantor's land intervened between the road and the premises granted: Held, that the grantor and those claiming from him were concluded from preventing the grantee to come out into the road over this slip of land. *Roberts v. Kurr*.

1 Taunt. 495

- 5 Where no evidence appeared to shew that a way over another's land had been used by leave or favour, or under a mistake of an award which would not support the right of way claimed, such a user for above twenty years exercised adversely and under a claim of right, is sufficient to leave to the jury to presume a grant which must have been made within twenty-six years, as all former ways were at that time extinguished by the operation of an Inclosure Act. *Campbell v. Wilson*. 3 E. R. 294

(b) By Prescription.

- 1 A claim of a prescriptive right of way from A. over the defendant's close unto D. is not supported by proof that a close called C., over which the way once led, and which adjoins to D. was formerly possessed by the owner of close A., and was by him conveyed in fee to another, without reserving the right of way; for hereby it appears that the prescriptive right of way does not, as claimed, extend unto D., but stops short at C.—*Quare*, if the claim had been for a prescriptive right of way over the defendant's close towards D? *Wright v. Ratray*. 1 E. R. 377
- 2 But where in trespass *quare clausum fregit*, the defendant prescribed for an occupation way from his own close "unto, through, and over," the *locus in*

quo to and unto a certain highway, &c. such plea may be sustained, though it appeared that one out of several intervening closes was in the possession of the defendant himself. *Jackson v. Shillito*. 1 E. R. 381, n.

- 3 One being seised in fee of the adjoining closes A. and B., over the former of which a way had immemorially been used to the latter, devises B. with the "appurtenances:" Held, that the devisee cannot under the word, "appurtenances," claim a right of way over A. to B., as no new right of way is thereby created, and the old one was extinguished by the unity of seisin in the devisor. *Whalley v. Thompson*. 1 B. & P. 371

- 4 Evidence of a prescriptive right of way for all manner of carriages, does not necessarily prove a right of way for all manner of cattle. *Ballard v. Dyson*. 1 Taunt. 279

- 5 But it is evidence of a drift way, for the jury to consider, together with the other evidence. 1 Taunt. 279

- 6 The extent of the usage is evidence of a right only commensurate with the user. 1 Taunt. 279

- 7 Trespass *quare clausum fregit*: plea, that defendant was seised in his demesne as of fee of a messuage, &c. in the parish, and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, occupiers of the messuage, &c. over the *locus in quo* to and from the messuage, &c. as appertaining thereto; replication that defendant and all those, &c. have not the said way as appertaining to the said messuage, &c.: Held, that the defendant's shewing that he was seised in fee of an ancient messuage in the parish, to which a right of way, as pleaded, over the *locus in quo* belonged, was evidence sufficient to support his plea, although the messuage was let to and in the occupation of a tenant, and the defendant only occupied a newly built house in the parish at the time of the trespass. *Stott v. Stott*. 16 E. R. 343

- 8 Plea, that defendant was seised in his demesne as of fee, &c., &c., and that he and all those whose estate, &c. have a right of way for himself, his and their farmers and tenants, occupiers, &c. is good, without alleging that the defendant is occupier. *Stott v. Stott*. 16 E. R. 343

(c) *Of Necessity.*

- 1 Where one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity as incidental to the grant. *Howton v. Frearson*. 8 T. R. 50
- 2 It seems that if the owner of two closes having no way to one of them but over the other, part with the latter without reserving the way, it will be reserved for him by operation of law. *Howton v. Frearson*. 8 T. R. 50
- 3 No way, or other easement, can subsist in land of which there is an unity of possession. *Morris v. Eggington*. 3 Taunt. 24
- 4 But if a lessor, having used convenient ways over his own adjoining land during his own occupation, demises premises with all ways appurtenant, unless it be shewn in evidence that there was some way appurtenant in

- alieno solo*, to satisfy the words of the grant, it shall be intended that he meant the ways used, and they shall pass, though he miscall them appurtenant. *Per Mansfield, C. J.* 3 Taunt. 24
- 5 *Quare*, Whether a way of necessity shall be the way most convenient to the lessee? 3 Taunt. 24
 - 6 A way of necessity exists after unity of possession of the close to which, and the close over which, and after a subsequent severance: if a person purchases close A., with a way of necessity thereto over close B., a stranger's land, and afterwards purchases close B., and then purchases close C., adjoining to close A., and through which he may enter close A., and then sells close B. without reservation of any way, and then sells closes A. and C.; the purchaser of close A. shall nevertheless have the ancient way of necessity to close A. over close B. *Buckby v. Coles*. 5 Taunt. 311

WEIGHTS AND MEASURES.

- 1 It is illegal to sell corn by any other than the Winchester measure. *Rex v. Major*. 4 T. R. 750
- 2 The buyer of corn by any other than the Winchester measure forfeits the penalty of 40s. besides the value of the corn, by statute 22 & 23 Car. 2. c. 12. *Rex v. Arnold*. 5 T. R. 353
- 3 If the *reddendum* in an old renewed lease be so many quarters of corn, it will be understood to mean legal quarters, reckoning the bushel at eight

- gallons; although the old leases before the *stat.* 22 & 23 Car. 2. c. 12. contained the same *reddendum*; and although, till lately, the lessees paid by composition, reckoning the bushel at nine gallons. *The Master and Brethren of the Hospital of St. Cross v. Lord Howard de Walden*. 6 T. R. 338
- 4 A custom that every pound of butter sold in a particular market should weigh eighteen ounces, was held bad. *Noble v. Darnell*. 3 T. R. 271

WILL.

I. REPUBLICATION.

II. REVOCATION.

I. REPUBLICATION.

N.B. For the mode and requisites of executing a Will according to the Statute of Frauds, see *ante*, pages 343, 4.

- 1 A. by will devised all his freehold and copyhold lands, &c. in trust for certain purposes, and afterwards purchased new lands; and then made a codicil, whereby after reciting that

- he had devised all his freehold and copyhold to the trustees named, he revoked the same so far as related to two of the trustees named, and devised his *said* lands, &c. to the other trustees upon the same trusts, and concluded with declaring the codicil to be part of his will: Held, that such a republication of the will would not operate to pass the after-purchased lands. *Lady Strathmore v. Bowes*. 7 T. R. 482
- 2 A codicil signed by the testator and attested by three witnesses "to be taken as part of his will," is a republication

of the will so as to make the will pass lands contracted for before, but conveyed between the date of the will and codicil. *Goodtitle, d. Woodhouse v. Meredith.* 2 M. & S. 5

II. REVOCATION.

- 1 Marriage, and the birth of a posthumous child, amount to an implied revocation of a will of lands made before marriage. *Doe v. Lancashire.* 5 T. R. 49
- 2 But the subsequent birth of a child is not of itself sufficient. *Shepherd v. Shepherd.* 5 T. R. 49, 51, n.
- 3 A deed intended to operate as an appointment of uses, but not sufficient for that purpose, may have the effect of revoking a will, if the party appear to have had that intention. *Shove v. Pincke.* 5 T. R. 124, 310
- 4 A. seised in fee, agreed by marriage articles to settle his estates, so as to secure his intended wife's jointure and the portions of younger children, and subject thereto upon his eldest son in tail male; he then devised those estates in fee in case he had no issue, and subject to any jointure as he might make, to trustees, for 500 years upon certain trusts; and afterwards conveyed them by lease and release to trustees, and their heirs, in pursuance of the articles, in trust for himself in fee, till the marriage, and afterwards for the various purposes of the marriage articles, and for default of issue of the marriage, and subject to a term for securing the jointure, to the use of himself in fee: he afterwards married and died without issue; Held that the deed of settlement, whereby he departed with the whole estate devised, operated as a revocation of the will, though he took back a fee by the same instrument, and though it was consistent with the provisions of the will: and it was held (*dissent. Eyre, C. J.*) that it made no difference, that with respect to one of the estates the conveyance in fee to the trustees was merely for the purpose of creating a term to secure his wife's jointure; and that the settlor took back the fee again subject to that term. *Goodtitle d. Holford v. Otway*, 2 H. B. 516. (Trial at bar).—1 B. & P. 576.

N. B. *The Judgment of the Court of Common Pleas, on the special verdict, was affirmed in the Kings Bench*, 7 T. R. 399

- 5 One devised his personal estate to A. and his real estate to B., and after A.'s death, the deviser having acquired other real property, some by devise and some by purchase, he made a second will, disposing by name of his after-acquired testamentary estate to C., and then added, "*As to the rest of my real and personal estate, I intend to dispose of it by a codicil, hereafter to be made by this my will.*" This is no revocation of the first will, whether considering that he meant to include the same property therein devised: because it is a mere declaration of an intent to dispose of it in future; and *non constat* that such disposition would be inconsistent with the first will; nor is it any revocation, considering that he meant only to include his after-purchased property not before devised, and his personal estate, the bequest of which had lapsed by the death of A. *Thomas d. Jones v. Evans.* 3 E. R. 488
- 6 A. by will provided an annuity for B. with whom he cohabited, and directed his trustee and executor out of his real estate, in case he should have any child or children by B., to raise 3000*l.* to be paid to and amongst his said children, and devised the remainder of his estate over to several of his relatives. Afterwards he married B., and had several children by her; Held, that such subsequent marriage and births did not revoke his will, the objects having been therein contemplated and provided for. *Kensel v. Scrafton.* 2 E. R. 530
- 7 2*u.* Whether such implied revocations may be rebutted by evidence of parol declarations of the testator made after the events that he meant his will to stand? 2 E. R. 530
- 8 Where one devised lands to two trustees in trust for certain purposes by a will duly executed and attested, and he afterwards struck out the name of one of those trustees, and inserted the names of two others; leaving the general purposes of the trust unaltered, though varying in certain particulars; and did not republish his will: Held, that his intent appearing to be only to revoke by the substitution of another good devise to other trustees; as such new devise could not take effect for want of the proper requisites of the Statute of Frauds, it should not operate as a revocation; or at most it could

only operate as a revocation *pro tanto*, as to the trustee whose name was obliterated; leaving the devise good as to the old trustee whose name was retained. *Short d. Gastrell v. Smith.*

4 E. R. 419

- 9 If a testator having executed a devise of lands in the presence of three witnesses, to two persons as joint tenants in fee, afterwards strike out the name of one of the devisees and there be no republication, the erasure will only operate as a revocation of the will *pro tanto*. *Larkins v. Larkins.*

3 B. & P. 16. 109

- 10 If a testator after having made his will, levy a fine to such uses as he shall

by deed or will appoint, and die without making any new will, the will made prior to the fine is revoked thereby.

Doe d. Dilnot v. Dilnot. 2 N. R. 401

- 11 A testator having devised his lands, suffered a recovery thereof, in which, as well as in the deed to make a tenant to the *præcipe*, the tenant was called Edward, his real name being Edmund: in ejectment by the heir at law against the devisees, the Court of C. P. held that the recovery was good by Estoppel against the testator and all persons claiming under him, and that the will therefore was revoked thereby. *Doe d. Lushington v. Llan-daff (Bp.)* 2 N. R. 491

WITNESS.

I. ATTENDANCE OF.

- (a) *By Subpœna duces tecum.*
- (b) *Proceedings against for non-attendance.*
- (c) *Remedy for expenses.*

II. INADMISSIBILITY OF—FROM RELATIVE SITUATIONS.

- (a) *Attorney or Counsel.*
- (b) *Husband and Wife.*

III. INCOMPETENCY OF, FROM INFAMY OF CHARACTER; OR PARTIES INJURED IN CRIMINAL PROCEEDINGS.

IV. INCOMPETENCY FROM INTEREST.

- (a) *Parties in a Suit.*
- (b) *Bankruptcy—in questions of.*
- (c) *Bills and Notes—in cases on.*
- (d) *Agents and Servants.*
- (e) *Commoners.*
- (f) *Corporators.*
- (g) *Creditors.*
- (h) *Parishioners.*
- (i) *Partners and Part-owners.*
- (k) *Underwriters.*

V. EXAMINATION OF.

I. ATTENDANCE OF.

- (a) *By Subpœna duces tecum.*

- 1 The writ of *subpœna duces tecum* is of compulsory obligation on a witness to

produce papers thereby demanded which he has in his possession, and which he has no lawful or reasonable excuse for withholding; of the validity of which excuse, the Court, and not the witness, is to judge. And in an action against a sheriff's bailiff for disobeying such writ, who having been *subpœnaed*, on a former action by the plaintiff against another, to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was nonsuited, his ability to produce the warrant and his want of just excuse for not producing it are sufficiently alleged by stating, that he could and might in obedience to the said writ of *subpœna* have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary. *Amey v. Long.*

9 E. R. 473

- (b) *Proceedings against—for non-attendance.*

- 1 A *subpœna* may be issued from the crown-office requiring a witness to attend at the assizes in the country to give evidence in support of an intended prosecution for a felony; and the Court of King's Bench will grant an attachment against him for not attending accordingly. *Rex v. King.*

8 T. R. 585

- 2 The Court of C. P. refused to grant an attachment against a witness, for not obeying a *subpœna* to attend at a trial;

on the ground that the whole expenses of the journey, and of the necessary stay at the place of trial were not tendered at the time of serving the *subpæna*. *Fuller v. Prentice.* 1 H. B. 49

- 3 The Court of C. P. refused an attachment against a witness, who being *subpænaed* without particular notice when the cause would come on, in the course of his third day's attendance left the Court to attend to urgent business of his trade, although the cause was tried in his absence and the plaintiff nonsuited, which his evidence would have prevented; even though the witness was induced to leave the Court by the representation of the adverse attorney. *Blandford v. DeTaset.* 5 Taunt. 260

S. C. 1 Marsh. 42

- 4 And that Court will not grant an attachment against a witness for not appearing to give evidence, unless a clear case of contempt be made out against him: Where the witness resides twenty-four miles from the assize town, and his expenses are not tendered to him till the evening before the trial, the Court will not grant an attachment. *Holme v. Smith.* 1 Marsh. 410

(c) *Remedy for Expenses.*

- 1 One who is *subpænaed* as a witness and attends at the trial, but there refuses to give evidence unless his expenses are paid, and is thereupon not examined, may yet maintain *assumpsit* for his necessary expenses of attendance against the party who *subpænaed* him: There was also evidence of a promise to pay the expenses at the time of serving the *subpæna*; which it was contended was waved by the subsequent refusal to be examined. *Hallet v. Mears.* 13 E. R. 15
- 2 Under the stat. 1 Jac. 1. c. 15. ss. 10 & 11, it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expenses of his journey before-hand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons, and consequently a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment authorizing his arrest for the purpose of examination, is legal. *Battie v. Gresley.* 8 E. R. 319

- 3 It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expense of the journey is a lawful impediment. *Battie v. Gresley.* 8 E. R. 319

- 4 Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the first summons. 8 E. R. 319

- 5 The propriety of granting such warrant, being an act of discretion, must be determined upon by the commissioners acting together at the time: And their order to their officer to make out the warrant must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant may be done by them separately. 8 E. R. 319

II. INADMISSIBILITY OF—FROM RELATIVE SITUATIONS.

(a) *Attorney or Counsel.*

- 1 An attorney is not restrained by any rule of law from giving evidence of a conversation between him and his client touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made by way of instruction for conducting his cause. *Cobden v. Kendrick.* 4 T. R. 431
- 2 But if any matter be disclosed to an attorney in the cause, pending the cause, he is not permitted to give it in evidence either in that or in any other action. *Wilson v. Rastal.* 4 T. R. 753
- 3 It is the privilege of the client and not of the attorney. 4 T. R. 753
- 4 But such privilege is confined to counsel, solicitors, and attorneys, when acting in their respective characters. 4 T. R. 753
- 5 An attorney is bound to disclose the contents of a notice which he received to produce a paper in the hands of his client, the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the attorney from his client, and not to adverse proceedings communicated

to him as attorney in the cause from the adverse party. *Spenceley v. Schultenburgh.* 7 E. R. 357

(b) *Husband and Wife.*

1. Husband and wife shall not be called in any case to give evidence, even tending to criminate each other. *Rex v. Cliviger (Inhab.)* 2 T. R. 263
2. Nor can they in any case be witnesses either for or against each other. *Davis v. Dinwoody.* 4 T. R. 678
3. In a case of settlement where a marriage in fact had been proved between two paupers, the first wife of the husband is not a competent witness to prove a former marriage with him, because such evidence shews him to have been guilty of bigamy. *Rex v. Cliviger (Inhab.)* 2 T. R. 263
4. Husband and wife may prove their own marriage on a question of settlement. 2 T. R. 263

III. INCOMPETENCY OF—FROM INFAMY OF CHARACTER; OR PARTIES INJURED IN CRIMINAL PROCEEDINGS.

See *Howard v. Shipley.* 4 E. R. 180, next page.

1. A witness admitting herself to have before sworn falsely upon the particular point, but attributing it to the persuasion of the defendant, is not an incompetent witness against him on an indictment for a conspiracy; but the objection goes strongly to her credit. *Rex v. Teal.* 11 E. R. 309
2. The party interested in the testimony of a witness, who is objected to on account of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *Rex v. Castell Careinion (Inhab.)* 8 E. R. 77
3. A. having brought an action against B., the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which A. having put in his answer, denying the allegations of B., which involved the merits of the suit at law, the injunction was dissolved: on which answer B. indicted A. for perjury: and the indictment and action coming on to be tried at the same assizes, the indictment standing first: Held, that B. was a competent witness to prove

the perjury, as he could not avail himself of the conviction of A. in any civil proceeding between them, either in law or equity. *Rex v. Boston.*

4 E. R. 572

4. Equity refused leave to file a supplemental bill in nature of a bill of review, in consequence of a conviction of a witness in the original proceeding for perjury, which conviction was obtained on the evidence of the plaintiff in the suit as well as of others. *Bartlett v. Pickersgill.* 4 E. R. 572, n.
5. If one party to a civil suit be convicted of perjury, upon the testimony of another, the witness cannot in any manner avail himself of that conviction in the same suit. *Burdon v. Browning.* 1 Taunt. 520
6. If several be charged with the same offence, and no evidence be given on the part of the prosecution against one of them, he is entitled to an acquittal before the others are called upon for their defence, in order to enable them to avail themselves of his testimony as a witness. *Ship Bounty, Case of.* 1 E. R. 313, n.

IV. INCOMPETENCY FROM INTEREST.

(a) *Parties in a Suit.*

1. In general a person is a competent witness, unless he be interested in the event of the suit. *Bent v. Baker (in error.)* 3 T. R. 27
And see 7 T. R. 62
2. In some cases, even an interested person is a competent witness from necessity, as where the interest arises after the plaintiff or defendant has an interest in his testimony. 3 T. R. 27
3. In order to render a witness incompetent, it is necessary to shew that he must derive a certain benefit from the determination of the cause one way or the other. *Carter v. Pearce.* 1 T. R. 164
4. The bare possibility of a witness being liable to an action in a certain event is no objection to his competency. 1 T. R. 163
5. But bail cannot be a witness for the principal. 1 T. R. 163
6. A co-obligor in a bond to the ordinary under stat. 23 & 24 Car. 2. c. 10. is a competent witness to prove a tender by the administratrix. 1 T. R. 163

7 So a creditor of the administratrix is a good witness for the same purpose. *Carter v. Pearce.* 1 T. R. 164

8 If a plaintiff and a defendant are both willing that the plaintiff shall give evidence in the cause, he is an admissible witness on his oath; although he comes to defeat the claim of another plaintiff suing jointly with himself. *Norden v. Williamson.* 1 Taunt. 378

9 It was held that a person is not a competent witness to impeach a security which he has given, although he is not interested in the event of the suit. *Walton v. Shelly.* 1 T. R. 296

10 *Quare*, Whether a person who is interested in the question put to him, though not in the event of the suit, be a competent witness? 1 T. R. 296
And see Jordaine v. Lashbrooke, next page.

11 *A.* having given a bond to *B.* for the payment of money, which, it is understood between them, is to be applied towards indemnifying *B.* from the expenses of an election in which *B.* is a candidate; in an action brought by *C.* against *D.* for money advanced and services performed, in supporting the interest of *B.* at the request of *D.*: *A.* is not a competent witness on behalf of *D.* *Trelawney v. Thomas.* 1 H. B. 303

12 *Quare*, Whether it be an objection to the competency of a witness for the plaintiff in an action of bribery at an election for members to serve in parliament, that a similar action was pending against the witness himself for bribery at the same election, and an acknowledgment by him that if the defendant were convicted, he should avail himself, if necessary, of his having been the first discoverer to the present plaintiff? *Edwards v. Evans.* 3 E. R. 451

13 It is now decided to be no objection. *Howard v. Shipley.* 4 E. R. 180

14 But where the evidence given by such a witness of the defendant's bribery was by means of the defendant's confession of it to the witness: Held, that the truth of the fact so confessed, as well as of the confession of such fact, was material for the consideration of the jury. 4 E. R. 180

15 In covenant for rent upon a lease by *A.* to *B.*, the point in issue was

whether *C.* (whose title both admitted) demised first to *A.* or to another person; *C.* is a competent witness to prove the point in issue; for the verdict cannot be given in evidence in any action which may afterwards be brought either by or against him. *Bell v. Harwood.* 3 T. R. 308

But see *Jordaine v. Lashbrooke.*

7 T. R. 601, *contra.*

16 But if two persons are contending for the possession, who are to pay rent in different rights, there the lord could not be admitted a witness to prove the demise in the ejectment. *Dictum per Buller, J.* 3 T. R. 308

17 In ejectment against a bailiff, the tenant in possession is not competent to prove that the witness, and not the defendant, is the possessor of the land. *Doe d. Jones v. Wilde.* 5 Taunt. 183

S. C. 1 Marsh. 7

18 In an action of trover for a horse, a witness is competent to prove that the plaintiff agreed that he (witness) should take the horse as a security for money due to him from the plaintiff, and should sell it if the money was not paid on a day certain, which being the case, the witness accordingly sold the horse to the defendant; for the verdict obtained on his evidence will not avail him in an action to be brought against him by the plaintiff. *Nix v. Cutting.* 4 Taunt. 18

19 In an action of trespass against the sheriff, for taking the goods of *A.* in execution for the debt of *B.*, where the question was, whether the goods had been previously assigned by *B.* to *A.* or not; *B.* was held not to be a competent witness to disprove the assignment to *A.* *Bland v. Ansley.* 2 N. R. 331

20 In a *qui tam* action on the statute of usury against the assignee of a bankrupt for taking usurious interest on a loan of money to the bankrupt before his bankruptcy, the bankrupt is not a competent witness to prove the offence, if he has not obtained his certificate, or repaid the money; notwithstanding he is ready to release to his assignees all benefit which may arise from the discharge of this debt in particular, and all claim to allowance and

surplus in general; and notwithstanding the assignee has proved his demand for the money lent under the commission. *Masters, q. t. v. Drayton.*

2 T. R. 496

- 21 In an action for usury, the borrower of the money, who has paid the same, is a competent witness to prove the whole case. *Smith, q. t. v. Prager.*

7 T. R. 60

(b) *Bankruptcy—in questions of.*

- 1 A certificated bankrupt is not a competent witness to prove the debt of the petitioning creditor, or any other fact necessary to support the commission. *Chapman v. Gardner.* 2 H. B. 279
S. P. Cross v. Fox. } 2 H. B. 279, n.
Flower v. Herbert. }

- 2 In an action by the obligees of a joint and several bond against one of the obligors, who was surety for another of them who had become bankrupt, which action was brought after the plaintiffs had elected to prove their debt under the commission, and thereby had relinquished their action against the bankrupt by s. 14. of the *stat. 49 G. 3. c. 121.*; the bankrupt not having obtained his certificate, and therefore still liable to be sued by the defendant; his surety, in case of a verdict against him by the plaintiffs, is not a competent witness for the defendant, to prove that a payment of a sum equal to the penalty of the bond made by him (the bankrupt) to the plaintiffs before the action brought, was made in discharge of the bond, and not upon any other account. *Townsend v. Downing.* 14 E. R. 565

(c) *Bills and Notes—in cases on.*

- 1 A person whose name was forged as drawer of a bill, was held not a competent witness to disprove an indorsement on the bill made by the party who forged it, respecting the payment of interest upon that bill. *Rex v. Crocker.* 2 N. R. 87
 2 In an action by the indorsee of a bill of exchange against the acceptor, the latter cannot call the drawer-indorser as a witness (because interested) to prove that the plaintiff had no right to recover upon the bill, having merely received it from the indorser in trust to obtain payment of it from the accep-

account of the indorser himself. *Buckland v. Tankard.*

5 T. R. 578

- 3 Where a bond was given in consideration of delivering up a promissory note, an indorser was not permitted to prove that the consideration of the note was usurious. *Watson v. Shelley.*

1 T. R. 296

- 4 But afterwards, on mature deliberation, the Court solemnly determined against the rule laid down in the above case: and held that in an action by an indorsee of a bill of exchange against the acceptor, the latter might call the payee and indorser as a witness to prove that the bill was void in its creation. *Jordaine v. Lashbrooke.*

7 T. R. 601

- 5 In an action against the acceptor of a bill, accepted for the accommodation of the drawer, the drawer is not a competent witness to prove that the holder came to the bill on a usurious consideration; because he does not stand indifferently liable to the holder and the acceptor: for the holder can recover against him only the contents of the bill; the acceptor is entitled to recover against him both the amount of the bill, and also all damages he may have sustained, including the costs of the action against himself. *Jones v. Brooke.*

4 Taunt. 464

- 6 The guarantee of a bill, discharged by bankruptcy of his liability on the bill, is not an incompetent witness in an action on the bill, by reason of his liability to costs in an action on the bill. *Brind v. Bacon.* 5 Taunt. 183

- 7 The maker of a note purporting to be payable on demand at his own abode, or at a London banker's, and not paid at either place, is a competent witness to prove whether he has made it payable at the banker's, where it purports to be payable. *Rex v. Treble.*

2 Taunt. 328

- 8 An indorser on a note, who has received money from the drawer to take it up, is a competent witness for the drawer, in an action against him by the indorser, to prove that he had satisfied the note; being either liable to the plaintiff on the note if the action were defeated, or to the defendant for money had and received if the action succeeded: and his being also liable in the latter case to compensate the defendant for the costs incurred in the

action by such non-payment makes no difference. *Birt v. Kershaw*.

2 E. R. 458

(d) *Agents and Servants.*

- 1 A person who is employed to sell goods, and is to have for himself whatever money he can procure for them beyond a stated sum, is to be considered as a broker, and is a competent witness to prove the contract between the seller and the buyer. *Benjamin v. Porteus*. 2 H. B. 590
- 2 If A. have received money from B. to pay to C., and the question be, whether A. were the agent of C.: for that purpose A. may be called as a witness to prove the agency. *Ilderton v. Atkinson*. 7 T. R. 480
- 3 So a captain of a ship who had borrowed money for the use of the ship of the plaintiffs, was held a competent witness to prove that fact in an action against the owners, whose defence was that he had borrowed it for his own use. *Evans v. Williams*. 7 T. R. 481, n.
- 4 In an action against a master for the negligence of his servant, the latter is not a competent witness to disprove the negligence without a release. *Green v. The New River Company*. 4 T. R. 589

(c) *Commoners.*

- 1 If a commoner prescribe, in right of a particular messuage, that the defendant shall, for his benefit, do a certain act which is beneficial to all the commoners, another commoner, who claims by a similar prescription in right of another tenement, and not by custom, is not a competent witness to prove the charge. *Anscomb v. Shore*. 1 Taunt. 261

(f) *Corporators.*

- 1 A corporation being lord of a manor, and having approved part of a common and leased it; a freeman is not a competent witness to prove that a sufficiency of common was left for the commoners. *Burton v. Hinde*. 5 T. R. 174

(g) *Creditors.*

- 1 A creditor who has assigned his debt is a competent witness to increase the fund out of which the debt is to be paid. *Heath v. Hall*. 4 Taunt. 326

(h) *Parishioners.*

- 1 By stat. 27 G. 3. c. 29. parishioners are made competent witnesses in prosecutions where the penalty is given to the parish, unless it exceed 20*l*. *Rex v. Davis*. 6 T. R. 177
- 2 On an appeal against a poor-rate because certain persons were omitted to be rated, a parishioner, who is liable to be rated, but not in fact rated, is a competent witness to prove the rateability of the appellants. *Rex v. Prosser*. 4 T. R. 17
- 3 A parishioner having rateable property in the parish, but omitted to be rated for the purpose of making him a witness upon a question of settlement between two parishes, is a competent witness for the parish in which he is so liable to be rated. *Rex v. Kirkford (Inhab.)* 2 E. R. 559
- 4 So such an one is a good witness to extend the boundaries of his parish, on a question of boundary between two adjoining parishes. *Deacon v. Cook*. 2 E. R. 562, n.
- 5 *Secus*, if he were actually rated at the time. 2 E. R. 562, n.
- 6 So a person having rateable property in a parish, but not rated in fact, is a competent witness in a case respecting the settlement of a pauper in that parish. *Rex v. South Lynn (Inhab.)* 5 T. R. 667—6 T. R. 157
- 7 And on an appeal between the parishes of A. and B. the former may call an inhabitant of the latter who is not rated to the poor, and compel him to be examined as a witness. *Rex v. Little Lumley (Inhab.)* 6 T. R. 157
- 8 Upon a question of settlement between two parishes, a parishioner of one of them having property there which is rated, though not in his own but in his son's name, for the purpose of making such parishioner a witness, is nevertheless incompetent to prove the settlement in the other parish. *Rex v. Killerby (Inhab.)* 10 E. R. 292
- 9 Persons appointed by statute to be governors and directors of the poor of a certain parish, and made liable upon appeal against a rate made by them to the payment of costs in case the sessions should award any to the appellant, cannot be witnesses on such appeal; though in truth only trustees,

and entitled to be reimbursed such costs out of the parochial fund; for they are parties to the cause, and liable to the costs in the first instance. *Rex v. Bermondsey (Poor Corp.)*

3 E. R. 7

10 Yet a tenant who was rated to the poor-rate, being indemnified by his landlord, was holden a competent witness on behalf of the parish in which he was a payer, in a question of settlement. *Rex v. Woodland.*

3 E. R. 11, n.

11 A rated inhabitant of a parish is to be considered as a party to an appeal between his parish and another, touching the settlement of a pauper; although the nominal parties be the churchwardens and overseers of the poor of the respective parishes; and being as such party directly interested in the event of that proceeding, he cannot be compelled to give evidence by the adverse parish even since the stat. 46 G. 3. c. 37. not being within the words or meaning of that Act. *Rex v. Woburn (Inhab.)*

10 E. R. 395

12 After a settlement proved at the sessions by the appellants in a third parish, a rated inhabitant of such third parish is not a competent witness for the respondents to disprove that settlement; being directly interested in the judgment of the sessions on that question, inasmuch as the order, if confirmed, would be conclusive evidence of the settlement being at that time in the appellant's parish, upon a subsequent order of removal from thence to such third parish. *Rex v. Terrington (Inhab.)*

15 E. R. 471

(i) *Partners and Part-owners.*

1 A dormant partner is a competent witness to prove a contract. *Mawman v. Gillett.*

2 Taunt. 325

2 In an action upon a joint contract against two, one who has suffered judgment by default is not admissible as a witness against the other, to prove that he joined in the contract; because if the plaintiff succeeded in the action, the witness would obtain by means of his own testimony contribution against the other. *Brown v. Brown.*

4 Taunt. 752

3 Where two persons joined in an assignment of a ship, one of them was permitted to prove that at the time

of the assignment he had no interest in the vessel. *Walton v. Shelley.*

1 T. R. 301

4 In an action on a policy of insurance on goods from London to Bmden, where the ship was lost by putting into the *Texel*; the captain, as part-owner of the ship, was admitted as a competent witness to prove that the ship originally sailed on the voyage insured by the direction of the owners of the goods, though not to prove that the deviation was justified by necessity. *De Symonds v. De la Cour.*

2 N. R. 374

(k) *Underwriters.*

1 A broker who underwrites a policy of insurance, after getting it underwritten by others, is a competent witness for the defendant, in an action against any of those who underwrote before him: And if he had engaged to contribute to the defendant's costs, and has an action depending against himself on the same policy, and has joined as a plaintiff in a bill in equity for a discovery, the objections arising from these circumstances may be removed by the defendant's releasing him from any contribution to the costs in law or in equity, and by an offer by himself and the defendant to pay the costs in equity, and dismiss the bill as to them. *Bent v. Baker.*

3 T. R. 27

2 The first and second underwriters upon a policy of insurance, who have paid the loss upon an undertaking made to them by the assured to repay the money in case they failed in an action brought by them against a subsequent underwriter seem not to be competent witnesses for the defendant in that action, to prove that one of the assured when he effected the policy, misrepresented to them that it was a summer instead of a winter risk but if, on the first trial of that action it does not appear whether the undertaking was made to the witnesses at the time they paid the loss, or afterwards, and after the action was commenced, the Court will send the case down to a second trial in order to ascertain that fact. *Forrester v. Pigou.*

1 M. & S. 9

V. EXAMINATION OF.

1 Formerly the rule was to object to the competency of a witness before he

- was sworn in chief; but still the objection must be made at the trial. *Turner v. Pearse* 1 T. R. 717
- 2 A witness may be asked whether he has not been in the pillory for perjury. *Rex v. Edwards.* 4 T. R. 440
- 3 A witness may object to answer a question which he thinks will tend to his crimination, though the answer would not lead to an immediate conclusion of guilt. *Cates v. Hardacre.* 3 Taunt. 424
- 4 The Court of C. P. in compelling a plaintiff to exhibit evidence to which the defendant is entitled to have access, will not compel such plaintiff to lay himself open to a prosecution under the Stamp Acts. *Whittaker v. Izod.* 2 Taunt. 115
- 5 Where the plaintiff entered an account in writing of goods and cash furnished to the defendant from time to time, each page of which was authenticated by the defendant's acknowledgment in writing of the receipt of the contents; though such an acknowledgment in writing cannot be given in evidence *per se*, in respect to the cash items, amounting to above 40s. in each page, for want of a receipt stamp, yet it is competent to the plaintiff to prove that upon calling over each article to the defendant, he admitted that he had received the same; and the witness may refresh his memory by referring to the accounts. *Jacob v. Lindsay.* 1 E. R. 460
- 6 A witness may refresh his memory by any book or paper, if he can afterwards swear to the fact from his own recollection; but if he cannot swear to the fact from recollection any farther than in finding it entered in a book or paper, the original book or paper must be produced. *Doe d. Church v. Perkins.* 3 T. R. 749
- 7 A witness cannot be cross-examined, as to any distinct collateral fact not relevant to the matter in issue, for the purpose of disproving the truth of the expected answer by other witnesses, in order to discredit the whole of his testimony. *Spenceley, q. t. v. Willott.* 7 E. R. 108
- 8 In an action against the defendant, occupier of a farm in the township of *Down Holland*, for not setting out tithes. Defence, a farm *modus*; and the plaintiff shewed by surveys and terriers that no *modus* within the township was mentioned in them; against which the defendant proved by witnesses, an uniform payment of a sum certain in respect of his tenement for upwards of 50 years: Held, that the plaintiff might, on cross-examination, ask those witnesses whether other tenements in *Down Holland* did not pay a similar sum. *Blundell, Clerk, v. Howard.* 1 M. & S. 292
- 9 A., captain of an India country trader, contracts in *India* with B. for a crew, according to the custom of the country; A. arrives in *England* with the crew, and then makes a voyage with them to the *West Indies* and back again. In an action by part of the crew for wages due on the *West India* voyage: it was held, on a motion for a *mandamus* to examine witnesses in *India*, that the cause of action did not arise in *India*, within 13 G. 3. c. 68. s. 44. *Francisco v. Gilmore.* 1 B. & P. 177
- 10 The Court of C. P. will not, upon motion, give leave to examine an attesting witness to a deed upon interrogatories, and to give such examination in evidence at the trial, on the ground that he is incapable, through illness, of attending in person, and that he is not likely to recover, so as to be able to attend; notwithstanding it also appears, by the affidavit, that the defendant had at one time admitted the execution of the deed; nor will the Court, on these grounds, grant a rule for dispensing with the attendance of such witness at the trial. *Jones v. Brewer.* 4 Taunt. 46
- 11 The Court, upon application of the defendant, postponed the trial of an information for a misdemeanour, upon the defendant's consenting, by writing under his own hand, to the examination upon interrogatories of a witness for the Crown. *Rex v. Morphew.* 2 M. & S. 602

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A
DIGESTED INDEX

TO THE

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TABLES OF STATUTES AND NAMES OF CASES.

G. WOODFALL, PRINTER,
ANGEL-COURT, SKINNER-STREET, LONDON.

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TABLE OF STATUTES,

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